

Neutral Citation Number: [2018] EWCA Civ 1697

Case Nos: C1/2017/1840 and C1/2017/1934

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MRS JUSTICE LANG DBE
[2017] EWHC 1456 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 July 2018

Before:

Lord Justice McFarlane
Lord Justice Lindblom
and
Lady Justice Asplin

- -

Between:	**C1/2017/1840**
Catesby Estates Ltd.	**Appellant**
- and -	
Peter Steer	**Respondent**
- and -	
Historic England	**Intervener**

- -
- -

Mr Rupert Warren Q.C. (instructed by **Eversheds Sutherland (International) LLP**) for the **Appellant**
Ms Nina Pindham (instructed by **Richard Buxton Environmental & Public Law**) for the **Respondent**
Ms Emma Dring (instructed by **Sharpe Pritchard LLP**) for the **Intervener**

And between: **C1/2017/1934**

Secretary of State for Communities and Local Government **Appellant**

- and -

Peter Steer **Respondent**

- and -

Historic England **Interested Party**

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Ms Jacqueline Lean (instructed by **the Government Legal Department**) for the **Appellant**
Ms Nina Pindham (instructed by **Richard Buxton Environmental & Public Law**) for the **Respondent**
Ms Emma Dring (instructed by **Sharpe Pritchard LLP**) for the **Interested Party**

Hearing date: 17 April 2018

Judgment Approved by the court for handing down (subject to editorial corrections)

Lord Justice Lindblom:

Introduction

1. Did an inspector deciding an appeal against the refusal of planning permission err in law in his understanding of the concept of the "setting" of a grade I listed building? That is the main question in these two appeals.

2. The appellant in the first appeal is Catesby Estates Ltd.. The appellant in the second appeal is the Secretary of State for Communities and Local Government. The appeals are against the order of Lang J., dated 22 June 2017, upholding an application by the respondent, Mr Peter Steer, under section 288 of the Town and Country Planning Act 1990. Mr Steer's challenge was to the decision of an inspector appointed by the Secretary of State, in a decision letter dated 22 August 2016, allowing two appeals by Catesby Estates under section 78 of the 1990 Act, after an inquiry held in July 2016. The first of those appeals was against the refusal by Amber Valley Borough Council of an application for planning permission for a development of housing – up to 400 dwellings and a convenience store – on a site of about 17 hectares on land at Kedleston Road and Memorial Road, Allestree in Derbyshire. The second was against the council's failure to determine another application for a development of up to 195 dwellings on about 7 hectares in the southern part of the same site. Mr Steer was an objector to the proposals, and a member of a group called Kedleston Voice, which also opposed the development. Historic England objected, and has taken part in the proceedings too.

3. The site is farmland, about 1.7 kilometres to the south-east of Kedleston Hall, which is a grade I listed building, and about 550 metres from the grade I listed Kedleston Hall registered park and garden and the Kedleston Conservation Area, whose boundary on its south-eastern side extends to the edge of the park. About 1.5 kilometres to the north of the site are the grade II* listed Kedleston Hotel and the Quarndon Conservation Area. The site itself was part of the manorial land owned by Sir Nathaniel Curzon, the first Lord Scarsdale, when, in 1761, he set about reconstructing his house and laying out the park. The land was beside the main road from Derby, by which most visitors to Kedleston Hall would arrive. From it one could see the park. And from the park there were views of the house. There were also views from the park towards Derby. In the 1960's, however, as the city expanded to the north-west, a screen of trees – the "Derby Screen" – was planted to block them. The Hall is widely acknowledged to be of exceptional historic and architectural interest. It is described by Pevsner as "one of the most magnificent apartments of the C18 in England" and "the most splendid Georgian house in Derbyshire, in extensive grounds". The park was largely the creation of the architect Robert Adam. Both the Hall and the park are now managed by the National Trust, and attract many visitors – about 120,000 in 2013.

4. Several objectors, including Historic England, maintained that the appeal site lay within the settings of both Kedleston Hall and Kedleston Park, largely because of the historic connections between the Hall and park and the farmland within the surrounding estate. In refusing planning permission for the larger scheme, the council asserted that the proposed development would harm the settings and significance of several heritage assets, including Kedleston Hall as a grade I listed building, contrary to government policy in paragraphs 132 and 134 of the

National Planning Policy Framework ("the NPPF"). It opposed the second scheme for the same reason.

The issue in the appeal

5. The single issue in the appeal is whether the inspector erred in law in his approach to the effects of the development on the setting of Kedleston Hall, thus failing to discharge the duty in section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the Listed Buildings Act").

Section 66(1)

6. Section 66(1) of the Listed Buildings Act 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."

Government policy and guidance

7. In the "Glossary" to the NPPF a "Heritage asset" is defined as "[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 …". The "Setting of a heritage asset" is defined in this way:

> "… 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."

The definition of "Significance (for heritage policy)" is:

> "… 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".

8. Paragraph 128 of the NPPF says that "[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 132 states:

"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. As heritage assets are irreplaceable, any harm or loss should require clear and convincing justification. Substantial harm to or loss of a grade II listed building, park or garden should be exceptional. Substantial harm to or loss of designated heritage assets of the highest significance, notably scheduled monuments, protected wreck sites, battlefields, grade I and II* listed buildings, grade I and II* registered parks and gardens, and World Heritage Sites, should be wholly exceptional."

Paragraph 133 says that "[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 four specified considerations apply. Paragraph 134 says that "[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".

9. The definition of the "Setting of a heritage asset" in the "Glossary" to the NPPF is explained in paragraph 18a-013-20140306 of the Planning Policy Guidance ("the PPG"), under the heading "What is the setting of a heritage asset and how should it be taken into account?":

> "A thorough assessment of the impact on setting needs to take into account, and be proportionate to, the significance of the heritage asset under consideration and the degree to which proposed changes enhance or detract from that significance and the ability to appreciate it.
>
> Setting is the surroundings in which an asset is experienced, and may therefore be more extensive than its curtilage. All heritage assets have a setting, irrespective of the form in which they survive and whether they are designated or not.
>
> The extent and importance of setting is often expressed by reference to visual considerations. Although views of or from an asset will play an important part, the way in which we experience an asset in its setting is also influenced by other environmental factors such as noise, dust and vibration from other land uses in the vicinity, and by our understanding of the historic relationship between places. For example, buildings that are in close proximity but are not visible from each other may have a historic or aesthetic connection that amplifies the experience of the significance of each.
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> The contribution that setting makes to the significance of the heritage asset does not depend on there being public rights or an ability to access or experience that setting. This will vary over time and according to circumstance.
>
> …".

Historic England's guidance

10. In July 2015 Historic England published a revision of the first edition of a guidance document entitled "The Setting of Heritage Assets – Historic Environment Good Practice Advice in Planning: 3" ("GPA3"). The second edition was published in December 2017. We are concerned only with the first edition, current at the time of the inspector's decision in this case. The "Introduction" to GPA3 made clear that its purpose was "to provide information on good practice", and it did "not constitute a statement of Government policy" (paragraph 1).

11. Under the heading "The extent of setting", it adopted the definition of the "Setting of a heritage asset" in the NPPF. It acknowledged that "[while] setting can be mapped in the context of an individual application or proposal, it does not have a fixed boundary and cannot be definitively and permanently described for all time as a spatially bounded area or as lying within a set distance of a heritage asset because what comprises a heritage asset's setting may change as the asset and its surroundings evolve or as the asset becomes better understood or due to the varying impacts of different proposals". It also recognized that "[a] conservation area will include the settings of listed buildings and have its own setting, as will the village or urban area in which it is situated …" (paragraph 4). On "Views and setting", it said that "[the] contribution of setting to the significance of a heritage asset is often expressed by reference to views, a purely visual impression of an asset or place which can be static or dynamic, including a variety of views of, across, or including that asset, and views of the surroundings from or through the asset, and may intersect with, and incorporate the settings of numerous heritage assets" (paragraph 5). Under the heading "Setting and the significance of heritage assets", it emphasized that the contribution made by the setting of a heritage asset to its significance "depends on a wide range of physical elements within, as well as perceptual and associational attributes pertaining to, the heritage asset's surroundings" (paragraph 9). On "Designed settings", it said (ibid.):

> "Many heritage assets have settings that have been designed to enhance their presence and visual interest or to create experiences of drama or surprise and these designed settings may also be regarded as heritage assets in their own right. Furthermore they may, themselves, have a wider setting: a park may form the immediate surroundings of a great house, while having its own setting that includes lines-of-sight to more distant heritage assets or natural features beyond the park boundary. Given that the designated area is often restricted to the 'core' elements, such as a formal park, it is important that the extended and remote elements of design are included in the evaluation of the setting of a designed landscape[.]"

12. "A Staged Approach to Proportionate Decision-Taking" was suggested, in five steps (paragraphs 10 to 31). On "Step 1: identifying the heritage assets affected and their settings" the guidance was that "… if the development is capable of affecting the contribution of a heritage asset's setting to its significance or the appreciation of its significance, it can be considered as falling within the asset's setting" (paragraph 13). This apparently circular proposition did not appear in the second edition of GPA3. "Step 2: Assessing whether, how and to what degree these settings make a contribution to the significance of the heritage asset(s)" would be to consider, first, "the physical surroundings of the asset, including its relationship with other heritage assets"; second, "the way the asset is appreciated"; and third, "the asset's associations

and patterns of use" (paragraph 18). For "Step 3: Assessing the effect of the proposed development on the significance of the asset(s)", the "(non-exhaustive) check-list of the potential attributes of a development affecting setting that may help to elucidate its implications for the significance of the heritage asset" included several "effects" that were not visual (paragraph 25).

Evidence at the inquiry

13. At the inquiry, as Lang J. said (in paragraph 51 of her judgment), there was "a significant body of evidence, from [Historic England], the National Trust, the Gardens Trust, the Development Control Archaeologist at Derbyshire County Council, and the experts called on behalf of the local community, Kedleston Voice, that the appeal site was part of the setting of both the Grade I listed Hall and the park, as well as the conservation area, even though the proposal would not intrude upon views to and from the Hall". The thrust of that evidence, said the judge, was that "the appeal site was part of the setting of the Hall because it had formed part of the estate, managed historically as an economic and social entity, and it remained in its historic agricultural use, with hedges and mature trees characterising the field boundaries". From the Hall and the park, "the surrounding rural context was important in preserving a sense of a parkland landscape at the centre of a managed rural estate, rather than in a suburban context". The site was on "the primary visitor route to the Hall and Park and so visitors would experience the historical narrative, and the concentric influence of the Hall on its landscape, as they traversed the agricultural estate, then entered the enclosed, designed park and gardens, enjoying the drama of anticipation as a great English country house was revealed to them".

The inspector's decision letter

14. The inspector described the "main issue" in both appeals as "the impact either proposal would have on the landscape character of the area and on the heritage assets of Kedleston Hall, Kedleston Hall Registered Park and Garden and Kedleston Conservation Area, Kedleston Hotel and Quarndon Conservation Area" (paragraph 4 of the decision letter). And "the matters to be covered" included "… landscape impact both in itself and also bearing in mind the historic connection with the Kedleston Hall estate, the statutory and policy background against which impacts on the heritage assets should be considered and, in the event of harm to any of those assets, the nature of the planning balance to be undertaken" (paragraph 6).

15. Under the heading "Landscape impact", the inspector found it "difficult to dissociate landscape impact from heritage impact". It was "not unreasonable to look at landscape quality and impact in purely physical or visual terms and to consider historical value and significance separately, in the context of the impact on the Hall and Park" (paragraph 17). He concluded that "setting aside for the moment the historical association with the Hall and Park, the appeal site exhibits no features that could qualify it as a valued landscape in the terms of paragraph 109 of the Framework" (paragraph 21). There was, he said, "no reason why, in physical or visual terms, harm to the landscape should compel dismissal of the appeals", and "[the] question of its historical value may be addressed in relation to the settings of Kedleston Hall and its registered Park and Garden" (paragraph 30).

16. Turning to “The settings of the heritage assets and the statutory and policy context”, he began by directing himself (in paragraph 31) on the relevant definitions and policies in the NPPF:

> “31. The definition of setting in the Framework is the “surroundings in which a heritage asset is experienced”. Further, the extent of a setting “is not fixed and may change as the asset and its surroundings evolve”. Setting is not itself a heritage asset but elements of a setting “may make a positive or negative contribution to the significance of an asset”. And paragraphs 126-141 of the Framework make it clear that, in considering a development proposal, what has to be assessed is the effect there would be, not on the setting, but on the significance of the heritage asset concerned.”

He considered the setting of each heritage asset, in turn. On the setting of Kedleston Hall he said (in paragraphs 32 to 36):

> “32. The Council, Kedleston Voice and English Heritage (as it was then) argue that Kedleston Hall and its Park are an integral whole and that, accordingly, their settings are the same. It was also argued that the historical, social and economic connection – the appeal site being part of the estate of which the Hall and Park were the hub – brought the appeal site within the setting of the Hall. There has, though, to be more of a physical or visual connection than that, otherwise land completely remote from the Hall could be deemed within its setting. The appellant takes the view that the Park provides the setting for the Hall. That is not an unreasonable approach to take; for example, the Historic England guidance recognises that a conservation area will include the settings of listed buildings and will have a setting of its own. That said, there are two ways to look at the setting of Kedleston Hall.
>
> 33. The planting of the Derby Screen, around 1960, brought about a very significant change. Originally, there were views out from the Hall and Park towards Derby – and, for those approaching the Hall, there would have been a first view into the Park, with a glimpse of the Hall, across the appeal site from Kedleston Road. The Derby Screen was planted to obscure the view of Allestree, development having encroached over the horizon, and the night-time glare from the increasingly large built-up area of Derby. Its planting was a deliberate decision, based on the changing surroundings, to make the Park more enclosed and inward-looking; and the Derby Screen has since been significantly extended into the Park by the National Trust. Thus, today, the appeal site forms no part of the setting of Kedleston Hall.
>
> 34. If one takes a more historical approach, however, then there was an open view where the Derby Screen now is. Moreover, the evidence suggests it was a designed view – documentary, in the references to the vista including Derby; physical, in the ditch of a sunken fence, akin to a ha-ha, which would have kept stock out (or in) without obstructing the view. The appellant argued that the sunken fence may have been a ditch predating the laying out of the Park but that does not exclude the proposition of a designed view.

35. The view was, clearly, a wide vista. The spire of Derby Cathedral is referred to as being seen in the panorama, though it could only have been seen from relatively close to the boundary of the Park, not from the Hall. The particular view to or from Kedleston Road is only a very small segment and is, from the Hall, at its very eastern extremity. There is no evidence that the view from Kedleston Road towards the Hall and Park was also part of the design; nor is it logical to draw the inference that the view towards the Hall and Park was designed simply because the view in the other direction was.

36. However, if one holds the opinion that the view both to and from Kedleston Road was a deliberate part of the design of the Park and that the Derby Screen, or part of it, could be opened out to restore that view, then the appeal site does indeed fall within the setting of Kedleston Hall."

He reached somewhat different conclusions on the setting of the registered park and garden and the Kedleston Conservation Area (in paragraphs 37 and 38):

"37. The Registered Park and the Conservation Area are coterminous and the designations have similar purposes in mind. The Hall and its Park were at the centre of a large estate, socially and economically, though not geographically (there was estate land in Staffordshire). The agricultural land around the Park certainly forms part of its setting in historical and cultural terms. In visual terms, what comes within the setting is less extensive. There were, and still are, places within the Park where the surrounding agricultural landscape contributes to views out; and there are places outside the Park which afford views in, not only of the Park but also, sometimes, of the Hall.

38. The appeal site may be considered to lie within the setting of the Park because of its relative proximity. There are clear views of the boundary of the Park, though it is debatable whether its trees and woodland, designed and laid out in a naturalistic manner, can actually be distinguished as such by anyone unfamiliar with designed parkland. The only views into the Park from or across the appeal site, or out from the Park towards it, have been obscured by the planting of the Derby Screen."

As for the setting of Kedleston Hotel, he said this (in paragraph 39):

"39. Kedleston Hotel stands on the site of an earlier inn but what is seen today dates from the same period as the Hall and Park and was built to cater for visitors to the Park and its Sulphur Bath. There is thus a close historic relationship between the Hotel and the Hall and Park. The appeal site lies within the setting of the Hotel in as much as it can be seen from the Hotel looking south – but the focus of views from the Hotel, in so far as there are any, is to the west and north-west, towards the Hall and Park. The Hotel is not visible, or certainly not noticeable, from the appeal site or Kedleston Road alongside it. There are views in which the Hotel and Hall can both be seen, for example from Common Hill, just west of Quarndon; from there, though, the appeal site lies in a wholly different direction, by about 90°."

and on the setting of the Quarndon Conservation Area, this (in paragraph 40):

"40. Quarndon Conservation Area is drawn tightly round the historic core of the village. It has relatively recent development virtually all around it. There is a significant amount of that to the south of the Conservation Area, in the direction of the appeal site. Because of this, it is debatable that the appeal site actually lies within the setting of the Conservation Area. It may be thought to do so, however, to the extent that it may be seen in winter views (when the trees are bare)."

17. He then considered the "Impact on the significance of the heritage assets", again taking each in turn.

18. As for Kedleston Hall, he began by considering the status and "significance" of the listed building itself (in paragraphs 41 to 44):

"41. There is no doubting that Kedleston Hall, a grade I listed building, is a heritage asset of the very greatest importance. Statute requires special regard to be had to the desirability of preserving not only the building but also its setting. Any harm to the significance of the Hall must be given very great weight when considering development proposals within its setting.

42. The Derby Screen is key to any impact on the significance of Kedleston Hall. At the present time, the existence of the Screen means that the proposed development would have no impact whatsoever on the setting of the Hall. The questions to be addressed, therefore, are about the prospect of the Screen being removed or opened up and, if it were, the resultant impact of the proposed development on the significance of the Hall.

43. It is not absolutely clear that the view across the appeal site between Kedleston Road and the Hall and Park was designed. …

44. There is no debate that the Screen was planted to obscure views of Allestree and the night-time glare from the lighting of the expanding urban area of Derby. Its planting was a deliberate response to changing circumstances. It may be seen as part of the evolution of the Park. Moreover, for whatever reason, the depth of the Screen has been substantially increased by the National Trust so that it is now some 40m or more wide. To remove it now, or to open it up in some way, raises a number of issues, as well as being a substantial and costly task."

He then (in paragraphs 45 to 51) discussed the possibility of the "Derby Screen" being removed, and the likely consequences of that, concluding (in paragraphs 49 to 51):

"49. It seemed, until late in the inquiry, that no consideration had ever been given to the removal of the Derby Screen, or to opening it up so that the Park and landscape beyond are inter-visible. The National Trust then wrote to the Council, attaching an extract from a conservation plan that had not hitherto been known to exist. However, while the letter mentions glimpses of the dome of the Hall from Kedleston Road, the extract talks only about views from the south-eastern corner of the Park and about managing and thinning the Derby Screen "to create more open woodland with permeable edges to the parkland"

– not the removal of part or all of the Derby Screen and not significantly different to what is in the 2013 Conservation Plan.

50. Thus, it is unclear that the view from Kedleston Road was a designed view, intended to give a glimpse of the Hall; it is known that the Derby Screen was planted as a response to changing circumstances; there is no firm intention to consider removal [of] the Derby Screen; even if there were, there are a number of attendant issues that would have to be resolved; such indications as there are relate only to views from the south-eastern corner of the Park and to thinning the Screen. There is nothing to suggest that a view from Kedleston Road giving a glimpse of the Hall might at some time be restored.

51. On that basis, it is entirely reasonable to conclude that the appeal site does not lie within the setting of Kedleston Hall and that section 66(1) of [the Listed Buildings Act] and policy in the Framework do not come into play."

He also considered the impact of the development assuming the "Derby Screen" had been removed (in paragraph 52):

"52. If the issues considered above were to be resolved in favour of removing all or part of the Derby Screen to restore a view to and from Kedleston Road, a question then arises as to what would be the impact of the proposed developments. The view from Kedleston Road would be lost. It could never be more than a glimpse across open countryside, rather than a designed view through parkland, but at least it might indicate that one was nearing the Hall and Park. The view from the Hall would be little changed. The cross-section provided by Dr Hickie [one of the council's witnesses] in his evidence suggests that the land itself would be all but invisible from the Hall, though houses upon it would be seen to bring the boundary of the urban area closer to the Park. All that would represent less than substantial harm – sufficiently little, in fact, that the effect on the significance of the Hall, standing within its designed Park, would be negligible."

19. In his conclusions on the impact on the setting of the registered park and garden and the Conservation Area the inspector said (in paragraphs 53 to 58):

"53. There is no dispute that the Park, registered in grade I, is, like the Hall, a heritage asset of the very highest importance. There is also no dispute that the appeal site lies within the setting of the Park and the Conservation Area; and that the harm caused to the significance of both would be less than substantial. The term 'less than substantial' does, however, cover a wide range of harm – and the question is just how great that harm would be.

54. There are two aspects to the impact on the setting of the Park – visual and historical. The Park was carefully designed and laid out in a naturalistic manner. There are (or were) designed views into the Park, with glimpses of the Hall, most notably (in the context of these appeals) from Kedleston Road between the Hotel and the Park entrances. The farmland surrounding the Park was historically part of the estate – and still is in that, while ownership may have changed, the estate is still managed from the

Hall. The farmland acts as a visual setting for the Park; and that is more important than might be thought at first blush – because the Park was designed naturalistically, not in a more formal style which may not have had, or needed, a measure of continuity with its surroundings.

55. The appeal site is part of that setting. So too is the built-up area of Allestree, which stands on land formerly part of the estate. And, of course, the Derby Screen was planted around 1960 because of the incursion of Allestree (and night-time glare from Derby) into the previously rural views from the Park. Much of what is said above about the Derby Screen applies equally to the Park. There would, however, have been views south-eastwards from within the Park, whether intentionally designed or not, from the Backgrounds and from the Long Walk. In historical terms, that brings the appeal site more firmly within the setting of the Park than if there had never been any inter-visibility. …

…

58. To sum up, there would be harm to the setting of the Park from development within it – but that would be mitigated to a degree by the extent of the existing built-up area, the existing vegetation and the remaining open land between the Park and the built-up area. That also applies to views out from the Park if the Derby Screen were removed or opened out; views towards the Park would, though, be less extensive and more oblique than possible at present. In terms of the significance of the Park and Conservation Area, though, the harm would be at the lower end of 'less than substantial'."

He concluded that there would be no "material impact" on the setting of the Kedleston Hotel if the proposed development was "[appropriately] designed and landscaped", and "no harm to its significance as a grade II* listed building" (paragraph 60). He found there would be "no harm to the significance" of the Quarndon Conservation Area (paragraph 61).

20. That assessment was carried into the inspector's "Conclusions on the main issue" (in paragraphs 62 to 64) and his "Overall conclusions" (in paragraphs 79 to 89). He acknowledged that "Kedleston Hall and its Park are heritage assets of the greatest importance" and that "[any] harm to their significance must carry very great weight in the balance against the public benefits of the appeal proposals required by paragraph 134 of the Framework". There was, however, "no harm to the significance of the Hall and only very modest harm to the significance of the Park and Conservation Area". And "[even] if the Derby Screen were removed or opened out, the harm to the significance of the Hall would be very limited indeed and the harm to the Park still no more than modest". Against that harm there was "the very great public benefit of market and affordable housing which is much needed, especially in Amber Valley but also in Derby City". This was, said the inspector, "more than sufficient to tip the balance in favour of the appeal proposals" (paragraph 83). Applying the policy for the "presumption in favour of sustainable development" in paragraph 14 of the NPPF, there was "no doubt that the adverse impacts of either development would not significantly and demonstrably outweigh the benefits from providing much-needed housing" (paragraph 87).

The judge's conclusions

21. Lang J. said the inspector had "rejected the evidence and submissions that the appeal site was part of the setting of the Hall, despite the historic social and economic connections" (paragraph 54 of the judgment). She concluded (in paragraph 60):

> "60. In my view, the Inspector's findings … clearly indicate that [his] focus was upon identifying a visual connection, and assessing the proposal's impact upon it. The historic social and economic connections were set to one side in this exercise. I therefore cannot accept the Secretary of State's submission that the Inspector merely formed a planning judgment that the historic social and economic factors were of insufficient weight, as there was no assessment of the weight to be accorded to them in the Inspector's decision-making process."

In the judge's view the inspector's approach to the other heritage assets "confirms that he treated the physical and visual connection as determinative" (paragraph 61). Her crucial conclusion was this (in paragraph 64):

> "64. In my judgment, although the Inspector set out the NPPF definition of setting … , he adopted a narrow interpretation of setting which was inconsistent with the broad meaning given to setting in the relevant policies and guidance which were before him … . Whilst a physical or visual connection between a heritage asset and its setting will often exist, it is not essential or determinative. The term setting is not defined in purely visual terms in the NPPF which refers to the "*surroundings in which a heritage asset is experienced*". The word "*experienced*" has a broad meaning, which is capable of extending beyond the purely visual."

The inspector's "justification for his narrow interpretation" was, said the judge, "misplaced because the term "*surroundings*" in the NPPF definition of setting does place a geographical limitation on the extent of the setting" (paragraph 67). He had "adopted an artificially narrow approach to the issue of setting which treated visual connections as essential and determinative", and "[in] adopting this approach, [he] made an error of law" (paragraph 69).

Did the inspector err in law in his understanding of the "setting" of a heritage asset?

22. Mr Rupert Warren Q.C., for Catesby Estates, and Ms Jacqueline Lean, for the Secretary of State, submitted that the inspector made no error of law when identifying the extent of the setting of Kedleston Hall and assessing the likely effect of the development on that setting. He took into account the relevant facts, did not misunderstand the relevant policy and guidance, and exercised his planning judgment reasonably when applying that policy and guidance. He did not disregard historic considerations. The suggestion that he did is based on a misreading of paragraph 32 of the decision letter. His approach there was consistent with authority, and correct. And as one can see from previous and subsequent paragraphs – in particular, paragraphs 17, 21 and 30, where he assessed the likely effects of the development on the landscape, and paragraphs 54, 55 and 57, where he assessed its likely effects on the settings of the other heritage assets, both with and without the "Derby Screen" – he had considerations

other than the visual and physical well in mind. The idea that he simply put those considerations to one side is wrong.

23. Ms Nina Pindham, for Mr Steer, and Ms Emma Dring, for Historic England, supported the judge's analysis. They submitted that the inspector's approach was unduly narrow. In identifying the setting of Kedleston Hall and assessing the likely effects of the development on that setting, he had considered only views and the impact on views. He did not consider historical factors. When dealing with the other heritage assets, the inspector also focused on visual impacts alone. Historical factors, Ms Pindham and Ms Dring submitted, can be enough on their own to bring a site within the setting of a listed building. And that was so with Kedleston Hall. A visual connection is not necessary in every case.

24. Although the "setting" of a listed building is a concept recognized by statute, it is not statutorily defined. Nor does it lend itself to precise definition (see *R. (on the application of Williams) v Powys County Council* [2017] EWCA Civ 427, at paragraphs 53 to 58). Implicit in section 66 of the Listed Buildings Act, however, is that the setting of a listed building is capable of being affected in some discernible way by development, whether within the setting or outside it. Identifying the extent of the setting for the purposes of a planning decision is not a matter for the court, but will always be a matter of fact and planning judgment for the decision-maker. And as Sullivan L.J. said in *R. (on the application of The Friends of Hethel Ltd.) v South Norfolk District Council* [2011] 1 W.L.R. 1216, "the question whether a proposed development affects, or would affect the setting of a listed building is very much a matter of planning judgment for the local planning authority" (paragraph 32 of the judgment).

25. In *Williams* – where judgment on the appeal was given after the hearing in this case, and shortly before Lang J.'s judgment was handed down – the grant of planning permission for a wind turbine was challenged on the ground that the local planning authority had failed lawfully to consider the likely visual effects of the development on the settings of several heritage assets, including two scheduled monuments and a grade II* listed church. The only potential effects on the settings of the heritage assets in that case were visual. It was in this context that I distinguished between the "site" of a scheduled monument and its "setting", which, I said, "encompasses the surroundings within which the monument may be experienced by the eye" (paragraph 31). I went on to say that the circumstances in which the section 66(1) duty has to be performed for the setting of a listed building will vary with a number of factors – typically, "the nature, scale and siting of the development proposed, its proximity and likely visual relationship to the listed building, the architectural and historic characteristics of the listed building itself, local topography, and the presence of other features – both natural and man-made – in the surrounding landscape or townscape", and possibly "other considerations too", depending on "the particular facts and circumstances of the case in hand" (paragraph 53). To "lay down some universal principle for ascertaining the extent of the setting of a listed building" would be, I thought, "impossible". But – again in the particular context of visual effects – I said that if "a proposed development is to affect the setting of a listed building there must be a distinct visual relationship of some kind between the two – a visual relationship which is more than remote or ephemeral, and which in some way bears on one's experience of the listed building in its surrounding landscape or townscape" (paragraph 56).

26. This does not mean, however, that factors other than the visual and physical must be ignored when a decision-maker is considering the extent of a listed building's setting. Generally, of course, the decision-maker will be concentrating on visual and physical considerations, as in *Williams* (see also, for example, the first instance judgment in *R. (on the application of Miller) v North Yorkshire County Council* [2009] EWHC 2172 (Admin), at paragraph 89). But it is clear from the relevant national policy and guidance to which I have referred, in particular the guidance in paragraph 18a-013-20140306 of the PPG, that the Government recognizes the potential relevance of other considerations – economic, social and historical. These other considerations may include, for example, "the historic relationship between places". Historic England's advice in GPA3 was broadly to the same effect.

27. It has also been accepted in this court that the effect of development on the setting of a listed building is not necessarily confined to visual or physical impact. As Lewison L.J. said in *R. (on the application of Palmer) v Herefordshire Council* [2016] EWCA Civ 1061 (in paragraph 5 of his judgment), "[although] the most obvious way in which the setting of a listed building might be harmed is by encroachment or visual intrusion, it is common ground that, in principle, the setting of a listed building may be harmed by noise or smell". In that case the potential harm to the setting of the listed building was by noise and odour from four poultry broiler units.

28. Three general points emerge. First, the section 66(1) duty, where it relates to the effect of a proposed development on the setting of a listed building, makes it necessary for the decision-maker to understand what that setting is – even if its extent is difficult or impossible to delineate exactly – and whether the site of the proposed development will be within it or in some way related to it. Otherwise, the decision-maker may find it hard to assess whether and how the proposed development "affects" the setting of the listed building, and to perform the statutory obligation to "have special regard to the desirability of preserving … its setting …".

29. Secondly, though this is never a purely subjective exercise, none of the relevant policy, guidance and advice prescribes for all cases a single approach to identifying the extent of a listed building's setting. Nor could it. In every case where that has to be done, the decision-maker must apply planning judgment to the particular facts and circumstances, having regard to relevant policy, guidance and advice. The facts and circumstances will differ from one case to the next. It may be that the site of the proposed development, though physically close to a listed building, has no real relationship with it and falls outside its setting, while another site, much further away, nevertheless has an important relationship with the listed building and is within its setting (see the discussion in sections 14.3, 15.2 and 15.8 of Mynors and Hewitson's "Listed Buildings and Other Heritage Assets", fifth edition). Under current national planning policy and guidance in England, in the NPPF and the PPG, the decision-maker has to concentrate on the "surroundings in which [the heritage] asset is experienced", keeping in mind that those "surroundings" may change over time, and also that the way in which a heritage asset can be "experienced" is not limited only to the sense of sight. The "surroundings" of the heritage asset are its physical surroundings, and the relevant "experience", whatever it is, will be of the heritage asset itself in that physical place.

30. Thirdly, the effect of a particular development on the setting of a listed building – where, when and how that effect is likely to be perceived, whether or not it will preserve the setting of the listed building, whether, under government policy in the NPPF, it will harm the "significance"

of the listed building as a heritage asset, and how it bears on the planning balance – are all matters for the planning decision-maker, subject, of course, to the principle emphasized by this court in *East Northamptonshire District Council v Secretary of State for Communities and Local Government* [2015] 1 W.L.R. 45 (at paragraphs 26 to 29), *Jones v Mordue* [2016] 1 W.L.R. 2682 (at paragraphs 21 to 23), and *Palmer* (at paragraph 5), that "considerable importance and weight" must be given to the desirability of preserving the setting of a heritage asset. Unless there has been some clear error of law in the decision-maker's approach, the court should not intervene (see *Williams*, at paragraph 72). For decisions on planning appeals, this kind of case is a good test of the principle stated by Lord Carnwath in *Hopkins Homes Ltd. v Secretary of State for Communities and Local Government* [2017] 1 W.L.R. 1865 (at paragraph 25) – that "the courts should respect the expertise of the specialist planning inspectors, and start at least from the presumption that they will have understood the policy framework correctly".

31. With those three points in mind, I believe the submissions made to us by Mr Warren and Ms Lean are correct. When one reads the relevant parts of the inspector's decision letter together and in their full context, I do not think one finds the errors contended for by Ms Pindham and Ms Dring. I cannot agree with the judge's conclusion (in paragraph 60 of her judgment) that the inspector simply "set to one side" the historical considerations said to be relevant to the setting of Kedleston Hall. He recognized the relevance of those considerations to the setting of the listed building, to the impact of the proposed development upon that setting, and its impact on the "significance" of the listed building as a heritage asset. He did not concentrate on visual and physical factors to the exclusion of everything else. In the passages I have quoted from the decision letter one can see that he was aware of the need to take into account not merely the visual effects of the development but also its effects on the historic value of the Hall, the park, and each of the other heritage assets he had to consider.

32. I differ from the judge's view (in paragraph 64 of her judgment) that the inspector "adopted a narrow interpretation of setting … inconsistent with the broad meaning given to setting in the relevant policies and guidance … before him". In my opinion he understood the relevant policies and guidance correctly, and applied them lawfully in assessing the likely effects of the development on the setting of each heritage asset.

33. He began (in paragraph 31 of his decision letter) by directing himself on the NPPF definition of the "Setting of a heritage asset", and the content of relevant NPPF policy. He did this accurately, and there is no suggestion that he did not.

34. He then (in paragraph 32) summarized the argument put forward by the council, Kedleston Voice and Historic England, that Kedleston Hall and its park were an integral whole, with the same setting, and, specifically, the assertion that "the historical, social and economic connection – the appeal site being part of the estate of which the Hall and park were the hub – brought the appeal site within the setting of the Hall". It was this argument he was dealing with when he said in the next sentence that "[there] has, though, to be more of a physical or visual connection than that" – by which he clearly meant more of a physical or visual connection than the fact that the appeal site had been "part of the [Kedleston] estate …".

35. That sentence should not be taken in isolation, but must be read in its full context. When this is done, its true meaning is certain and clear.

36. In the circumstances here the inspector was, in my view, entitled to look for a "physical or visual connection" of some kind as a means of establishing the extent of the setting of this listed building. The crucial question, I think, is whether his conclusion on the need for "more of a physical or visual connection than that" – meaning more of a physical or visual connection than the mere fact that the appeal site had been "part of the estate of which the Hall and Park were the hub" – is to be read as if it were a statement of general principle, or simply as a planning judgment on the facts of this particular case.

37. In the course of argument before us, Ms Dring accepted that if it was the latter, the Secretary of State's appeal must succeed. She was, in my view, right to do so.

38. As Mr Warren and Ms Lean submitted, the expression "more of a physical or visual connection than that" conveys a relative concept, not an absolute one. The inspector was not, in my view, automatically discounting the "historical, social and economic connection" as irrelevant. He was clearly aware of the potential relevance of such a connection to the question of whether the appeal site could be regarded as lying within the setting of the listed building and to the question of whether the proposed development would affect that setting. He was not saying that land could only fall within the setting of Kedleston Hall if there was a "physical or visual connection" between them. He was simply saying that in this instance the extent of the setting of the listed building could not be determined by the fact of the "historical, social and economic connection" to which he referred. There had to be something more than this connection alone if the appeal site were to be regarded as falling within the setting of the Hall.

39. As is clear when that sentence in paragraph 32 of the decision letter is read in its context, this was not, and was not intended to be, a statement of general principle. It represented the inspector's own exercise of planning judgment in the particular circumstances of this case. And there was a simple explanation for that planning judgment, which he gave: "otherwise", he said, "land completely remote from the Hall could be deemed within its setting". He was not confining himself merely to visual and physical considerations, as if he thought that, in principle, he could not take other factors into account. He was not adopting a false test or a false approach. He knew, as he went on to say (in paragraph 37), that "[the] Hall and its Park were at the centre of a large estate, socially and economically, though not geographically (there was estate land in Staffordshire)". But the historic connection could not be the sole criterion for judging whether a site lay within the setting of the listed building. Land historically farmed within the estate as a whole, and belonging to that social and economic entity, might be so geographically detached from Kedleston Hall as to be "completely remote". The historic connection between the farmland of which the site of the proposed development formed part was not, in the circumstances, sufficient to bring the site within the setting of the Hall.

40. In the fourth and fifth sentences of paragraph 32 the inspector endorsed the contention put forward by Catesby Estates: "that the Park provides the setting for the Hall" – in his view, "not an unreasonable approach to take". This was, once again, a planning judgment exercised by the inspector in the particular circumstances of this case. He found support for it in "the Historic England guidance", which, he said, "recognises that a conservation area will include the settings of listed buildings and will have a setting of its own". Far from ignoring the advice in GPA3, he clearly had it in mind and relied on it. And it was open to him to find that the setting

of Kedleston Hall as a listed building was different from the setting of the park as a registered park and garden and from the setting of the conservation area.

41. These were all reasonable conclusions for the inspector to reach on the facts, taking into account all relevant considerations, and notwithstanding the case put forward by the council, Kedleston Voice and Historic England. They show a lawful approach to identifying the setting of Kedleston Hall, which did not neglect historical, social and economic considerations.

42. But the inspector went further. He acknowledged (at the end of paragraph 32) that there were "two ways to look at the setting of Kedleston Hall". He then set out (in paragraphs 33 to 36) a careful description of the setting of the Hall as it has changed over time. He considered the views of the Hall originally available from across the appeal site, the evidence of a "designed view" from the Hall, and the interposition of the "Derby Screen", which, in his judgment, now prevented the appeal site from forming part of the setting of the listed building. He also considered the relevant documentary and physical evidence on views to and from Kedleston Hall, and the interruption of those views by the "Derby Screen". He was conscious of the relevance of historical considerations in forming his own conclusion on the extent of the setting of the listed building. This strengthens the conclusion that his approach was not restricted to visual and physical considerations alone, but was comprehensive and complete. I think his relevant conclusions are unassailable.

43. The same may be said of his conclusions on the impact of the proposed development on the setting of the Hall (in paragraphs 41 to 52). Here too he grappled with the evidence on historic views, the loss of such views, and the possible implications of the "Derby Screen" being removed – unlikely as that was. Once again, his approach cannot be faulted, and his conclusions were well within the limits of lawful planning judgment. He was entitled to conclude (in paragraph 51) that, with the "Derby Screen" in place, the appeal site did "not lie within the setting of Kedleston Hall" and that that the section 66(1) duty and corresponding guidance in the NPPF did "not come into play"; and (in paragraph 52) that even if the "Derby Screen" were to be removed, or partly removed, the effect of the development "on the significance of the Hall, standing within its designed Park, would be negligible". Those conclusions were available to him on the evidence, and in these proceedings they are secure. They do not betray an unlawful approach, in which considerations other than the visual and physical were disregarded.

44. That the inspector grasped the concept of the setting of a listed building is demonstrated in the parts of his decision letter where he considered the settings of the other heritage assets and the likely effects of the development on each. Those passages serve to confirm the lawfulness of his approach to identifying the setting of Kedleston Hall, and of his conclusion that the potential effect of the development upon it was no more than "negligible". His approach to identifying the setting of each heritage asset he had to consider was, in my view, consistent and sound. So were his conclusions on the likely effect of the proposed development – or its lack of effect – on the setting in question and its impact – or lack of impact – on "significance". At no stage did he exaggerate the importance of physical and visual considerations, or unduly diminish the significance of the historical, the social and the economic.

45. For example, when considering the setting of the park and the Kedleston Conservation Area, he acknowledged (in paragraph 37) that "[the] Hall and its Park were at the centre of a large estate" and accepted that the "agricultural land around the Park certainly forms part of its setting in historical and cultural terms", though in "visual terms" the setting was "less extensive". This was to give both "historical and cultural" and "visual" considerations their place and due weight in establishing the extent of the setting of the park, and to recognize that the juxtaposition of designed parkland to the surrounding farmland created a different setting for that heritage asset from the setting of the Hall as a listed building. Historical considerations again played their part in the assessment, as well as views. But the decisive factor in the inspector's conclusion (in paragraph 38), that the appeal site fell within the setting of the park – as was common ground – was their "relative proximity" to it and "clear views of the boundary of the Park". The Hall was further away. There was a direct visual relationship between the appeal site and the park, but not between the site and the Hall. Again, however, the "Derby Screen" had largely obstructed views in both directions – from and of the park.

46. The tenor of the inspector's conclusions on the likely impact of the development on the setting of the park and the Kedleston Conservation Area (in paragraphs 53 to 58) is similar. As he said (in paragraph 54), there were "two aspects to the impact on the setting of the Park – visual and historical". He considered both, and he did so impeccably. He accepted (in paragraph 55) that the appeal site was "part of that setting", as was the built-up area of Allestree, and (in paragraph 58) that "there would be harm to the setting of the Park from development within it", but that "[in] terms of the significance of the Park and Conservation Area, … the harm would be at the lower end of 'less than substantial'". Here too, there can be no complaint that either his approach or the conclusion he reached was unlawful.

47. His conclusions on the settings of the Kedleston Hotel as a listed building and of the Quarndon Conservation Area, though informed by the relevant historical considerations, depended mainly on the visual – the "views" to which he referred (in paragraphs 39 and 40). Those conclusions are not vulnerable in a legal challenge. Nor do they reveal a mistaken approach to the setting of Kedleston Hall. Here again, the circumstances were different. The fact that there was, as the inspector observed (in paragraph 39), a "close historic relationship between the Hotel and the Hall and Park" does not mean that there was any such relationship between the hotel and the farmland where the appeal site lay. The same may also be said of the Quarndon Conservation Area – "drawn tightly round the historic core of the village", as the inspector put it (in paragraph 40). These conclusions, and his finding (in paragraphs 60 and 61) that neither the setting of the listed hotel nor that of the conservation area would be harmed by the development, reveal no error of law. They do not suggest that he misunderstood the concept of the setting of a heritage asset. What they do show is that his approach was both consistent and correct.

Conclusion

48. For the reasons I have given, I would allow this appeal.

Lady Justice Asplin

49. I agree.

Lord Justice McFarlane

50. I also agree.