Case No: C1/2013/0843

Neutral Citation Number: [2014] EWCA Civ 137
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
THE HON. MRS JUSTICE LANG
CO/4231/2012

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/02/2014

Before:

LORD JUSTICE MAURICE KAY
VICE PRESIDENT OF THE COURT OF APPEAL, CIVIL DIVISION
LORD JUSTICE SULLIVAN
and
LADY JUSTICE RAFFERTY

- -

Between:

BARNWELL MANOR WIND ENERGY LIMITED	**Appellant**
- and -	
(1) EAST NORTHAMPTONSHIRE DISTRICT COUNCIL **(2) ENGLISH HERITAGE** **(3) NATIONAL TRUST** **(4) THE SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT**	**Respondents**

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Gordon Nardell QC and **Justine Thornton** (instructed by **Eversheds LLP**) for the **Appellant**
Morag Ellis QC and **Robin Green** (instructed by **Sharpe Pritchard**) for the **First, Second and Third Respondents**
The Fourth Respondent did not appear and was not represented

Hearing date: 23rd January 2014

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Judgment

Lord Justice Sullivan:

Introduction

1. This is an appeal against the order dated 11th March 2013 of Lang J quashing the decision dated 12th March 2012 of a Planning Inspector appointed by the Secretary of State granting planning permission for a four-turbine wind farm on land north of Catshead Woods, Sudborough, Northamptonshire. The background to the appeal is set out in Lang J's judgment: [2013] EWHC 473 (Admin).

Section 66

2. Section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the Listed Buildings Act") imposes a "General duty as respects listed buildings in exercise of planning functions." Subsection (1) 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."

Planning Policy

3. When the permission was granted the Government's planning policies on the conservation of the historic environment were contained in Planning Policy Statement 5 (PPS5). In PPS5 those parts of the historic environment that have significance because of their historic, archaeological, architectural or artistic interest are called heritage assets. Listed buildings, Scheduled Ancient Monuments and Registered Parks and Gardens are called "designated heritage assets." Guidance to help practitioners implement the policies in PPS5 was contained in "PPS5 Planning for the Historic Environment: Historic Environment Planning Practice Guide" ("the Practice Guide"). For present purposes, Policies HE9 and HE10 in PPS5 are of particular relevance. Policy HE9.1 advised that:

> "There should be a presumption in favour of the conservation of designated heritage assets and the more significant the designated heritage asset, the greater the presumption in favour of its conservation should be…. 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, including scheduled monuments ….grade I and II* listed buildings and grade I and II* registered parks and gardens….should be wholly exceptional."

Policy HE9.4 advised that:

> "Where a proposal has a harmful impact on the significance of a designated heritage asset which is less than substantial harm, in all cases local planning authorities should:
>
> (i) weigh the public benefit of the proposal (for example, that it helps to secure the optimum viable use of the heritage asset in the interests of its long-term conservation) against the harm; and
>
> (ii) recognise that the greater the harm to the significance of the heritage asset the greater the justification will be needed for any loss."

Policy HE10.1 advised decision-makers that when considering applications for development that do not preserve those elements of the setting of a heritage asset, they:

> "should weigh any such harm against the wider benefits of the application. The greater the negative impact on the significance of the heritage asset, the greater the benefits that will be needed to justify approval."

The Inspector's decision

4. The Inspector concluded that the wind farm would fall within and affect the setting of a wide range of heritage assets [22][1]. For the purposes of this appeal the parties' submissions largely focussed on one of the most significant of those assets: a site owned by the National Trust, Lyveden New Bield. Lyveden New Bield is covered by a range of heritage designations: Grade I listed building, inclusion in the Register of Parks and Gardens of Special Historic Interest at Grade I, and Scheduled Ancient Monument [44].

5. It was common ground between the parties at the inquiry that the group of designated heritage assets at Lyveden New Bield was probably the finest surviving example of an Elizabethan Garden, and that as a group the heritage asset at Lyveden New Bield had a cultural value of national, if not international significance. The Inspector agreed, and found that:

> "…this group of designated heritage assets has archaeological, architectural, artistic and historic significance of the highest magnitude." [45]

6. The closest turbine in the wind farm site (following the deletion of one turbine) to Lyveden New Bield was around 1.3 km from the boundary of the Registered Park and 1.7 km from the New Bield itself. The Inspector found that:

[1] [ ] refers to paragraph numbers in the Inspector's decision.

> "The wind turbines proposed would be visible from all around the site, to varying degrees, because of the presence of trees. Their visible presence would have a clear influence on the surroundings in which the heritage assets are experienced and as such they would fall within, and affect, the setting of the group." [46]

This conclusion led the Inspector to identify the central question, as follows:

> "Bearing in mind PPS5 Policy HE7, the central question is the extent to which that visible presence would affect the significance of the heritage assets concerned." [46]

7. The Inspector answered that question in relation to Lyveden New Bield in paragraphs 47-51 of his decision letter.

> "47. While records of Sir Thomas Tresham's intentions for the site are relatively, and unusually, copious, it is not altogether clear to what extent the gardens and the garden lodge were completed and whether the designer considered views out of the garden to be of any particular significance. As a consequence, notwithstanding planting programmes that the National Trust have undertaken in recent times, the experience of Lyveden New Bield as a place, and as a planned landscape, with earthworks, moats and buildings within it, today, requires imagination and interpretation.
>
> 48. At the times of my visits, there were limited numbers of visitors and few vehicles entering and leaving the site. I can imagine that at busy times, the situation might be somewhat different but the relative absence of man-made features in views across and out of the gardens compartments, from the prospect mounds especially, and from within the garden lodge, give the place a sense of isolation that makes the use of one's imagination to interpret Sir Thomas Tresham's design intentions somewhat easier.
>
> 49. The visible, and sometimes moving, presence of the proposed wind turbine array would introduce a man-made feature, of significant scale, into the experience of the place. The array would act as a distraction that would make it more difficult to understand the place, and the intentions underpinning its design. That would cause harm to the setting of the group of designated heritage assets within it.
>
> 50. However, while the array would be readily visible as a backdrop to the garden lodge in some directional views, from the garden lodge itself in views towards it, and from the

prospect mounds, from within the moated orchard, and various other places around the site, at a separation distance of between 1 and 2 kilometres, the turbines would not be so close, or fill the field of view to the extent, that they would dominate the outlook from the site. Moreover, the turbine array would not intrude on any obviously intended, planned view out of the garden, or from the garden lodge (which has windows all around its cruciform perimeter). Any reasonable observer would know that the turbine array was a modern addition to the landscape, separate from the planned historic landscape, or building they were within, or considering, or interpreting.

51. On that basis, the presence of the wind turbine array would not be so distracting that it would prevent or make unduly difficult, an understanding, appreciation or interpretation of the significance of the elements that make up Lyveden New Bield and Lyveden Old Bield, or their relationship to each other. As a consequence, the effect on the setting of these designated heritage assets, while clearly detrimental, would not reach the level of substantial harm."

8. The Inspector carried out "The Balancing Exercise" in paragraphs 85 and 86 of his decision letter.

"85. The proposal would harm the setting of a number of designated heritage assets. However, the harm would in all cases be less than substantial and reduced by its temporary nature and reversibility. The proposal would also cause harm to the landscape but this would be ameliorated by a number of factors. Read in isolation though, all this means that the proposal would fail to accord with [conservation policies in the East Midlands Regional Plan (EMRP)]. On the other hand, having regard to advice in PPS22, the benefits that would accrue from the wind farm in the 25 year period of its operation attract significant weight in favour of the proposal. The 10 MW that it could provide would contribute towards the 2020 regional target for renewable energy, as required by EMRP Policy 40 and Appendix 5, and the wider UK national requirement.

86. PPS5 Policies HE9.4 and HE10.1 require the identified harm to the setting of designated heritage assets to be balanced against the benefits that the proposal would provide. Application of the development plan as a whole would also require that harm, and the harm to the landscape, to be weighed against the benefits. Key principle (i) of PPS22 says that renewable energy developments should be capable of being

> accommodated throughout England in locations where the technology is viable and environmental, economic, and social impacts can be addressed satisfactorily. I take that as a clear expression that the threshold of acceptability for a proposal like the one at issue in this appeal is not such that all harm must be avoided. In my view, the significant benefits of the proposal in terms of the energy it would produce from a renewable source outweigh the less than substantial harm it would cause to the setting of designated heritage assets and the wider landscape."

Lang J's Judgment

9. Before Lang J the First, Second and Third Respondents ("the Respondents") challenged the Inspector's decision on three grounds. In summary, they submitted that the Inspector had failed to:

   (1) have special regard to the desirability of preserving the settings of listed buildings, including Lyveden New Bield;

   (2) correctly interpret and apply the policies in PPS5; and

   (3) give adequate reasons for his decision.

   The Secretary of State, the Fourth Respondent, had conceded prior to the hearing that the Inspector's decision should be quashed on ground (3), and took no part in the proceedings before Lang J and in this Court.

10. Lang J concluded that all three grounds of challenge were made out. [72][2] In respect of ground (1) she concluded that:

> "In order to give effect to the statutory duty under section 66(1), a decision-maker should accord considerable importance and weight to the "desirability of preserving… the setting" of listed buildings when weighing this factor in the balance with other 'material considerations' which have not been given this special statutory status. Thus, where the section 66(1) duty is in play, it is necessary to qualify Lord Hoffmann's statement in *Tesco Stores v Secretary of State for the Environment & Ors* [1995] 1 WLR 759, at 780F-H that the weight to be given to a material consideration was a question of planning judgment for the planning authority" [39]

   Applying that interpretation of section 66(1) she concluded that:

> "….the Inspector did not at any stage in the balancing exercise accord "special weight", or considerable importance to "the

[2] [ ] refers to paragraph numbers in the judgment.

> desirability of preserving the setting". He treated the "harm" to the setting and the wider benefit of the wind farm proposal as if those two factors were of equal importance. Indeed, he downplayed "the desirability of preserving the setting" by adopting key principle (i) of PPS22, as a "clear indication that the threshold of acceptability for a proposal like the one at issue in this appeal is not such that all harm must be avoided" (paragraph 86). In so doing, he applied the policy without giving effect to the section 66(1) duty, which applies to all listed buildings, whether the "harm" has been assessed as substantial or less than substantial." [46]

11. In respect of ground (2) Lang J concluded that the policy guidance in PPS5 and the Practice Guide required the Inspector to assess the contribution that the setting made to the significance of the heritage assets, including Lyveden New Bield, and the effect of the proposed wind turbines on both the significance of the heritage asset and the ability to appreciate that significance. Having analysed the Inspector's decision, she found that the Inspector's assessment had been too narrow. He had failed to assess the contribution that the setting of Lyveden New Bield made to its significance as a heritage asset and the extent to which the wind turbines would enhance or detract from that significance, and had wrongly limited his assessment to one factor: the ability of the public to understand the asset based on the ability of "the reasonable observer" to distinguish between the "modern addition" to the landscape and the "historic landscape." [55] - [65]

12. In respect of ground (3) Lang J found that the question whether Sir Thomas Tresham intended that the views from the garden and the garden lodge should be of significance was a controversial and important issue at the inquiry which the Inspector should have resolved before proceeding to assess the level of harm.[68] However, the Inspector's reasoning on this issue was unclear. Having said in paragraph 47 of his decision that it was "not altogether clear ….whether the designer considered views out of the garden to be of any significance", he had concluded in paragraph 50 that "the turbine array would not intrude on any obviously intended, planned view out of the garden, or from the garden lodge (which has windows all around its cruciform perimeter)." It was not clear whether this was a conclusion that there were no planned views (as submitted by the Appellant) or a conclusion that there were such views but the turbine array would not intrude into them. [70] – [71].

The Grounds of Appeal

13. On behalf of the Appellant, Mr. Nardell QC challenged Lang J's conclusions in respect of all three grounds. At the forefront of his appeal was the submission that Lang J had erred in concluding that section 66(1) required the Inspector, when carrying out the balancing exercise, to give "considerable weight" to the desirability of preserving the settings of the many listed buildings, including Lyveden New Bield. He submitted that section 66(1) did not require the decision-maker to give any particular weight to that factor. It required the decision-maker to ask the right

question – would there be some harm to the setting of the listed building – and if the answer to that question was "yes" – to refuse planning permission unless that harm was outweighed by the advantages of the proposed development. When carrying out that balancing exercise the weight to be given to the harm to the setting of the listed building on the one hand and the advantages of the proposal on the other was entirely a matter of planning judgment for the decision-maker.

14. Turning to the policy ground, he submitted that Lang J had erred by taking an over-rigid approach to PPS5 and the Practice Guide which were not intended to be prescriptive. Given the way in which those objecting to the proposed wind farm had put their case at the inquiry, the Inspector had been entitled to focus on the extent to which the presence of the turbines in views to and from the listed buildings, including Lyveden New Bield, would affect the ability of the public to appreciate the heritage assets.

15. In response to the reasons ground, he submitted that the question whether any significant view from the lodge or garden at Lyveden New Bield was planned or intended was a subsidiary, and not a "principal important controversial", issue. In any event, he submitted that on a natural reading of paragraph 50 of the decision letter the Inspector had simply found that the turbines would not intrude into such significant views, if any, as were obviously planned or intended, so it had been unnecessary for him to resolve the issue that he had left open in paragraph 47 of the decision.

Discussion

Ground 1

16. What was Parliament's intention in imposing both the section 66 duty and the parallel duty under section 72(1) of the Listed Buildings Act to pay "special attention ….. to the desirability of preserving or enhancing the character or appearance" of conservation areas? It is common ground that, despite the slight difference in wording, the nature of the duty is the same under both enactments. It is also common ground that "preserving" in both enactments means doing no harm: see South Lakeland District Council v Secretary of State for the Environment [1992] 2 AC 141, per Lord Bridge at page 150.

17. Was it Parliament's intention that the decision-maker should consider very carefully whether a proposed development would harm the setting of the listed building (or the character or appearance of the conservation area), and if the conclusion was that there would be some harm, then consider whether that harm was outweighed by the advantages of the proposal, giving that harm such weight as the decision-maker thought appropriate; or was it Parliament's intention that when deciding whether the harm to the setting of the listed building was outweighed by the advantages of the proposal, the decision-maker should give particular weight to the desirability of avoiding such harm?

18. Lang J analysed the authorities in paragraphs [34] – [39] of her judgment. In chronological order they are: The Bath Society v Secretary of State for the

Environment [1991] 1 WLR 1303; South Lakeland (see paragraph 16 above); Heatherington (UK) Ltd. v Secretary of State for the Environment (1995) 69 P & CR 374; and Tesco Stores Ltd. v Secretary of State for the Environment [1995] 1 WLR 759. Bath and South Lakeland were concerned with (what is now) the duty under section 72. Heatherington is the only case in which the section 66 duty was considered. Tesco was not a section 66 or section 72 case, it was concerned with the duty to have regard to "other material considerations" under section 70(2) of the Town and Country Planning Act 1990 ("the Planning Act").

19. When summarising his conclusions in Bath about the proper approach which should be adopted to an application for planning permission in a conservation area, Glidewell LJ distinguished between the general duty under (what is now) section 70(2) of the Planning Act, and the duty under (what is now) section 72(1) of the Listed Buildings Act. Within a conservation area the decision-maker has two statutory duties to perform, but the requirement in section 72(1) to pay "special attention" should be the first consideration for the decision-maker (p. 1318 F-H). Glidewell LJ continued:

> "Since, however, it is a consideration to which special attention is to be paid as a matter of statutory duty, it must be regarded as having considerable importance and weight…… As I have said, the conclusion that the development will neither enhance nor preserve will be a consideration of considerable importance and weight. This does not necessarily mean that the application for permission must be refused, but it does in my view mean that the development should only be permitted if the decision-maker concludes that it carries some advantage or benefit which outweighs the failure to satisfy the section [72(1)] test and such detriment as may inevitably follow from that."

20. In South Lakeland the issue was whether the concept of "preserving" in what is now section 72(1) meant "positively preserving" or merely doing no harm. The House of Lords concluded that the latter interpretation was correct, but at page 146E-G of his speech (with which the other members of the House agreed) Lord Bridge described the statutory intention in these terms:

> "There is no dispute that the intention of section [72(1)] is that planning decisions in respect of development proposed to be carried out in a conservation area must give a high priority to the objective of preserving or enhancing the character or appearance of the area. If any proposed development would conflict with that objective, 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. But if a development would not conflict with that objective, the special attention required to be paid to that objective will no longer stand in its way and the

development will be permitted or refused in the application of ordinary planning criteria."

21. In Heatherington, the principal issue was the interrelationship between the duty imposed by section 66(1) and the newly imposed duty under section 54A of the Planning Act (since repealed and replaced by the duty under section 38(6) of the Planning and Compulsory Purchase Act 2004). However, Mr. David Keene QC (as he then was), when referring to the section 66(1) duty, applied Glidewell LJ's dicta in the Bath case (above), and said that the statutory objective "remains one to which considerable weight should be attached" (p. 383).

22. Mr. Nardell submitted, correctly, that the Inspector's error in the Bath case was that he had failed to carry out the necessary balancing exercise. In the present case the Inspector had expressly carried out the balancing exercise, and decided that the advantages of the proposed wind farm outweighed the less than substantial harm to the setting of the heritage assets. Mr. Nardell submitted that there was nothing in Glidewell LJ's judgment which supported the proposition that the Court could go behind the Inspector's conclusion. I accept that (subject to grounds 2 and 3, see paragraph 29 et seq below) 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 LJ's judgment 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."

23. That conclusion is reinforced by the passage in the speech of Lord Bridge in South Lakeland to which I have referred (paragraph 20 above). It is true, as Mr. Nardell submits, that the ratio of that decision is that "preserve" means "do no harm". However, Lord Bridge's explanation of the statutory purpose is highly persuasive, and his observation that there will be a "strong presumption" against granting permission for development that would harm the character or appearance of a conservation area is consistent with Glidewell LJ's conclusion in Bath. There is a "strong presumption" against granting planning permission for development which would harm the character or 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."

24. While I would accept Mr. Nardell's submission that Heatherington does not take the matter any further, it does not cast any doubt on the proposition that emerges from the Bath and South Lakeland cases: that Parliament in enacting section 66(1) did intend 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.

25. In support of his submission that, provided he asked the right question – was the harm to the settings of the listed buildings outweighed by the advantages of the proposed

development – the Inspector was free to give what weight he chose to that harm, Mr. Nardell relied on the statement in the speech of Lord Hoffmann in Tesco that the weight to be given to a material consideration is entirely a matter for the local planning authority (or in this case, the Inspector):

> "If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State." (p.780H).

26. As a general proposition, the principle is not in doubt, but Tesco was concerned with the application of section 70(2) of the Planning Act. It was not a case under section 66(1) or 72(1) of the Listed Buildings Act. The proposition that decision-makers may be required by either statute or planning policy to give particular weight to certain material considerations was not disputed by Mr. Nardell. There are many examples of planning policies, both national and local, which require decision-makers when exercising their planning judgment to give particular weight to certain material considerations. No such policies were in issue in the Tesco case, but an example can be seen in this case. In paragraph 16 of his decision letter the Inspector referred to Planning Policy Statement 22 Renewable Energy (PPS22) which says that the wider environmental and economic benefits of all proposals for renewable energy, whatever their scale, are material considerations which should be given "significant weight". In this case, the requirement to give "considerable importance and weight" to the policy objective of preserving the setting of listed buildings has been imposed by Parliament. Section 70(3) of the Planning Act provides that section 70(1), which confers the power to grant planning permission, has effect subject to, inter alia, sections 66 and 72 of the Listed Buildings Act. Section 70(2) requires the decision-maker to have regard to "material considerations" when granting planning permission, but Parliament has made the power to grant permission having regard to material considerations expressly subject to the section 66(1) duty.

27. Mr. Nardell also referred us to the decisions of Ouseley J and this Court in Garner v Elmbridge Borough Council [2011] EWCA Civ 891, but the issue in that case was whether the local planning authority had been entitled to conclude that no harm would be caused to the setting of another heritage asset of the highest significance, Hampton Court Palace. Such was the weight given to the desirability of preserving the setting of the Palace that it was common ground that it would not be acceptable to grant planning permission for a redevelopment scheme which would have harmed the setting of the Palace on the basis that such harm would be outweighed by some other planning advantage: see paragraph 14 of my judgment. Far from assisting Mr. Nardell's case, Garner is an example of the practical application of the advice in policy HE9.1: that substantial harm to designated heritage assets of the highest significance should not merely be exceptional, but "wholly exceptional".

28. It does not follow that if the harm to such heritage assets is found to be less than substantial, the balancing exercise referred to in policies HE9.4 and HE 10.1 should ignore the overarching statutory duty imposed by section 66(1), which properly

understood (see Bath, South Somerset and Heatherington) requires considerable weight to be given by decision-makers to the desirability of preserving the setting of all listed buildings, including Grade II listed buildings. That general duty applies 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. If the harm to the setting of a Grade I listed building would be less than substantial that will plainly lessen the strength of the presumption against the grant of planning permission (so that a grant of permission would no longer have to be "wholly exceptional"), but it does not follow that the "strong presumption" against the grant of planning permission has been entirely removed.

29. For these reasons, I agree with Lang J's conclusion that Parliament's intention in enacting section 66(1) was that decision-makers should give "considerable importance and weight" to the desirability of preserving the setting of listed buildings when carrying out the balancing exercise. I also agree with her conclusion that the Inspector did not give considerable importance and weight to this factor when carrying out the balancing exercise in this decision. He appears to have treated the less than substantial harm to the setting of the listed buildings, including Lyveden New Bield, as a less than substantial objection to the grant of planning permission. The Appellant's Skeleton Argument effectively conceded as much in contending that the weight to be given to this factor was, subject only to irrationality, entirely a matter for the Inspector's planning judgment. In his oral submissions Mr. Nardell contended that the Inspector had given considerable weight to this factor, but he was unable to point to any particular passage in the decision letter which supported this contention, and there is a marked contrast between the "significant weight" which the Inspector expressly gave in paragraph 85 of the decision letter to the renewable energy considerations in favour of the proposal having regard to the policy advice in PPS22, and the manner in which he approached the section 66(1) duty. It is true that the Inspector set out the duty in paragraph 17 of the decision letter, but at no stage in the decision letter did he expressly acknowledge the need, if he found that there would be harm to the setting of the many listed buildings, to give considerable weight to the desirability of preserving the setting of those buildings. This is a fatal flaw in the decision even if grounds 2 and 3 are not made out.

Ground 2

30. Grounds 2 and 3 are interlinked. The Respondents contend that the Inspector either misapplied the relevant policy guidance, or if he correctly applied it, failed to give adequate reasons for his conclusion that the harm to the setting of the listed buildings, including Lyveden New Bield, would in all cases be less than substantial. I begin with the policy challenge in ground 2. Lang J set out the policy guidance relating to setting in PPS5 and the Practice Guide in paragraphs 62-64 of her judgment. The contribution made by the setting of Lyveden New Bield to its significance as a heritage asset was undoubtedly a "principal controversial" issue at the inquiry. In paragraph 4.5.1 of his Proof of Evidence on behalf of the Local Planning Authority Mr. Mills, its Senior Conservation Officer, said:

> "To make an assessment of the indirect impact of development or change upon an asset it is first necessary to make a judgment about the contribution made by its setting."

Having carried out a detailed assessment of that contribution he concluded in paragraph 4.5.17:

> "In summary, what Tresham created at the site was a designed experience that was intimately linked to the surrounding landscape. The presence of the four prospect mounts along with the raised terrace provide a clear indication of the relationship of the site with the surrounding landscape."

Only then did he assess the impact of the proposed development on the setting by way of "a discussion as to the impact of the proposal on how the site is accessed and experienced by visitors."

31. In its written representations to the inquiry English Heritage said of the significance and setting of Lyveden New Bield:

> "The aesthetic value of the Lyveden Heritage Assets partly derives from the extraordinary symbolism and quality of the New Bield and the theatrical design of the park and garden. However, it also derives from their visual association with each other and with their setting. The New Bield is a striking presence when viewed on the skyline from a distance. The New Bield and Lyveden park and garden are wonderfully complemented by their undeveloped setting of woodland, pasture and arable land."

In paragraph 8.23 English Heritage said:

> "The New Bield and Lyveden park and garden were designed to be prominent and admired in their rural setting, isolated from competing structures. The character and setting of the Lyveden Heritage Assets makes a crucial contribution to their significance individually and as a group."

32. In its written representations to the inquiry the National Trust said that each arm of the cruciform New Bield "was intended to offer extensive views in *all directions* over the surrounding parks and the Tresham estate beyond" (paragraph 11). The National Trust's evidence was that "one if not *the* **Principal designed** *view from* within the lodge was from the withdrawing rooms which linked to the important Great Chamber and Great Hall on the upper two levels of the west arm of the lodge" (paragraph 12). The Trust contended that this vista survived today, and was directly aligned with the proposed wind farm site (emphasis in both paragraphs as in the original).

33. In his proof of evidence, the planning witness for the Stop Barnwell Manor Wind Farm Group said that:

> "….the views of Lyveden New Bield from the east, south-east and south, both as an individual structure and as a group with its adjoining historic garden and listed cottage, are views of a very high order. The proposed turbines, by virtue of their monumental scale, modern mechanical appearance, and motion of the blades, would be wholly alien in this scene and would draw the eye away from the New Bield, destroying its dominating presence in the landscape."

34. This evidence was disputed by the Appellant's conservation witness, and the Appellant rightly contends that a section 288 appeal is not an opportunity to re-argue the planning merits. I have set out these extracts from the objectors' evidence at the inquiry because they demonstrate that the objectors were contending that the undeveloped setting of Lyveden New Bield made a crucial contribution to its significance as a heritage asset; that the New Bield (the lodge) had been designed to be a striking and dominant presence when viewed in its rural setting; and that the lodge had been designed so as to afford extensive views in all directions over that rural setting. Did the Inspector resolve these issues in his decision, and if so, how?

35. I endorse Lang J's conclusion that the Inspector did not assess the contribution made by the setting of Lyveden New Bield, by virtue of its being undeveloped, to the significance of Lyveden New Bield as a heritage asset. The Inspector did not grapple with (or if he did consider it, gave no reasons for rejecting) the objectors' case that the setting of Lyveden New Bield was of crucial importance to its significance as a heritage asset because Lyveden New Bield was designed to have a dominating presence in the surrounding rural landscape, and to afford extensive views in all directions over that landscape; and that these qualities would be seriously harmed by the visual impact of a modern man-made feature of significant scale in that setting.

36. The Inspector's reason for concluding in paragraph 51 of the decision that the presence of the wind turbine array, while clearly having a detrimental effect on the setting of Lyveden New Bield, would not reach the level of substantial harm, was that it would not be so distracting that it would not prevent, or make unduly difficult, an understanding, appreciation or interpretation of the significance of the elements that make up Lyveden New Bield or Lyveden Old Bield or their relationship to each other.

37. That is, at best, only a partial answer to the objectors' case. As the Practice Guide makes clear, the ability of the public to appreciate a heritage asset is one, but by no means the only, factor to be considered when assessing the contribution that setting makes to the significance of a heritage asset. The contribution that setting makes does not depend on there being an ability to access or experience the setting: see in particular paragraphs 117 and 122 of the Practice Guide, cited in paragraph 64 of Lang J's judgment.

<u>Ground 3</u>

38. The Inspector said that his conclusion in paragraph 51 of the decision letter that the presence of the wind turbine array would not be so distracting that it would prevent or make unduly difficult, an understanding, appreciation or interpretation of the significance of the elements that make up Lyveden New Bield had been reached on the basis of his conclusions in paragraph 50. In that paragraph, having said that the wind turbine array "would be readily visible as a backdrop to the garden lodge in some directional views, from the garden lodge itself in views towards it, and from the prospect mounds, from within the orchard, and various other places around the site, at a separation distance of between 1 and 2 kilometres", the Inspector gave three reasons which formed the basis of his conclusion in paragraph 51.

39. Those three reasons were:

(a) The turbines would not be so close, or fill the field of view to the extent, that they would dominate the outlook from the site.

(b) The turbine array would not intrude on any obviously intended, planned view out of the garden or the garden lodge (which has windows all around its cruciform perimeter).

(c) Any reasonable observer would know that the turbine array was a modern addition to the landscape, separate from the planned historic landscape, or building they were within, or considering, or interpreting.

40. Taking those reasons in turn, reason (a) does not engage with the objectors' contention that the setting of Lyveden New Bield made a crucial contribution to its significance as a heritage asset because Lyveden New Bield was designed to be the dominant feature in the surrounding rural landscape. A finding that the "readily visible" turbine array would not dominate the outlook from the site puts the boot on the wrong foot. If this aspect of the objectors' case was not rejected (and there is no reasoned conclusion to that effect) the question was not whether the turbine array would dominate the outlook from Lyveden New Bield, but whether Lyveden New Bield would continue to be dominant within its rural setting.

41. Mr. Nardell's submission to this Court was not that the Inspector had found that there were no planned views (cf. the submission recorded in paragraph 70 of Lang J's judgment), but that the Inspector had concluded that the turbine array would not intrude into obviously intended or planned views <u>if any</u>. That submission is difficult to understand given the Inspector's conclusion that the turbine array would be "readily visible" from the garden lodge, from the prospect mounds, and from various other places around the site. Unless the Inspector had concluded that there were <u>no</u> intended or planned views from the garden or the garden lodge, and he did not reach that conclusion (see paragraph 47 of the decision letter), it is difficult to see how he could have reached the conclusion that the "readily visible" turbine array would not "intrude" on any obviously intended or planned views from the garden lodge. I am inclined to agree with Mr. Nardell's alternative submission that the Inspector's conclusion that while "readily visible" from the garden lodge, the turbine array would not "intrude" on any obviously intended or planned view from it, is best understood

by reference to his third conclusion in paragraph 50. While visible in views from the garden lodge the turbine array would not intrude upon, in the sense of doing substantial harm to, those views, for the reasons given in the last sentence of paragraph 50.

42. I confess that, notwithstanding Mr. Nardell's assistance, I found some difficulty, not in understanding the final sentence of paragraph 50 – plainly any reasonable observer would know that the turbine array was a modern addition to the landscape and was separate from the planned historic landscape at Lyveden New Bield – but in understanding how it could rationally justify the conclusion that the detrimental effect of the turbine array on the setting of Lyveden New Bield would not reach the level of substantial harm. The Inspector's application of the "reasonable observer" test was not confined to the effect of the turbine array on the setting of Lyveden New Bield. As Lang J pointed out in paragraph 57 of her judgment, in other paragraphs of his decision letter the Inspector emphasised one particular factor, namely the ability of members of the public to understand and distinguish between a modern wind turbine array and a heritage asset, as his reason for concluding either that the proposed wind turbines would have no impact on the settings of other heritage assets of national significance [28] – [31]; or a harmful impact that was "much less than substantial" on the setting of a Grade 1 listed church in a conservation area [36].

43. Matters of planning judgment are, of course, for the Inspector. No one would quarrel with his conclusion that "any reasonable observer" would understand the differing functions of a wind turbine and a church and a country house or a settlement [30]; would not be confused about the origins or purpose of a settlement and a church and a wind turbine array [36]; and would know that a wind turbine array was a modern addition to the landscape [50]; but no matter how non-prescriptive the approach to the policy guidance in PPS5 and the Practice Guide, that guidance nowhere suggests that the question whether the harm to the setting of a designated heritage asset is substantial can be answered simply by applying the "reasonable observer" test adopted by the Inspector in this decision.

44. If that test was to be the principal basis for deciding whether harm to the setting of a designated heritage asset was substantial, it is difficult to envisage any circumstances, other than those cases where the proposed turbine array would be in the immediate vicinity of the heritage asset, in which it could be said that any harm to the setting of a heritage asset would be substantial: the reasonable observer would always be able to understand the differing functions of the heritage asset and the turbine array, and would always know that the latter was a modern addition to the landscape. Indeed, applying the Inspector's approach, the more obviously modern, large scale and functional the imposition on the landscape forming part of the setting of a heritage asset, the less harm there would be to that setting because the "reasonable observer" would be less likely to be confused about the origins and purpose of the new and the old. If the "reasonable observer" test was the decisive factor in the Inspector's reasoning, as it appears to have been, he was not properly applying the policy approach set out in PPS5 and the Practice Guide. If it was not the decisive factor in the Inspector's reasoning, then he did not give adequate reasons for his conclusion

that the harm to the setting of Lyveden New Bield would not be substantial. Since his conclusion that the harm to the setting of the designated heritage assets would in all cases be less than substantial was fed into the balancing exercise in paragraphs 85 and 86, the decision letter would have been fatally flawed on grounds 2 and 3 even if the Inspector had given proper effect to the section 66(1) duty.

Conclusion

45. For the reasons set out above, which largely echo those given by Lang J in her judgment, I would dismiss this appeal.

Lady Justice Rafferty:

46. I agree.

The Vice President:

47. I also agree.