"SETTING" SETTLED?

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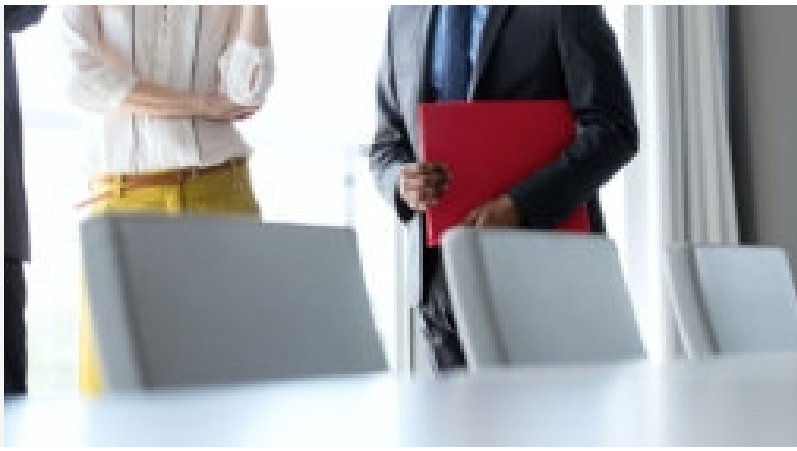

INTRODUCTION

On 19 July 2018, the UK Court of Appeal ("CoA") handed down its judgment overturning the High Court's ruling in *Steer v Secretary of State for Communities and Local Government* [2017] EWHC 1456 (Admin), in which a very wide interpretation of "setting" of a listed building was adopted by the Court.

While there is nothing, in our view, particularly novel in law with the decision, it does resolve two of the fundamental issues with the High Court's judgment. Firstly, it confirms the primacy of the decision maker's planning judgement and reiterates that it is not for the Court to intervene in matters of planning judgement. Secondly, it resolves the, perhaps unintended, practical effect of the High Court's decision that virtually the whole land surface of England could be argued to be the setting of some heritage asset if you go back far enough. We have considered the practical effects of this decision for developers and planners at the end of this note.

BACKGROUND

The case concerned a development proposal by Catesby Estates Ltd ("Catesby") of up to 400 dwellings and a convenience store in Derbyshire approximately 1.7km south-east of the Grade I listed Kedleston Hall and 550m from Kedleston Hall's registered park and garden and the Kedleston Conservation Area. The application site had historical, social, and economic connections with Kedleston Hall, forming

part of a large agricultural estate, which had been managed from Kedleston Hall. However, it was not visible from Kedleston Hall itself due to a screening belt of woodland known as the Derby Screen, introduced in the 1960s to obscure views of the expanding urban area of Derby.

The application was granted on appeal by an Inspector, on behalf of the Secretary of State, following the initial refusal by the Amber Valley Borough Council. A local resident applied under section 288 of the Town and Country Planning Act 1990 ("TCPA") to quash the Secretary of State's decision. Historic England joined the proceedings as Interested Party on the basis that there was a wider concern about the implications of the Inspector's allegedly mistaken approach to the setting of a heritage asset which it considered to be a matter of public importance, affecting the future discharge of Historic England's functions.

At first instance, Lang J made a number of findings concerning the definition of "setting", including:

- The relevant guidance documents all support a "*broad meaning given to setting*", and although "*a physical or visual connection between a heritage asset and its setting will often exist, it is not essential or determinative*". The word "experienced" in the NPPF definition of "setting" (see the Glossary) "*has a broad meaning which is capable of extending beyond the purely visual*" ([64]); and
- The definition of "setting" includes "surroundings" and therefore imports a geographical limitation on the extent of setting ([67]).

Lang J went on to find that the Inspector had "*adopted an artificially narrow approach to the issue of setting which treated visual connections as essential and determinative*", and that this had amounted to an error of law. It was against this point that both Catesby and the Secretary of State sought to appeal to the CoA.

COA DECISION

The question before the CoA was whether the Inspector had erred in law in his understanding of the concept of the "setting" of a Grade I listed building.

Importantly, the CoA observed that although the "setting" of a listed building is a concept recognised by statute, it is neither statutorily defined nor does it lend itself to precise definition1. The CoA unequivocally confirmed that 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 judgement for the decision-maker2.

Additionally, the CoA observed that just as the guidance3 concerning setting recognises the potential relevance of considerations other than just physical and visual, such as economic, social and historical considerations4, the CoA has already accepted that the effect of development on the setting of a listed building is not necessarily confined to visual or physical impact5.

Three general points emerge ([28]-[30]):

- 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;
- 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 (and, as the CoA notes, nor could it). In every case where that has to be done, the decision-maker must apply planning judgement to the particular facts and circumstances, having regard to relevant policy, guidance and advice; and
- The effect of a particular development on the setting of a listed building are all matters for the planning decision-maker (such as where, when, and how that effect is likely to be perceived, whether or not it will preserve the setting of the listed building, whether it will harm the "significance" of the listed building as a heritage asset, and how it bears on the planning balance), subject, of course, to the principle emphasised by the CoA in the Barnwell Manor case 6.

In the circumstances, the CoA rejected the High Court's conclusion that the Inspector had set aside the historic and other connections between the site and Kedleston Hall. Rather, it stated that the critical question was whether the Inspector's 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 judgement on the facts of this particular case. During the course of arguments, Historic England accepted that if it was the latter, the Secretary of State's appeal must succeed ([36]).

The CoA agreed with the submissions for Catesby and the Secretary of State that the Inspector had simply concluded that, in this particular instance, the extent of the setting of the listed building could not be determined by the fact of the "historical, social and economic connection"; there had to be something more than this if the appeal site were to be regarded as falling within the setting of Kedleston Hall ([38]).

PRACTICAL EFFECT FOR PLANNERS AND DEVELOPERS

We do not consider that the CoA judgment deviates much from the existing case law concerning "setting" or raises any novel propositions. Rather, it confirms that there are a number of factors that are capable of being taken into account in assessing the setting of a listing building and, as a related point, the effect of the proposed development on that setting; these factors include more than just a physical or visual connection.

If anything, this case serves to reinforce the fact that, as with all planning matters, a decision on "setting" is one of fact and degree and an exercise of planning judgement. Planning judgement and the issue of weight to be given to relevant considerations are not matters with which the court will readily intervene. As such, the only real avenue of recourse, it appears, in relation to a decision regarding setting (assuming it has been taken lawfully and the relevant tests correctly applied), would be irrationality arguments and in particular *Wednesbury* unreasonableness (i.e. the decision is so unreasonable that no reasonable person acting reasonably could have come to it), the threshold for which means that success on this ground remains a difficult outcome to secure.

In our experience, heritage remains a complex area where mistakes are still too often made and it is a fertile ground for challenges. While the CoA has helpfully confirmed the basic approach to the issue of setting in heritage matters, this does reinforce the need for any developer to "frontload" their application process in order to arm the decision-maker with all it requires in order to apply the relevant tests correctly and lawfully when reaching a planning judgement. Ensuring that the work has been done at the outset will assist in reducing the risk of challenge to an application; if the decision has been taken lawfully, the risk of a claim being brought that has any real chance of success is greatly reduced.

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1 *R (Williams) v Powrys CC* [2017] EWCA Civ 427.

2 See para [24].

3 The NPPF, PPG (the 2012 versions were in force at the time of the decision), and Historic England's "Good Practice Advice in Planning 3: The setting of Heritage Assets".

4 See para [26].

5 See para [27].

6 *East Northamptonshire District Council v SSCLG* [2015] 1 W.L.R. 45.

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