Neutral Citation Number: [2016] EWCA Civ 806

Case No: C1/2016/0470

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MRS JUSTICE PATTERSON
[2016] EWHC 48 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 August 2016

Before:

Lord Justice Sales
and
Lord Justice Lindblom

- -

Between:

R. (on the application of Save Britain's Heritage)	**Appellant**
- and -	
(1) Liverpool City Council **(2) Regeneration Liverpool and Neptune In Partnership Ltd.**	**Respondents**

Mr Richard Harwood Q.C. (instructed by **Harrison Grant**) for the **Appellant**
Mr Anthony Crean Q.C. and Ms Constanze Bell (instructed by **Liverpool City Council**) for the **First Respondent**
Mr Richard Kimblin Q.C. and Ms Thea Osmund-Smith (instructed by **Brabners LLP**) for the **Second Respondent**

Hearing date: 22 June 2016

- -

Judgment Approved by the court for handing down

Judgment Approved by the court for handing down

Lord Justice Lindblom:

Introduction

1. In this appeal we must consider the meaning and application of the Government's guidance for the consultation of Historic England and the Department for Culture, Media and Sport on proposals for development in the buffer zone of a World Heritage Site.

2. The appellant, Save Britain's Heritage ("Save"), appeals against the order of Patterson J., dated 15 January 2016, dismissing its claim for judicial review of the planning permission granted by the first respondent, Liverpool City Council, on 1 September 2015 for a major development of mixed uses proposed by the second respondent, Regeneration Liverpool and Neptune In Partnership Ltd., on a site in Lime Street in Liverpool city centre. Save challenged the grant of planning permission on a single ground, which was that the city council had failed to notify the Department for Culture, Media and Sport of the proposal, and thus also the World Heritage Committee of UNESCO, in breach, it said, of the World Heritage Committee's Operational Guidelines and the guidance in paragraph 18a-036 of the Planning Practice Guidance issued by the Government in March 2014. After a rolled-up hearing on 18 December 2015, Patterson J. granted permission to apply for judicial review, but dismissed the claim. I granted permission to appeal on the papers on 4 May 2016.

The city council's decision

3. The Liverpool – Maritime Mercantile City World Heritage Site was inscribed on the World Heritage List by UNESCO's World Heritage Committee in 2004. In 2012, in view of its "serious concern at the potential threat of the proposed development of Liverpool Waters on the Outstanding Universal Value of the property" – another proposal, unrelated to the one with which we are concerned – the World Heritage Committee decided to inscribe the World Heritage Site on the List of World Heritage in Danger.

4. The site of the partnership's proposed development lies within the buffer zone of the World Heritage Site. It comprises the properties at 45 and 51 to 79 Lime Street and those to the rear in Bolton Street, close to the southern boundary of the William Brown Conservation Area and several listed buildings, including the grade I listed St George's Hall and the grade II listed Lime Street Station. It is in an area designated for mixed uses in the Liverpool Unitary Development Plan.

5. The application for planning permission was submitted to the city council on 15 March 2015. Revisions to the proposal were made in June 2015. The proposed development would involve the demolition of a number of buildings on Lime Street, including the unlisted Futurist Cinema, and the construction of buildings of various heights for a mix of uses. The revised scheme was for a development including 3,022 square metres of commercial accommodation on the ground floor with a 101-bedroom hotel on a further three storeys facing Lime Street, and an 11-storey building fronting on to Bolton Street, which would provide residential accommodation for students, containing 412 bedrooms. The "Heritage Assessment" submitted with the application for planning permission referred to three kinds of "local view" identified in the city council's World Heritage Site

Supplementary Planning Document (October 2009), including "Defined Vistas" (paragraph 7.4). It assessed the "[defined] vista from Renshaw Street/the Adelphi Hotel, looking towards St George's Hall (WHS 'Defined Vista g')" (paragraph 7.5.1). In assessing the effect of the proposed development on this view, it said that there would be a "significant impact … from the WHS defined vista g" (paragraph 7.10). But it went on to say (in paragraph 7.11):

> "It is considered that the impact of the development will be beneficial to the view. The existing buildings of the terrace are in a poor state of repair and [currently] detract from the settings of the heritage assets and view of the WHS. The proposed development presents a modern façade to Lime Street, but retains storey heights which are similar to that of the existing, maintaining a framing position within the view which is secondary to the heritage assets and enhances their settings. Although the Futurist will be lost from this view, it is considered that the impact is not adverse due to the low heritage significance of the building and limited contribution to the view overall."

6. Historic England, when consulted on the revised scheme, did not object to it. The Victorian Society did. So did Save, in a letter dated 22 July 2015 – on the grounds of likely harm to heritage assets and to the city's historic environment. In that letter, having referred to their concern about the effects of the proposed development on listed buildings nearby, they added that "[a] further consideration must be Liverpool's World Heritage Site …, with the application site being located in the WHS buffer zone, and within viewing distance of the William Brown Street WHS area, which includes St George's Hall and Lime Street Station". They urged the city council "to refuse planning permission and work with the applicant to restore and enhance the existing buildings, and therefore enhance the WHS and surrounding heritage assets which are synonymous with the City of Liverpool".

7. The revised proposal came before the city council's Planning Committee on 11 August 2015. The officers' report recommended its approval, and the committee accepted that recommendation. On 14 August 2015 Save wrote to the Secretary of State for Communities and Local Government requesting him to call in the application for his own determination. On 26 August 2015 a Senior Planning Manager in the Department for Communities and Local Government, Mr Gerry Carpenter, wrote to the city council's Principal Planning Officer, Ms Barbara Kirkbride, confirming that the Secretary of State for Communities and Local Government had decided not to call the application in and was content for the city council to determine it.

The issues in the appeal

8. The main issue in the appeal is whether the judge was wrong to conclude that the city council was not required, in the light of the guidance in paragraph 18a-036 of the Planning Practice Guidance, to notify the Department for Culture, Media and Sport of the proposal, or at least to consider doing so.

9. In his skeleton argument, counsel for Save, Mr Richard Harwood Q.C., identified four questions for us. First, "[what] does the Planning Practice Guidance say about consultation with the Department for Culture, Media and Sport … and the World Heritage Committee … on applications involving World Heritage Sites and what approach is required in law to

conform with this guidance" (ground 2 in the appellant's notice)? Secondly, "[did] the [city council] consider whether to refer the application to the [Department for Culture, Media and Sport] and so to the [World Heritage Committee]" (ground 1)? Thirdly, "[if] the [city council] did not consider whether to refer the application, did it reach a conclusion on the effect of the proposal on Outstanding Universal Value … which meant that referral was not expected and was such a conclusion lawful" (also ground 1)? And fourthly, "[if] the [city council] acted unlawfully, is there a sufficient reason to justify declining to quash the planning permission" (grounds 3 and 4)? The first three of those questions all go to the single main issue to which I have referred. The fourth goes to the court's discretion to withhold a remedy.

The city council's application for further evidence to be admitted in the appeal

10. At the hearing, Mr Anthony Crean Q.C. for the city council, relying on the principles in *Ladd v Marshall* [1954] 1 W.L.R. 1489, applied for permission to rely on evidence not before the judge in the court below. That application was resisted by Mr Harwood for Save. The additional evidence was in two witness statements: a witness statement of the city council's Divisional Manager for Planning and Building Control, Mr David Hughes, dated 16 June 2016, and the second witness statement of Mr Rob Burns, the city council's Urban Design and Heritage Manager, Planning and Building Control, dated 15 June 2016. Exhibited to Mr Hughes' witness statement was a copy of a letter to Mr Carpenter, dated 25 August 2015, from Historic England's Planning Director, North West, Ms Catherine Dewar, which recorded Historic England's position on the proposal, including their view on its implications for the World Heritage Site. As Mr Hughes explained in his witness statement, and this is not in dispute, the city council only became aware of the existence of that letter on 15 June 2016 – long after the hearing before Patterson J.. I accept, as Mr Crean submitted, that a copy of the letter was then obtained by the city council with reasonable diligence. And the content of the letter is clearly relevant to the main issue in the appeal. I would therefore admit it. Mr Burns' second witness statement added to the evidence already before the court on the activities of UNESCO's World Heritage Committee, and the number of proposals the city council receives for development in the World Heritage Site and its buffer zone. Such evidence, as Mr Harwood said, could readily have been put before the judge. It was produced very late. It provoked a response from Save, in a witness statement of its Director, Ms Henrietta Billings, dated 21 June 2016. And in any event I do not think it is of any real significance to the issues we have to decide. I would not admit it as evidence in the appeal.

Save's further evidence

11. After the hearing of the appeal, on 20 July 2016, Save's solicitor sent an e-mail to the court, attaching the witness statement of Elizabeth Fuller, Save's Buildings at Risk Officer (which is dated 20 July 2016). In her witness statement Ms Fuller described the discussion of circumstances in, and relating to, the Liverpool – Maritime Mercantile City World Heritage Site at the proceedings of the 40th Session of the World Heritage Committee, held in Istanbul between 10 and 20 July 2016. Having received that witness statement, we gave counsel the opportunity to make further written submissions on the evidence it contains, and in particular on the decision that resulted from it, and they duly did so. In his written submissions Mr Harwood pointed out that the World Heritage Committee's decision had

not yet been made by the time the hearing of the appeal concluded, submitted that the decision bears significantly on issues in the appeal, and contended, therefore, that this new evidence ought to be admitted. In his submissions on behalf of the partnership in response Mr Richard Kimblin Q.C. submitted that the new evidence was not admissible under the principles in *Ladd v Marshall*. If it were admitted, he argued, it would not have an important effect on the issues in the appeal – which concern a decision of the city council taken some ten months before the World Heritage Committee's decision in Istanbul – save possibly for the fourth of Mr Harwood's four questions, the question of discretion (see paragraph 9 above). I acknowledge the force of that submission, but – perhaps over-generously to Save – I would not exclude this further evidence, and I shall deal with the submissions counsel have made about it.

The statutory regime for notification and consultation

12. The Town and Country Planning (Consultation) (England) Direction 2009, made by the Secretary of State for Communities and Local Government under his power to do so in article 10(3) and 14(1) of the Town and Country Planning (General Development Procedure) Order 1995 (S.I. 1995/419), came into force of 20 April 2009. It was annexed to Circular 02/09, published by the Government on 30 March 2009. At the time of the city council's decision in this case the direction contained the relevant provisions for the consultation of the Secretary of State in cases where English Heritage – from April 2015, Historic England – objected to an application for planning permission for "World Heritage Site development". The circular was cancelled when the Government published the Planning Practice Guidance in March 2014. The direction was retained.

13. The direction applies to applications for planning permission for several kinds of development, including "World Heritage Site development", received by a local planning authority on or after 20 April 2009 (paragraph 3 of the Direction). Paragraph 6 states:

> "For the purposes of this Direction, "World Heritage Site development" means development which would have an adverse impact on the outstanding universal value, integrity, authenticity and significance of a World Heritage Site or its setting, including any buffer zone or its equivalent, and being development to which English Heritage has objected, that objection not having been withdrawn".

Paragraph 9 provides:

> "Where a local planning authority does not propose to refuse an application for planning permission to which this Direction applies, the authority shall consult the Secretary of State".

Paragraph 10 specifies the material the authority is required to send to the Secretary of State when required to consult under paragraph 9, which includes "(c) a copy of any representations made to the authority in respect of the application".

14. I should add here that we are not concerned in this appeal with the requirements for consultation in the Planning (Listed Buildings and Conservation Areas) Regulations 1990 (as amended), or with those in the Town and Country Planning (Development Management Procedure) (England) Order 2010, which continued to apply to applications

for planning permission made before 15 April 2015 (under article 47(3) of the Town and Country Planning (Development Management Procedure) (England) Order 2015).

Government policy for heritage assets

15. In the section of the National Planning Policy Framework ("NPPF") headed "Conserving and enhancing the historic environment", paragraph 132 says that "[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", and that "[the] more important the asset, the greater the weight should be". It points out that "[significance] can be harmed or lost through alteration or destruction of the heritage asset or development within its setting". And it goes on to say that "[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". Paragraphs 133 and 134 contain policies for the approach to be taken to proposed development that will lead to "substantial harm to or loss of significance of a designated heritage asset" (paragraph 133) or "less than substantial harm" (paragraph 134).

16. Policies of specific relevance to World Heritage Sites appear in paragraphs 137 and 138. Paragraph 137 says that "[local] planning authorities should look for opportunities for new development within … World Heritage Sites and within the setting of heritage assets to enhance or better reveal their significance …", and that "[proposals] that preserve those elements of the setting that make a positive contribution to or better reveal the significance of the asset should be treated favourably". Paragraph 138 says that "[loss] of a building (or other element) which makes a positive contribution to the significance of the … World Heritage Site should be treated either as substantial harm under paragraph 133 or less than substantial harm under paragraph 134, as appropriate, taking into account the relative significance of the element affected and its contribution to the significance of the … World Heritage Site as a whole".

17. The "Setting of a heritage asset" is defined in the glossary in Annex 2 to the NPPF, 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."

"Significance (for heritage policy)" is also defined:

> "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."

Paragraph 18a-036 of the Planning Practice Guidance

18. The Planning Practice Guidance was published online on 6 March 2014. A large number of circulars and other guidance documents that had survived the publication of the NPPF two years earlier were now cancelled, including – as I have said – Circular 02/09, and also Circular 07/09, "Circular on the Protection of World Heritage Sites", which had been published jointly by the Department for Communities and Local Government and the Department for Culture, Media and Sport in July 2009.

19. Paragraph 18a-036 of the Planning Practice Guidance is within a section providing guidance relating to "Designated heritage assets". Paragraph 18a-026 in this section says that "[the] Outstanding Universal Value of a World Heritage Site, set out in a Statement of Outstanding Universal Value, indicates its importance as a heritage asset of the highest significance …". In a series of paragraphs under the heading "Further guidance on World Heritage Sites", paragraph 18a-028 confirms that World Heritage Sites are "defined as designated heritage assets in the [NPPF]". Paragraph 18a-031 states that "… [NPPF] policies will apply to the Outstanding Universal Value as they do to any other heritage significance [World Heritage Sites] hold", and that, "[as] the [NPPF] makes clear, the significance of the designated heritage asset derives not only from its physical presence, but also from its setting". Paragraph 18a-033 – "How is the setting of a World Heritage Site protected?" – says that the UNESCO Operational Guidelines "seek protection of "the immediate setting" of each "World Heritage Site … and suggest designation of a buffer zone wherever this may be necessary"; that "[the] buffer zone forms part of the setting of the World Heritage Site"; and that "[it] may be appropriate to protect the setting of World Heritage Sites in other ways, for example by protection of specific views and viewpoints". Headed "What approach should be taken to assessing the impact of development on World Heritage Sites?", paragraph 18a-035 says that "[applicants] proposing change that might affect the Outstanding Universal Value, integrity and, where applicable, authenticity of a World Heritage Site through development within the Site or affecting its setting or buffer zone … need to submit sufficient information with their applications to enable assessment of impact on Outstanding Universal Value".

20. Paragraph 18a-036 is headed "What consultation is required in relation to proposals that affect a World Heritage Site?". It has two sub-paragraphs. The first states:

> "The World Heritage Committee Operational Guidelines ask governments to inform it at an early stage of proposals that may affect the Outstanding Universal Value of the Site and "before making any decisions that would be difficult to reverse, so that the Committee may assist in seeking appropriate solutions to ensure that the Outstanding Universal Value is fully preserved". Therefore, it would be very helpful if planning authorities could consult Historic England (for cultural Sites) or Natural England (for natural Sites) and Department for Culture, Media and Sport (DCMS) at an early stage and preferably pre-application."

The second sub-paragraph says this:

> "Planning authorities are required to consult the Secretary of State for Communities and Local Government before approving any planning application to which Historic England maintains an objection and which would have an adverse impact on the Outstanding Universal Value, integrity, authenticity and significance of a

> World Heritage Site or its setting, including any buffer zone or its equivalent. The Secretary of State then has the discretion as to whether to call-in the application for his/her own determination. … ."

The World Heritage Committee's Operational Guidelines

21. The World Heritage Committee's "Operational Guidelines for the Implementation of the World Heritage Convention" were published in their present form in July 2015. Among other things, they provide guidance on the "process for monitoring the state of conservation of World Heritage properties". They describe the activity of "Reactive Monitoring" – which is "the reporting by the Secretariat, other sectors of UNESCO and the Advisory Bodies to the [World Heritage Committee] on the state of conservation of specific World Heritage properties that are under threat". To this end States Parties are required to "submit specific reports and impact studies each time exceptional circumstances occur or work is undertaken which may have an impact on the Outstanding Universal Value of the property or its state of conservation" (paragraph 169). Paragraph 172, under the heading "Information received from States Parties and/or other sources", states:

> "The World Heritage Committee invites the States Parties to the *Convention* to inform the Committee, through the Secretariat, of their intention to undertake or to authorize in an area protected under the *Convention* major restorations or new constructions which may affect the Outstanding Universal Value of the property. Notice should be given as soon as possible (for instance, before drafting basic documents for specific projects) and before making any decisions that would be difficult to reverse, so that the Committee may assist in seeking appropriate solutions to ensure that the Outstanding Universal Value of the property is fully preserved."

"The Protection & Management of World Heritage Sites in England"

22. The guidance in the first sub-paragraph of paragraph 18a-036 of the Planning Practice Guidance replaced the guidance contained in a document entitled "The Protection & Management of World Heritage Sites in England". That document was published in July 2009 by English Heritage, together with the Department for Communities and Local Government and the Department for Culture, Media and Sport. When the Planning Practice Guidance was published, Historic England left it on their website "for reference purposes". In section 7 of that guidance document, which explained the "Use of the planning system to protect World Heritage Sites", paragraphs 7.12 and 7.13 said:

> "7.12 The UNESCO World Heritage Committee has asked to be informed by national governments of proposals for major restorations or interventions which may affect the Outstanding Universal Value of a World Heritage Site. They ask for notice to be given as soon as possible so that the Committee may assist in seeking appropriate solutions to ensure that the Outstanding Universal Value of the property is fully preserved. This process raises considerable problems in terms of defining whether developments will have an adverse impact on Outstanding Universal Value and of timing since the World Heritage Committee meets only

> once a year while in the UK planning decisions are normally taken more rapidly. In some cases, it may be appropriate to refer cases before submission of an actual planning application.
>
> 7.13 The decision on whether or not to refer cases to UNESCO is taken by DCMS. They will first seek the advice of English Heritage and it is helpful for English Heritage staff in the relevant regional office to be consulted at an early stage by planning authorities on all cases with significant potential impact on Outstanding Universal Value. All cases for which English Heritage requests call-in because of impact on Outstanding Universal Value will be considered for potential referral to the UNESCO World Heritage Committee. English Heritage will also advise DCMS on whether cases should be referred at an earlier stage of their development (see Section 10 also)."

In section 10, "Involvement of the UNESCO World Heritage Committee in individual World Heritage Sites", paragraph 10.5 recalls the guidance in paragraphs 169 and 172 of the World Heritage Committee's Operational Guidelines – that "[governments] are asked to notify the World Heritage Centre of major events (such as natural emergencies) which affect World Heritage Sites as well as major restorations or new developments which might affect the Outstanding Universal Value of a World Heritage Site".

What does the guidance in paragraph 18a-036 of the Planning Practice Guidance mean and how is it complied with (ground 2 of the appeal)?

23. This is, in effect, the first of Mr Harwood's four questions and logically the first for us to tackle.

24. Mr Harwood's argument, one must remember, goes only to the guidance in the first sub-paragraph of paragraph 18a-036 of the Planning Practice Guidance. He did not – and could not – suggest that the city council failed to comply with any statutory requirement for consultation (in contrast, for example, with the situation in *R. (on the application of the Friends of Hethel Ltd.) v South Norfolk District Council* [2011] 1 W.L.R. 1216: see paragraphs 21 to 41 of the judgment of Sullivan L.J.). Nor did he argue that the city council misconstrued or acted inconsistently with the guidance in the second part of paragraph 18a-036, which reflects the relevant provisions in the 2009 direction. His submission on this ground is that Patterson J. misinterpreted the first part of paragraph 18a-036. The city council was required by that guidance at least to consider referring the partnership's application to the Department for Culture, Media and Sport, and, through that department, the World Heritage Committee, as a proposal that "may affect" the Outstanding Universal Value of the World Heritage Site. He submitted that the words "may affect" must mean "may affect in a negative, neutral or positive way", not merely "affect adversely". He said the approach to consultation required of a local planning authority under this guidance could aptly be described as "precautionary", bearing in mind that the whole exercise is being carried out in the realm of aesthetic judgment.

25. I cannot accept those submissions.

26. We are concerned here not with planning policy of the kind contained in the NPPF but with practice guidance whose role, largely, is to amplify published policy. The status of

national policy and guidance in the planning sphere, and its relationship to the statutory regime for the making of planning decisions, has recently been the subject of discussion in this court in *West Berkshire District Council v Secretary of State for Communities and Local Government* [2016] EWCA Civ 441 (see, in particular, paragraphs 8 to 37 of the judgment of Laws and Treacy L.JJ., with which the Master of the Rolls agreed). There is no need to enlarge that discussion in this appeal. All parties agreed that it forms a backdrop for our consideration of the issues here. As they acknowledged, the Government's planning policy for England is in the NPPF. The Planning Practice Guidance supplements and explains policies in the NPPF, and assists in their application. And it should be construed, if it can be, consistently with them. None of this is controversial.

27. The approach to be taken in interpreting planning policy is familiar. It is the approach indicated by the Supreme Court in *Tesco Stores Ltd. v Dundee City Council* [2012] UKSC 13 – construing the words of the policy objectively, not in isolation but in their context, and keeping in mind that one is not considering a statute or contract (see, in particular, the judgment of Lord Reed at paragraphs 17 to 19). This approach applies equally, in my view, to the interpretation of practice guidance issued by the Government to augment its published policy.

28. When one reads the first part of paragraph 18a-036 of the Planning Practice Guidance in the context of the related passages of the Planning Practice Guidance and other relevant policy and guidance, I think its meaning is clear.

29. The guidance here is directed to action being taken at national government level, in accordance with the World Heritage Committee's Operational Guidelines, to bring to the attention of the World Heritage Committee proposals that "may affect" the Outstanding Universal Value of the World Heritage Site in question, and to do so before decisions that would be "difficult to reverse" are taken on those proposals. The obvious purpose of this guidance is to enable the World Heritage Committee to ensure that harm to the World Heritage Site is avoided, by making it possible for them to "assist in seeking appropriate solutions to ensure that the Outstanding Universal Value is fully preserved". That language echoes paragraph 172 of the Operational Guidelines.

30. What do the words "may affect" mean in this context? In my view the answer is plain, not only from the tenor of the guidance given in this series of paragraphs in the Planning Practice Guidance but also from the other policy and guidance to which they refer. Read in context, the words "may affect the Outstanding Universal Value" mean, I believe, "may have an adverse impact on the Outstanding Natural Value" – the kind of harm to a World Heritage Site or its setting contemplated in the second part of paragraph 18a-036. A construction of the words "may affect" as meaning "may affect in a negative, neutral or positive way" would not reflect the concept of effects requiring "appropriate solutions to ensure that the Outstanding Universal Value is fully preserved". It would not reflect the policies for the conservation of heritage assets, including World Heritage Sites, in the NPPF. And it would be inconsistent with the equivalent previous guidance in paragraph 7.12 of the document published by English Heritage and the two government departments in 2009 ("The Protection & Management of World Heritage Sites in England") in response to paragraph 172 of the World Heritage Committee's Operational Guidelines – which referred to "an adverse impact on Outstanding Universal Value".

31. Whether a particular proposal "may affect" Outstanding Universal Value so as to justify informing the World Heritage Committee is a matter for the Government, with the benefit of the advice of Historic England. But this discretion for the Government does not imply a requirement for a local planning authority to consult Historic England and the Department for Culture, Media and Sport on any proposal that the authority considers might affect Outstanding Universal Value in some way, whether harmfully or not.

32. Where this passage of the guidance refers specifically to the action that local planning authorities can take, it does so not in mandatory or even directory terms, but in language best described as encouraging or, as Patterson J. put it in paragraph 86 of her judgment, "advisory". It is language very different from what one would expect to see if the authors of the guidance were seeking to impose some kind of requirement. Authorities are told it would be "very helpful" if they "could" consult Historic England and the Department for Culture, Media and Sport, and to do so "at an early stage and preferably pre-application". By contrast, in the second part of paragraph 18a-036, where the guidance reminds local planning authorities of the requirement to consult the Secretary of State in the circumstances to which it refers, it is drawing attention to a specific statutory requirement and adopts the same language as the source of that requirement (paragraphs 6 and 9 of the 2009 direction). If a local planning authority does not do what is said to be "very helpful", it cannot be said to have acted in breach of any requirement in the guidance. At worst, it will simply have omitted to do more than the relevant statutory regime compels it to do, more than it is enjoined to do by any relevant policy in the NPPF, and more than the Planning Practice Guidance itself says is required.

33. When an authority does consult Historic England on a proposal that, in the authority's view, might affect the Outstanding Universal Value of a World Heritage Site, it will have brought the proposal to the notice of the Government's specialist adviser on development within the historic environment. It will then have enabled Historic England to form their own judgment on any effect the development might have on Outstanding Universal Value – harmful, neutral or beneficial – and to advise the Government accordingly, allowing the Government to decide whether the World Heritage Committee should be informed. The authority will thus have substantially complied with the guidance, even if it has not also separately consulted the Department for Culture, Media and Sport. Once they have been consulted, Historic England may reasonably be expected to alert the Department for Culture, Media and Sport to any concerns they have about the effect the development might have on Outstanding Universal Value. This understanding of the guidance has common sense on its side. It also accords with the corresponding guidance in paragraph 7.13 of the 2009 guidance document. That guidance emphasized the remit of English Heritage. It said that the Department for Culture, Media and Sport "will first seek the advice of English Heritage" in making its decisions on referral to the World Heritage Committee; that it would be "helpful for English Heritage staff … to be consulted at an early stage …"; that all cases "for which English Heritage requests call-in because of impact on Outstanding Universal Value" would be considered for possible referral; and that "English Heritage will also advise DCMS" on referral at an earlier stage.

Did the city council comply with the guidance in paragraph 18a-036 (ground 1)?

34. This single question embraces the second and third of Mr Harwood's four.

35. In paragraph 77 of her judgment Patterson J. said that "[although] no documentation has been provided from Historic England after the call-in application was referred to them … a clear inference can be drawn that they either had no concerns or were insufficiently concerned about the application so as to advise the DCLG to call it in". And in deciding not to call-in the application the Secretary of State must have considered the question of any effect on the World Heritage Site or its setting (paragraph 78). The concept of an impact on the setting of the World Heritage Site was not necessarily to be equated with the concept of an effect on the Outstanding Universal Value of the World Heritage Site (paragraph 79). The judge went on (in paragraph 80) to refer to the evidence given by Mr Burns, which had been tested by cross-examination at the hearing before her:

> "Mr Burns' evidence was clear. He presented as an impressive and thoughtful witness. He said that he had thought about impact on the OUV and concluded that there was none. He had done his own assessment which was referred to in the email of 15 July 2015. Whilst it is right that there is no express reference to OUV on the face of that email his oral evidence was clear; he had considered it. … ."

The judge also found that, in the circumstances of this case, even if the city council had been required to refer the application to the Department for Culture, Media and Sport, "given the stance of Historic England on the call-in application, … there is no evidence to support a submission that [the Department for Culture, Media and Sport] would have onward referred the application in any event" (paragraph 82). If every proposal for development that could have an effect upon Outstanding Universal Value had to be referred to the World Heritage Committee, there would be "considerable problems for the [World Heritage Committee] system" (paragraph 83). She rejected the contention that the city council had "failed to ask itself the right question"; Mr Burns' evidence had "made it quite clear" that the city council had done so (paragraph 84).

36. The e-mail of 15 July 2015 to which the judge referred in paragraph 80 of her judgment was a long e-mail sent by Mr Burns to Ms Kirkbride, in the course of which Mr Burns said:

> "…
>
> - The proposal is located in the buffer zone of the [World Heritage Site], adjacent to the boundary, and will have an impact on the setting of a sequence of listed buildings …
> - Due to its proximity to the World Heritage Site, it will also have an impact on its setting.
>
> …
>
> - Whilst the Heritage Impact Assessment that accompanies the proposals describes the assets and their significance, the discussion of impacts in inadequate. However, my own analysis undertaken at pre-application stage … indicates that the scale of the proposals will not substantially impact on the World Heritage Site or the William Brown [Conservation Area], and the setting of the two, listed, public houses whilst being [affected], is already compromised by the large student blocks to the east. As such, I regard the proposals to be acceptable in terms of the impact in the settings of designated heritage assets.
>
> … ."

When cross-examined by Mr Harwood about that e-mail at the hearing before Patterson J., and in his re-examination by leading counsel then appearing for the city council, Mr Vincent Fraser Q.C., Mr Burns made it plain that in his view there would be neither any adverse impact on Outstanding Universal Value nor indeed any impact. The final exchanges in re-examination were these (transcript, p.8C-E):

> "MR FRASER: Can we understand what your position is with respect to this particular proposal, Mr Burns.
>
> A. Indeed, I am happy to reiterate that. I don't believe there is any adverse impacts [sic] on OUV due to this application.
>
> MR FRASER: I think it is the use of the words "adverse impact". Do you think there is any effect upon the OUV I think is the question in this case that is being raised with you, Mr Burns?
>
> A. No, no impact on OUV."

37. Before us, Mr Harwood submitted that Patterson J. was wrong to find that the city council had lawfully applied the guidance in the first part of paragraph 18a-036 of the Planning Practice Guidance. In fact, he said, it never considered that guidance at all. It never asked itself whether it should refer the application to the Department for Culture, Media and Sport. It never asked itself whether the proposed development fell within the scope of the guidance – though, as Mr Harwood contended, Mr Burns had accepted in his evidence to the court that the development would have some impact on the Outstanding Universal Value of the World Heritage Site.

38. I do not think that argument is sound. In my view the judge's analysis was essentially right.

39. There can be no complaint here that the city council failed to consult Historic England early enough to enable them to participate effectively in the process by which the decision on the proposal was made. The relevant correspondence is before the court. The city council first consulted English Heritage in a letter dated 11 March 2015, inviting them to submit "any comments" on the proposed development by 1 April 2015. In their letter in response, dated 2 April 2015, Historic England said nothing about any effects the development might have on the World Heritage Site or its setting. After the scheme was revised the city council consulted Historic England again, in a letter dated 25 June 2015, inviting comments by 16 July 2015. Historic England responded on 23 July 2015, again saying nothing about any effect the development might have on the World Heritage Site or its setting.

40. The officers' report to the city council's Planning Committee for its meeting on 11 August 2015 referred to the objections of Save and the Victorian Society, and to the position of Historic England. The officers' view was that "the loss of the buildings [on the application site] will have no adverse impact on the setting of designated assets, including listed buildings, adjoining conservation areas or the World Heritage Site" (paragraphs 2.6 and 8.1 of the report), and that, in the light of national policy in the NPPF, "the scale of the

proposals will not substantially impact on the setting of the World Heritage Site or adjoining William Brown Street Conservation Area" (paragraph 4.6).

41. On 13 August 2015 Mr Carpenter sent an e-mail to Ms Kirkbride, telling her that the Secretary of State had received a number of requests for the application to be called-in. Mr Carpenter also asked Ms Kirkbride to provide the name of the officer at Historic England who had dealt with the application so that he could "make contact to discuss the potential impact of the proposal on the setting of the World Heritage Site". On 19 August 2015 Mr Carpenter sent an e-mail to the city council saying that the Secretary of State had recently received a "lengthy request to call in" from Save, which he had passed to Historic England, who would be providing him with "comments about the potential impact on the WHS".

42. On 25 August 2015 Mr Burns sent an e-mail to two officials at the Department for Culture, Media and Sport – Mr Keith Nichol and Ms Hannah Jones – with copies to two officers of Historic England, one of whom was Ms Dewar. In that e-mail Mr Burns said the proposed development had "been given permission" – which of course was not so at that stage – and providing a hyperlink for documents relating to the proposal.

43. On the same day Ms Dewar sent her letter to Mr Carpenter explaining Historic England's position on the proposal. As I have said, the judge did not see a copy of that letter, but it is now before us (see paragraph 10 above). Ms Dewar wrote:

> "… We were first consulted in March 2015 (letter dated [2 April] 2015) and then in late July on the amended proposal (response e-mail 23 July 2015). Our statutory remit is to assess the impact of the proposals upon the significance of the grade II[*] listed Vines public house. However, we also include in this letter … our advice on the impact of the proposed development upon the setting of the Liverpool [Maritime] Mercantile City World Heritage Site (WHS).
>
> …
>
> The development is also located within the buffer zone of the WHS inscribed by UNESCO in 2004. The WHS wraps around Lime Street station, listed grade II, and returns via the Grade I listed St George's Hall towards the William Brown Street group of Grade II* listed buildings. This character area of the WHS is focused on the physical manifestation of the wealth generated by the international trade, mercantile systems and cultural connections in the form of the architectural set pieces of St George's Hall and the cultural quarter. The prominence of these civic buildings with their robust scale and massing, strengthened by their location, has in our view the capacity to withstand the height and scale of the proposed development which would not harm the Outstanding Universal Value of the WHS nor its setting.
>
> The significance of heritage assets can be harmed or lost through development within the setting and any harm should have a clear and convincing justification. Paragraph 137 of the [NPPF] states that local planning authorities should look for opportunities for new development within the setting of heritage assets to enhance or better reveal their significance. In our opinion, there would be no harm caused to the significance of either the Vines Public House or the WHS through this proposed development within their setting."

44. In my view, in the light of that letter and the other correspondence to which I have referred, it is clear that the city council did not itself fail substantially to comply with the guidance in paragraph 18a-036 of the Planning Practice Guidance; nor did it prevent the Government from complying both with that guidance and with the World Heritage Committee's Operational Guidelines.

45. Given the way in which the advice on the consultation of Historic England and the Department for Culture, Media and Sport is expressed in the first part of paragraph 18a-036, substantial compliance with that advice may be achieved, and in this case I think was achieved, by the timely consultation of Historic England. By consulting Historic England first in March 2015 and then in June, the city council enabled them to consider, at a sufficiently early stage, whether the proposed development would have an effect on the Outstanding Universal Value of the World Heritage Site, and, if necessary, to bring the proposal to the attention of the Department for Culture, Media and Sport so that a view could be taken on referral to the World Heritage Committee. The fact that the city council did not directly consult the Department for Culture, Media and Sport, or indeed notify it of the proposal, until 25 August 2015, was not a material failure to follow the guidance in paragraph 18a-036.

46. The fact that the city council did not refer to the guidance in paragraph 18a-036 in its correspondence with Historic England and the two government departments does not mean that it acted inconsistently with that guidance. The question here is not whether it explicitly or even consciously followed the guidance, but whether it failed to act in accordance with the guidance in such a way as to vitiate its decision on the application for planning permission. In my view it plainly did not. I should add that there is no evidence to suggest that it was unaware of the advice in paragraph 18a-036. But in any event, whether knowingly or not, it acted consistently with that advice.

47. Like the judge, I reject the concept that the effect of new development on the setting of a World Heritage Site must necessarily be an adverse impact, or indeed an impact of any kind, on its Outstanding Universal Value. That concept is not to be found in government policy in the NPPF, or in the Planning Practice Guidance. As Mr Kimblin submitted, development in the setting of a heritage asset, in this instance development in the buffer zone of a World Heritage Site, will bring about some physical and visual change within the setting. Such change may potentially affect the "significance" of the heritage asset, in this instance the Outstanding Universal Value of the World Heritage Site. I emphasize "potentially". There might or might not be an impact on Outstanding Universal Value, and the impact might or might not be adverse. Whether the impact, if harmful, is such as to militate against the grant of planning permission is ultimately a question for the decision-maker to determine in the light of relevant policy, including policy in the NPPF. This will be a matter of fact and judgment in every case.

48. I would endorse the judge's understanding of the evidence given to the court by Mr Burns about the view the city council took in this case. There is no attack on the planning judgment in Mr Burns' conclusion that there would be no impact, let alone any harmful impact, on Outstanding Universal Value. That was the planning judgment on which the city council acted. It is unassailable in these proceedings. It follows that even if the construction of paragraph 18a-036 of the Planning Practice Guidance put forward by Mr Harwood were correct – which I do not accept – the city council could not be criticized for

omitting to consult the Department for Culture, Media and Sport directly, as well as Historic England. Even on that unrealistically strict reading of the guidance, there was no need for it to do so.

49. It is significant that, having taken Historic England's advice, the Secretary of State did not call in the application for his own determination, and also that Historic England, for its part, did not find it necessary to refer the proposal to the Department for Culture, Media and Sport with a view to its informing the World Heritage Committee of the proposal before planning permission for it was granted.

50. On 4 December 2015, some three months after the city council had granted planning permission, Ms Jones – then the World Heritage Site and Underwater Policy Advisor at the Department for Culture, Media and Sport – wrote to the World Heritage Committee. Ms Jones referred to her previous letter, dated 13 October 2015, in which she had pointed out that it was "neither desirable nor feasible to stop taking planning decisions" on all proposals within the World Heritage Site while work continued with a view to removing it from the List of World Heritage in Danger. She said that the city council had "continued … to take decisions except in the Central Docks neighbourhood of the Liverpool Waters development"; that, "advised by Historic England", it had "also continued to consider the potential impacts of development proposals on the OUV of the World Heritage property as part of its development control procedures and in line with the policies set out in the [NPPF]"; and that it had "identified a number of proposals in the WHS and its buffer zone that could have a potential impact on OUV and considered/is considering the potential impacts before taking planning decisions". Then she said this:

> "I am therefore writing to notify you in line with paragraph 172 of the *Operational Guidelines* of development proposals that may have a potential impact on the OUV of the property. In addition, I have included details of some [development] proposals which have been given planning permission since the 39th Session of the Committee in Bonn, where the potential impact on OUV was considered and judged by the Council and Historic England to be insufficiently significant to cause actual harm to the property in the event of the developments being built."

51. The five developments in the first of those two categories – the paragraph 172 notifications – included a proposal for development at Tobacco Warehouse, Stanley Dock, which was "[considered] to have beneficial impact on World Heritage Site and OUV …", and a proposal for development at a site in New Chinatown, which was "within the buffer zone, but is unlikely to affect OUV". The three developments in the second category – developments granted planning permission since the 39th Session of the World Heritage Committee – included the partnership's development in Lime Street, which Ms Jones said had been "adjudged by Liverpool City Council not to have a harmful impact on the OUV of the property, a position with which Historic England agreed" – adding, however, that the city council's decision had now been challenged in these proceedings. The other two developments in this category, at Wolstenholme Square and at Skelhorne Street, did "not affect OUV" and did "not impact on OUV …". Ms Jones did not say that the partnership's proposal, or either of the other two, ought to have been the subject of a paragraph 172 notification prior to the grant of planning permission. Nor did she express any concern about the lack of direct consultation with the Department for Culture, Media and Sport before the partnership's application was determined. She merely provided details of these three projects as information for the World Heritage Committee.

52. In my view, therefore, the judge was right to conclude that the city council did not commit any error of law of the kind contended for by Mr Harwood in his submissions on this ground of appeal.

53. I see nothing to upset that conclusion in the decision taken by the World Heritage Committee when it met recently in Istanbul.

54. In the course of its proceedings in Istanbul the World Heritage Committee discussed the intention of the United Kingdom (as "State Party") to produce a document for the "Desired state of conservation for the removal of the property from the List of World Heritage in Danger" ("DSOCR"). In its decision (40 COM 7A.31), among other things, it "[noted] that all stakeholders recognize the serious concerns of the World Heritage Committee over the potential threat of the Liverpool Waters development scheme to the Outstanding Universal Value (OUV) of the property" (paragraph 3); "[recalled] the conclusions of the 2015 joint World Heritage Centre/ICOMOS Advisory mission, in particular the need to reduce the urban density and height of the proposed development from the height maximums granted for the Liverpool Waters project …" (paragraph 4); "[recalled] … that the [DSOCR] is a tool and framework document which defines the state of conservation that a property must reach in order to demonstrate that it is no longer threatened by ascertained or potential serious and specific danger and to enable its removal from the List of World Heritage in Danger …", and "[reiterated] its request to the State Party to submit the final draft of the DSOCR to the World Heritage Centre by 1 December 2016 …" (paragraph 5), it "[further noted] the confirmation of the State Party that a moratorium remains in place for the Liverpool Central Docks, but [requested] the State Party to ensure that only repair and reuse of historic buildings, maintenance works and small scale projects should receive permission within the rest of the property until the DSOCR is finalized and adopted" (paragraph 6); "[noted] furthermore that the State Party submitted on [16 July 2016] new information on two projects (Princes Reach Princes Dock and Proposed Student Residence in Skelhorne Street), and [requested] the State Party to ensure that neither project receives approval until the DSOCR has been finalised and adopted" (paragraph 7); "[requested] furthermore the State Party to submit to the World Heritage Centre, by 1 February 2017, an updated report on the state of conservation of the property and the implementation of the above, for examination by the World Heritage Committee at its 41st session in 2017" (paragraph 10) ; and "[decided] to retain Liverpool – Maritime Mercantile City [World Heritage Site] on the List of World Heritage in Danger, with the possibility of deletion from the World Heritage list in the absence of timely implementation of the above recommendations" (paragraph 11). As I understand it, the general moratorium within "the rest of the property", referred to in paragraph 6 of the decision, does not extend to the buffer zone. But in any event neither that moratorium nor the request in paragraph 7 of the decision for a specific moratorium on the approval of the two particular schemes referred to there – until the DSOCR has been adopted – can have any effect on decisions already taken to approve other proposals for development within the buffer zone. I should add that the Skelhorne Street scheme referred to in paragraph 7 of the decision is a current proposal for a site adjacent to the site of the partnership's proposed development in Lime Street.

55. In my view that decision does not disturb the conclusion that the city council acted lawfully in its handling of the partnership's application throughout, and, in particular, the conclusion that it committed no error of law in not notifying the Department for Culture, Media and Sport of that proposal, and in proceeding to grant planning permission for it in

September 2015. The World Heritage Committee's decision does not mention the partnership's development. It does not record any dissatisfaction with the United Kingdom's present approach to notification under paragraph 172 of the Operational Guidelines. It does not complain of a failure by the United Kingdom to notify it of the partnership's project in Lime Street. Nor does it identify any concern, in the context of that proposal, about the city council's compliance with domestic policy and guidance for World Heritage Sites and their settings – including the guidance in paragraph 18a-036 of the Planning Practice Guidance.

56. In short, therefore, the World Heritage Committee's decision in Istanbul does not in my view provide any support for Mr Harwood's argument on this issue in the appeal.

Discretion (grounds 3 and 4)

57. The last of Mr Harwood's four questions goes to the court's discretion to withhold an order quashing the planning permission. Mr Harwood submitted that if it had been directly consulted by the city council when it should have been, the Department for Culture, Media and Sport would – or at least might – have referred the partnership's proposal to the World Heritage Committee; and that the city council's decision could well have been different if that department had been made aware of it.

58. In view of my conclusions on the previous two issues, this issue is academic. This was also Patterson J.'s conclusion (in paragraph 88 of her judgment). But the judge went on to consider whether the city council's decision might have been different if the Department for Culture, Media and Sport had been consulted. She did so both by adopting the approach identified by the Supreme Court in *Walton v Scottish Ministers* [2012] UKSC 44 and that required under section 31(2A) of the Senior Courts Act 1981. Either way, she concluded, "the outcome would have been the same" (paragraph 90).

59. I agree. As I have said, there is no dispute that the city council complied fully with the relevant statutory requirements for consultation, and no dispute that it consulted Historic England in accordance with paragraph 18a-036 of the Planning Practice Guidance. Historic England had no objection to the proposal, did not seek a call-in, and did not see any need to alert the Department for Culture, Media and Sport to the proposal before planning permission was granted. There is no evidence before the court to suggest that the department took a different view. If anything, Ms Jones' letter of 4 December 2015 to the World Heritage Committee is evidence against that suggestion. Finally, there is no hint that the World Heritage Committee itself, once made aware of the development, considered it to be within the ambit of paragraph 172 of the Operational Guidelines. In the circumstances the only sensible conclusion here is that direct consultation of the Department for Culture, Media and Sport would not have led to a different outcome for the partnership's application for planning permission.

60. In his further written submissions Mr Harwood contended that the World Heritage Committee's decision in Istanbul shows it is highly likely that if it had been consulted on the partnership's proposal it would have objected. The site of the partnership's proposal is within the buffer zone of the World Heritage Site, and adjacent to the site of the undetermined Skelhorne Street scheme, which, said Mr Harwood, does not involve the demolition of any historic buildings. And the partnership's scheme is for considerably

more development than is contemplated as acceptable in paragraph 6 of the decision. Mr Harwood also submitted that the World Heritage Committee's decision lends force to his argument that the words "may affect the Outstanding Universal Value" in paragraph 172 of the Operational Guidelines and in paragraph 18a-036 of the Planning Practice Guidance refer to any effect, whether positive or adverse. It is clear, he said, that the World Heritage Committee is "at loggerheads with the [United Kingdom] authorities about development in [the World Heritage Site] and its [buffer zone]", and the projects regarded as acceptable by "those authorities" are being objected to by the World Heritage Committee. In the light of the World Heritage Committee's decision, he submitted, it is likely that it would have objected to the partnership's proposal if it had been consulted. And in view of the dispute between the World Heritage Committee and "the [United Kingdom] authorities", the court should conclude that the outcome of the partnership's proposal might well have been different.

61. I cannot accept those submissions. I have already explained why I do not believe that the World Heritage Committee's decision in Istanbul assists Mr Harwood in contending that the city council's decision under challenge in these proceedings was unlawful (see paragraphs 55 and 56 above). The same conclusions are relevant also to the issue of discretion, but they need not be set out again here. The World Heritage Committee's decision does not say, or in my view imply, that, in dealing with the partnership's proposal for the Lime Street site, the Government or the city council either misconstrued or misapplied the guidance in paragraph 172 of the Operational Guidelines or the guidance in paragraph 18a-036 of the Planning Practice Guidance. As Mr Crean and Mr Kimblin have observed in responding to Mr Harwood's written submissions, the court is being invited to infer, on the part of the World Heritage Committee, views that, even now, it has not expressed on the Lime Street proposal itself and the city council's decision to approve that proposal when it did. The World Heritage Committee's decision in Istanbul does not demonstrate that it would, or might, have objected to that proposal if it had been consulted upon it before planning permission was granted in September 2015. Its decision does not demonstrate that it now takes the view that it should have been consulted on that proposal. Nor does it demonstrate that at any stage while the proposal was under consideration the World Heritage Committee, had it been consulted, would have wanted to effect a more restrictive "moratorium" than was then in place.

62. In my view therefore, taking into account the totality of the evidence now before the court, if the error of law alleged in this case had been established – which I have concluded it has not – the court would have been entitled to withhold an order to quash the city council's decision. And I think it would have been right to do so.

Conclusion

63. For the reasons I have given I would dismiss this appeal.

Sales L.J.

64. I agree that the appeal should be dismissed for the reasons given by Lindblom L.J.. I add a short judgment of my own because of the unusual form of the guidance set out in the first sub-paragraph of paragraph 18a-036 of the Planning Practice Guidance. That sub-

paragraph is directed to provision of information to enable central government to comply with the UK's obligations in international law under the 1972 World Heritage Convention and the associated Operational Guidelines by informing the World Heritage Committee about proposals which may have an adverse effect on the Outstanding Universal Value of a World Heritage Site. The guidance to local planning authorities is not posed in mandatory terms, so the question arises what legal effect should follow if a local planning authority does not do what it is told "would be very helpful" for it to do, namely consult Historic England (for a cultural site) and the Department for Culture, Media and Sport ("DCMS") at an early stage.

65. Where planning guidance from central government is set out in mandatory terms, such as in the NPPF, the Secretary of State indicates that it is something which should be complied with such that, under the scheme of the planning legislation, it will be an error of law by a local planning authority to fail to comply with it when granting planning permission (unless it has good reason not to) of a character that will normally vitiate the validity of a decision by the authority to grant such permission. However, the way in which the guidance in the first sub-paragraph of 18a-036 is expressed falls far short of a mandatory demand by the Secretary of State that a local planning authority must consult Historic England and DCMS, on pain of making its decision invalid if it does not.

66. At the same time, I do not think that the Secretary of State intended the first sub-paragraph simply to be a polite request with no legal effect whatever within the planning regime. I consider that by this sub-paragraph in the guidance the Secretary of State has indicated that he does expect that, as a matter of substance, a local planning authority will at least draw a relevant development proposal to the attention of Historic England before granting planning permission.

67. That is for two reasons. First, Historic England is the government's expert adviser who will be best placed to advise central government in the form of DCMS whether it should be taking action to ensure that the UK complies with its obligations under international law in relation to notifying the World Heritage Committee in appropriate cases, and indeed is the expert body whom DCMS would be expected to consult if it was notified of a development proposal. If neither Historic England nor DCMS are informed about a development proposal which may have an adverse effect on a World Heritage Site, the likely outcome is that the UK government will fail to comply with its obligations under international law. Clearly, the point of the guidance is to try to ensure that this does not occur.

68. Secondly, the second sub-paragraph of 18a-036 and the 2009 Direction which is summarised there both require planning authorities to consult the Secretary of State for Communities and Local Government before approving a planning application affecting a World Heritage Site to which Historic England maintains objection, so that the Secretary of State can consider whether to call the application in for decision by him. Both of them presuppose that Historic England has indeed been given notice of the application so that it can decide whether to object to it. Counsel told us that there is no other distinct obligation on a local planning authority to bring such an application to the attention of Historic England, whether in statute, guidance or the 2009 Directive. So the Secretary of State must have intended as a matter of substance that a local planning authority should take steps pursuant to the first sub-paragraph of 18a-036 to draw the application to the attention of Historic England. In that regard, it is significant that paragraph 18a-036 replaced and in substance replicates paragraphs 7.12 and 7.13 (set out at paragraph [22] above) of the joint

guidance issued in 2009 by the Secretary of State for Communities and Local Government, English Heritage and DCMS, which was referred to as relevant guidance in paragraph 24 of Circular 07/2009, the original Circular which came into effect in conjunction with the 2009 Direction. That guidance was what originally appears to have provided the relevant obligation to ensure that notice of a relevant development proposal came to the attention of English Heritage (now called Historic England), and the first sub-paragraph of 18a-036 now fulfils the same function.

69. In my view, proper interpretation of the guidance in the first sub-paragraph of 18a-036 and an examination of its legal effect has to take account of the very muted terms used in it to ask a local planning authority to do something whilst also having regard to the Secretary of State's intention that a substantive outcome should be achieved pursuant to it. One may adapt what was said by Cooke J. in *New Zealand Institute of Agricultural Science Inc v Ellesmere County* [1976] 1 NZLR 630, at 636, about the legal effect of failure to comply with a procedural requirement contained in legislation (in a passage endorsed by Lord Steyn in *R v Soneji* [2006] 1 A.C. 340, at [20]):

> "Whether non-compliance with a procedural requirement is fatal turns less on attaching a perhaps indefinite label to that requirement [i.e. whether it is directory or mandatory] than on considering its place in the scheme of the Act or regulations and the degree and seriousness of the non-compliance."

So, in examining the intended meaning and effect of the first sub-paragraph of 18a-036, I think it is relevant to examine the degree and seriousness of the departure of the city council from what it was asked to do. Did the Secretary of State intend that a failure by the city council distinctly to notify DCMS of the planning application should qualify as an error of law, even though the council had informed Historic England in good time and it could naturally be expected that if there was any problem they would draw it to the attention of DCMS for DCMS to take appropriate steps on behalf of the UK government under the 1972 Convention and the Operational Guidelines (compare *Soneji* at [23], per Lord Steyn)?

70. In my judgment, the answer to this question must be 'no'. There was clearly substantial compliance by the city council with the request for assistance in the first sub-paragraph of 18a-036, and this substantial compliance with the request constituted full compliance with the implied legal obligation created by the guidance issued in that form.

71. By notifying Historic England, the city council ensured that if matters needed to be drawn to the attention of DCMS so that the UK government could act as required by the 1972 Convention and the Operational Guidelines they would be. It also ensured that the Secretary of State for Communities and Local Government had an opportunity to call in the planning application, with the benefit of advice from Historic England, should he wish to do so. The purposes to which the request to local planning authorities in the first sub-paragraph of 18a-036 were directed were achieved by what the city council did. Its action in granting planning permission after taking these steps was not unlawful.