Neutral Citation Number: [2014] EWHC 1662

Case No: CO/5313/2013

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/05/2014

Before:

LADY JUSTICE HALLETT
Vice President of the Queen's Bench Division
MR JUSTICE OUSELEY
MR JUSTICE HADDON-CAVE

- -

Between:

THE QUEEN (on the application of PLANTAGENET ALLIANCE LTD)	**Claimant**
- and -	
SECRETARY OF STATE FOR JUSTICE	**First Defendant**
- and -	
THE UNIVERSITY OF LEICESTER	**Second Defendant**
- and -	
LEICESTER CITY COUNCIL	**Third Defendant**
THE MEMBERS FOR THE TIME BEING OF THE CHAPTER, THE COUNCIL AND THE COLLEGE OF CANONS OF THE CATHEDRAL OF SAINT MARTIN LEICESTER	**First Interested Party**
THE MEMBERS FOR THE TIME BEING OF THE CHAPTER, THE COUNCIL AND THE COLLEGE OF CANONS OF THE CATHEDRAL AND METROPOLITAN CHURCH OF SAINT PETER YORK	**Second Interested Party**

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Gerard Clarke and Tom Cleaver (instructed by **Gordons LLP**) for the **Claimant**
James Eadie QC and Ben Watson (instructed by **The Treasury Solicitor**) for the **First Defendant**

Anya Proops and Heather Emmerson (instructed by **The University of Leicester**) for the **Second Defendant**
Andrew Sharland (instructed by **Leicester City Council)** for the **Third Defendant.**

Hearing dates: 13th and 14th March 2014
- -
Judgment Approved by the court
for handing down

This is the Judgment of the Court:

INTRODUCTION

1. Richard III was the last King of England to die on the battlefield. His death marked the end of the Middle Ages. He has remained a significant and controversial historical figure ever since. Tudor propagandists in the 16th Century portrayed him in a negative light. Thomas More described Richard III as *"little of stature, ill-featured of limbs, crook-backed… hard-favoured of image"*. Polydore Vergil says Richard III was *"deformed of body… one shoulder higher than the other"* (Ross, *Richard III*, pp. xxii-xxiv). Shakespeare famously characterised Richard III as a ruthless and scheming Machiavellian villain, albeit a man of wit and courage. There was, however, a revival of interest in Richard III's reign and character in the 20th Century, championed by groups such as the Richard III Society.

2. The Richard III Society ("the Society") was formed in 1924, over 400 years after his death. In 1980, HRH The Duke of Gloucester became its patron. The Royal Family is, however, not descended lineally from Richard III. No one is. The Society's aim was to rehabilitate Richard III's historical reputation, promulgating a more balanced picture of Richard III as a good and humane man who sought stability, peace, order and sound administration for a kingdom recently much troubled. The Society has an established reputation for its historical research. Its membership numbers several thousand around the world.

3. One of the Society's leading members, Ms Philippa Langley, had a strong desire to find Richard III's body. Initial research narrowed down the location of Richard III's grave to an open-air municipal car-park in Leicester on the site of the Grey Friars Priory. The car park, owned by Leicester City Council ("the Council") overlay part of the Priory's former grounds.

4. Ms Langley worked in partnership with the University of Leicester Archaeological Services ("ULAS"). Necessary permissions for excavating the site and funding from, amongst others, Leicester University ("the University") were obtained. On 24th August 2012, human bone was discovered and digging stopped. On 3rd September 2012, an exhumation licence was obtained from the Burials Team of the Ministry of Justice, which meant that the archaeological work could continue. On 5th September 2012, two human skeletons were unearthed, one of which bore the unmistakeable signs of *scoliosis* and traumatic injury. Steps were taken to trace descendants of

Richard III's sister, Anne of York, for mitochondrial DNA purposes. On 4th February 2013, the University of Leicester announced that DNA matching that of Anne of York had been taken from two descendants, the results confirmed beyond reasonable doubt that the remains were those of Richard III and it had been agreed they should be re-interred in Leicester Cathedral.

5. The Claimant, The Plantagenet Alliance Limited, objected. The Plantagenet Alliance is a not-for-profit entity set up by Mr Stephen Nicolay, the 16th great-nephew of Richard III. Mr Nicolay is the sole director and shareholder of the Claimant, which he incorporated to pursue the litigation brought on behalf of himself and a number of collateral descendants of Richard III (comprising 16th, 17th and 18th great-nephews and great-nieces). However, they represent but a tiny fraction of Richard III's descendants. Calculations of the number of living collateral descendants of Richard III varies between one and well over ten million worldwide.

6. Mr Nicolay was not a member of the Society and not aware that he was probably related to Richard III until late 2011. In early 2012 he received confirmation that he is a 16th great-nephew. The Claimant's stated aim, in challenging the licence to exhume what we now know are Richard III's remains, is to bring about their re-interment in York Minster. Thus, Richard III has, once more, become the subject of keen debate.

7. In the exceptional circumstances of this case, we shall set the scene with a short and, we hope, uncontentious summary of Richard's life.

HISTORICAL BACKGROUND

8. Richard Plantagenet was born in 1452 at Fotheringay Castle in Northamptonshire. He was the youngest son of Richard, 3rd Duke of York, and Cecily Neville, and twelfth of their thirteen children. He was born into a world dominated for the next 30 years by the complex dynastic and civil conflicts fought by rival branches of the Plantagenets, the Houses of Lancaster and York, which became known as the 'Wars of the Roses'.

9. In 1460, Richard's father, a claimant to the throne of King Henry VI, was killed at the Battle of Wakefield, together with Richard's elder brother Edmund, Earl of Rutland. Richard, then aged eight, and his elder brother George, later Duke of Clarence, were sent to the Low Countries.

10. In 1461, Richard's eldest brother, Edward, seized the English throne by defeating the Lancastrians at the Battle of Towton and was crowned King Edward IV. Richard attended the coronation and was named Duke of Gloucester, appointed a Knight of the Garter and a Knight of the Bath.

11. Richard was then sent to Middleham Castle in Wensleydale, Yorkshire, for knightly training under the tutelage of his cousin Richard Neville, 16th Earl of Warwick, who became known as 'Warwick the Kingmaker'. Richard stayed at Middleham, and Warwick's other estate at Sheriff Hutton, until early 1465. Richard developed *idiopathic scoliosis* during his adolescence, causing curvature of the spine.

12. In 1464, Edward IV secretly married a Lancastrian widow, Elizabeth Woodville. This alienated Warwick, who sought a political match with a European princess.

13. In 1470, Warwick defected to the side of Margaret of Anjou, who favoured the House of Lancaster. Richard and his brother Edward IV fled to Burgundy, where they were looked after by Richard's sister Margaret, wife of Charles the Bold, the Duke of Burgundy.

14. In 1471, Richard and Edward IV returned to England. Richard, although only 18 years old, was given command of the vanguard at the Battles of Barnet and Tewkesbury. These battles were resounding victories for the Yorkists. The Earl of Warwick and the Lancastrian heir, Prince Edward of Wales, were killed. Henry VI died shortly thereafter. Edward IV was restored to the throne of England in the spring of 1471.

15. Edward IV granted Richard many of Warwick's forfeited estates. In 1472, Richard married Warwick's daughter, Anne Neville, the widow of Prince Edward of Wales. Richard became a powerful magnate in his own right, with particular influence in Yorkshire and elsewhere in the north of England. Richard served Edward IV as a military commander and Governor of the North. In 1475, Richard took part in the invasion of France. In 1476, Anne gave birth to their only child, Edward. In 1482, Richard attended Parliament for the *attainder* of his brother The Duke of Clarence for treason and his execution. In 1482, Richard invaded the Kingdom of Scotland at Edward IV's behest.

16. In 1483, Edward IV died shortly before his 41st birthday. His Queen, Elizabeth Woodville, had borne two male heirs, Edward V (aged twelve) and his younger brother Richard, Duke of York. Elizabeth sent for her elder son, Edward, to be brought to London from Ludlow for his coronation as Edward V. He was to be accompanied to London by his maternal uncle, Earl Rivers. Richard, who by this time had been appointed Lord Protector, travelled south towards London with Lord Hastings. *En route*, Richard encountered and arrested Earl Rivers at Northampton and escorted his nephew, Edward V, to London. They arrived on 4th May 1483. The young Edward V was placed in the Tower of London. Elizabeth had taken sanctuary in Westminster Abbey with her family. On 16th June 1483, Edward V's younger brother Richard, Duke of York, left the sanctuary of Westminster Abbey and was said to have joined Edward V in the Tower. On 22nd June 1483, the marriage of Edward IV to Elizabeth Woodville was declared illegal because of its clandestine nature and a

pre-existing contract of marriage between Edward IV and Lady Eleanor Butler. Edward IV's children of that marriage were declared illegitimate.

Richard III crowned on 6th July 1483

17. On 6th July 1483, Richard III was crowned at Westminster Abbey, together with Anne. Their only son, Edward, was subsequently invested as Prince of Wales. Richard III's supporters, such as Sir Robert Hildyard, were honoured and rewarded.

18. In the autumn of 1483, a rebellion broke out in the West Country led by the Duke of Buckingham and supported by the exiled Henry Tudor, a scion of the House of Lancaster and descendant of Edward III through his son, John of Gaunt. The rebellion was swiftly put down. However, Henry Tudor then began preparations for an invasion from France.

19. Meanwhile, in the spring of 1484, Richard III suffered the loss of his son Edward, Prince of Wales. This was followed, in March 1485, by the death of his wife, Anne. Anne was subsequently buried in Westminster Abbey.

Battle of Bosworth on 22nd August 1485

20. On 7th August 1485, Henry Tudor landed at Milford Haven in Wales with his French troops. Richard III mobilised his forces from Nottingham. Battle was joined at Bosworth Field in Leicestershire on 22nd August 1485. Lord Stanley, who had earlier pledged his support for Richard III, held back his troops and then launched them against Richard III. Richard III was overwhelmed and killed in battle. Richard III's body was carried to Leicester by the victorious Tudor troops and put on public display in the town in order that Yorkist sympathisers could be in no doubt that the former ruler was slain. Richard III was then buried in the choir of the Franciscan Priory of the Grey Friars in Leicester. Henry VII's Court Historian, Polydore Vergil, records that the dead King was *"…buryed two days after without any pompe or solemne funeral… in thabbay of monks Franciscanes at Leychester"* (*Three Books of Polydore Vergil's English History*, edited by Sir Henry Ellis, London, 1844, p. 447).

21. Contemporaneous and historical accounts provide a striking record of events: "Richard's body was found among the other slain.... Many other insults were heaped on it, and, not very humanely, a halter was thrown round the neck, and it was carried to Leicester..." (Crowland Chronicle, c.1486). "Richard's naked body was slung over a horse, its head, arms and legs dangling" (Anglica Historia, c. 1503-13). "And Richard late King as gloriously as he by the morning departed from that town, so as irreverently was he that afternoon brought into that town, for his body despoiled to the skin, and nought being left about him, so much as would cover his privy member, he was trussed behind the pursuivant called Norroy as an hog or another vile beast, and so all besprung with mire and filth was brought to a church in Leicester for all men to wonder upon, and there lastly irreverently buried." (Fabyans Chronicle, c. 1533).

22. The minutes of York Council on 23rd August 1485 recorded that "King Richard, late mercifully reigning upon us … was piteously slain and murdered to the great heaviness of this city" (R. Davies, Extracts from the Municipal Records of the City of York, during the reigns of Edward IV, Edward V and Richard III, 1843, p, 218).

23. Richard was declared a traitor and usurper, and subjected to an Act of *Attainder* after his death. The fate of 'the Princes in the Tower', Edward V and his younger brother, Richard, remained shrouded in mystery. The Battle of Bosworth Field ended the Wars of the Roses. The accession of Henry VII to the throne heralded the advent of the Tudor dynasty and the beginning of the Early Modern period of English history.

24. In 1495, Henry VII evinced concern that the late King's body should be enclosed in a suitable tomb. His motives are unclear. An official document dated 1st July, 11 Henry VII, records that the Royal Commissioners arranged for one Walter Hylton, a Nottingham alabasterman, to build a memorial over Richard III's grave and to receive £50 for the task (*Public Records Office Early Chancery Proceedings* series, C1/206/69).

25. In 1538, in the reign of Henry VIII, Grey Friars Priory was destroyed and razed to the ground during the Dissolution of the Monasteries and Richard III's tomb broken up. Subsequently, in the early 1600s, Robert Herrick, the Mayor of Leicester, built a mansion with a large garden on the site of the former priory. In 1611, Christopher Wren, the future Dean of Windsor and father of the famous architect, whilst walking in the garden, was shown *"a handsome Stone Pillar, three Foot high"* bearing the inscription *"Here lies the Body of Richard III, some Time King of England"* (*Parentalia, or Memoirs of the Family of the Wrens*, London, 1750, p. 725). It was presumed that Richard III's body had been removed from its coffin during the Dissolution and cast into the nearby River Soar. (See generally David Baldwin's monograph, *King Richard's Grave in Leicester*, 1986).

26. In fact, Richard III remained buried in the same spot on the site of Grey Friars Priory in Leicester until his remains were discovered over 500 years after his death.

27. We turn to consider in more detail the events that led up to the discovery of Richard III's remains and the process that led to the issue of the exhumation licence under challenge in these proceedings.

THE DISCOVERY OF RICHARD III'S REMAINS

'Looking for Richard: In search of a King'

28. The discovery of Richard's remains was due to the meticulous research by the historian, Dr. John Ashdown-Hill, in his book *"The Last Days of King Richard III"*

and the inspired and determined work by Ms Langley and other members of the Society, including David and Wendy Johnson, in partnership with ULAS, headed by Mr Richard Buckley. ULAS is the professional archaeological unit within the University.

29. In 2010, Ms Langley met the Chief Executive of the Council to discuss a proposal by her and others for archaeological work to be undertaken in the Grey Friars car park and elsewhere nearby. She called this proposal *"Looking for Richard: In search of a King"*.

30. In January 2011, Ms Langley contacted Mr Clifford of the Ministry of Justice ("MoJ") Burials Team. This Team deals with applications for exhumation licences under the Burials Act 1857.

31. Mr Clifford, realising the potential sensitivities of the proposal, the need to proceed *"with caution"* and the need to alert the Palace at some point, warned Ms Langley:

> *"There are no statutory criteria for deciding licence applications, but we will carefully consider them on the merits, taking into account, for example, what arrangements are proposed to deal with the remains; whether they might command public confidence and whether there are, or might be, objections from any legitimate quarters. It is relatively unusual to have a licence application in relation to the remains of a named person of this age, and therefore with potential descendants, so this would raise greater sensitivities to weigh up, even if the remains were not royal. You are, of course, already well seized of this."*

32. In reply, Ms Langley sent him the *"Reburial Document"* in which she described to him the *"potential way forward"* with the remains: namely, reburial in Leicester Cathedral. He found this helpful. He did not suggest that collateral descendants of Richard III should, or would, be consulted.

33. About this time, Ms Langley also approached ULAS with proposals for an archaeological dig to be carried out. It was part of her proposal to them that the remains of Richard III, if found, should be reinterred in Leicester Cathedral. In his witness statement, Mr Buckley, Director of ULAS, said that Ms Langley told him that she had already had discussions with representatives from the Palace and the Duke of Gloucester, Leicester Cathedral, the Council and the Society. She had also told him that all were content with the proposal for re-interment in the Cathedral. Mr Buckley agreed that that would be the most appropriate course: it was the nearest consecrated ground to Grey Friars and accorded with best archaeological practice. Grey Friars Church was also in the Cathedral's parish. He told the University, the Council, the Society and a County Council/City Council tourist promotion partnership, that ULAS would undertake a desk-based archaeological assessment. This was ready in April 2011.

34. Meanwhile, Ms Langley had had further contact with Mr Clifford of the MoJ Burials Team. Mr Clifford's note of their 8th February 2011 meeting records that she told him that she had recently met the Private Secretary to the Duke of Gloucester - who was said to be supportive of the project - and the Coroner of the Royal Household. She had also sent Mr Clifford the ULAS desk study, which the later meeting was to discuss. In her witness statement, Ms Bernstein (who replaced Mr Clifford as Head of the Burials Team in the MoJ) said that she was told by Mr Clifford that the *"views of living relatives"* to which he referred were only those of the Royal Family. He noted that, although there was a *"moderate potential for the discovery of burials"* on the site, in the event of an application for an exhumation licence being received, it was important to avoid excessive caution or *"naïve enthusiasm"* and to be guided by relevant experts. He said that granting the licence for the excavation was worth *"a punt"* if there were *"no objections from the Council or the Royal Family"*. The Clerk to the Privy Council in the Cabinet Office was aware of the case. The Royal Family interest could be reflected *"for our purposes in the terms of the licence conditions as to how the remains are treated"*.

35. Ms Langley met with ULAS and the Council on 20th April 2011 to discuss the outcome of the desk study and how the site might be further investigated. At that meeting, excavations were discussed. The Council was happy for the project to be carried out by ULAS. The Council and ULAS recognised the importance of investigating the site, whether or not the remains of Richard III were found. Ms Langley again made clear her desire for the remains of Richard III, if found, to be re-interred in Leicester Cathedral. The reasons why the Cathedral was preferable to other locations in Leicester were discussed. There was no detailed discussion of re-interment elsewhere since the case for re-interment in Leicester *"was so strong"*, according to the Head of Arts and Museums at the Council, Ms Levitt, who had responsibility for the Council's interests in the remains. This was what she described as their *"working assumption"* as to what would happen to any remains if found. At that stage, however, she thought that there was *"a less than 1% chance"* of finding the remains of Richard III.

36. Ms Levitt shortly afterwards introduced Ms Langley to the Dean of Leicester Cathedral who supported the project. There had already been discussion between Ms Langley and the Cathedral. The Very Reverend David Monteith, the successor Dean, provided a witness statement in which he emphasised that the Cathedral gave its early agreement to re-interment there of the remains of Richard III, if found. He also emphasised the strength of the Cathedral's commitment to the partnership, which had seen it commit itself to substantial financial expenditure in preparation for reburial in Leicester Cathedral, following the discovery, and the scientific confirmation, of the identification of Richard III's remains.

37. As part of its planning requirements, and before any excavations could take place, the Council required a *"Written Scheme of Investigation"* to be approved by its archaeologist. This was probably also a necessary precursor to the application for an exhumation licence. It was produced by ULAS, in discussion with Ms Langley, and was eventually approved by the City Archaeologist in July/early August 2011. The

final version was not produced until 19th July 2012. The Scheme provided for re-interment in Leicester Cathedral of any remains identified as those of Richard III.

38. From late April 2011, the Council started developing its view of its own role in the project. It saw itself as very much party to it. Ms Levitt wanted to work on the specification for consultation on deciding what to do with any remains which might be found, and who would be responsible for reburial. Consultation would take time. She saw consultation as important to the Council, and in her application of the Department for Culture, Media and Sport ("DCMS")*"Guidance for the Care of Human Remains in Museums"*. She expressed the point to Ms Langley in August 2011 that adherence to set guidelines included an *"obligation to consult and respect the wishes of living decedent [sic], the Royal family, or any other descendant"*. The Council claimed to be responsible for all human remains found, and to have decision-making responsibility. This was not, however, made public. The Written Scheme of Investigation was silent on this aspect.

Reinterment at Leicester Cathedral agreed

39. At a meeting on 20th April 2011 between the Council, Leicester University and the Society, along with others, it was agreed that should the remains of Richard III be discovered, re-interment in the Leicester Cathedral would be best archaeological practice, and consistent with what the participants saw as the many strong connections between Richard III and the City of Leicester. It was also agreed that the University and the City/County tourist promotion company would cover part of the excavation costs and the costs of the coffin. The Council offered a contingency sum. Contributions were eventually agreed, and Ms Langley obtained funds, including from the Society, to make up the shortfall. All requisite permissions had been obtained by 20th July 2012.

40. Ms Levitt said in her witness statement that if at the stage of the desk study there had been a clear case for re-interment elsewhere than Leicester, *"we would have considered it, but it is unlikely that we could have justified permitting the excavation"*. Mr Buckley also emphasised in his witness statement that it was unlikely that the University, as the major funder of the excavations, would have agreed to make such a considerable investment unless re-interment was to take place in the City. Neither would ULAS have been willing to spend money on exhumation if there had been a real prospect that re-interment would sever the link between Leicester and Richard III.

41. On 12th August 2011, the Council permitted Ms Langley and *"her partners and successors"* to carry out a ground penetrating radar survey, a privilege for which Ms Langley, on behalf of the Society, paid. The Council also permitted her to carry out excavations subject to various conditions, including the existence of sufficient secure funds to complete the work properly and to make good. Standard archaeological practices were to be applied to human remains. For various reasons, there was a delay in the start of the excavations until 24th August 2012.

Public announcements on 24th and 31st August 2012

42. The first obviously public announcement of what was going to happen was made at a press conference held by the University on the first day of the excavations, 24th August 2012. It announced the commencement of excavations with a view to finding the remains of Richard III. The dig was aimed at determining the whereabouts of the Church on the site and where in the Church the body was buried. If Royal remains were found, they would be re-interred in Leicester Cathedral. The University also issued a press statement to the same effect. At a further press conference on 31st August 2012 the same was said. At the time, these announcements did not appear to generate controversy, either over the possible exhumation (which has never been controversial), or over the location of reburial.

Exhumation Licence granted on 3rd September 2012

43. On the first very day of excavation, 24th August 2012, human bone was found. The excavation was stopped immediately. The discovery of human remains meant that an exhumation licence was legally required. The application for an exhumation licence was made by Mr Buckley of ULAS. The application could have been made by the Council, or indeed by Ms Langley. However, an application for an archaeological licence such as this would normally be made by an archaeologist who could satisfy the MoJ that he had the skills necessary to meet the terms of the licence.

44. The application for an exhumation licence was lodged on 31st August 2012 using the requisite form. It described the site and the history of the Friary and went on to state as follows:

> *"A research excavation is underway to investigate the remains of Leicester's Franciscan Friary and also potentially locate the burial place of Richard III whose remains were interred here in 1485, although those may subsequently have been exhumed and thrown into the nearby River Soar after the Dissolution in 1538. It is proposed to exhume up to six sets of human remains for scientific examination."*

45. The application explained that remains were to be placed in the Jewry Wall Museum in Leicester, but the form added that:

> *"…in the unlikely event that the remains of Richard III are located the intention is for these to be reinterred at St Martin's Cathedral, Leicester, within 4 weeks of exhumation."*

46. On 3rd September 2012, the Secretary of State for Justice granted a Licence to the University of Leicester under section 25 of the Burial Act 1857 in the following terms:

> *"**LICENCE FOR THE REMOVAL OF HUMAN REMAINS***
>
> *The Secretary of State, in exercise of the power vested in him by section 25 of the Burials Act 1857 (20 & 21 Vic., cap. 81), grants a licence for the removal of the remains of* ***persons unknown*** *from or within the place in which they are now interred at* ***1-7 Grey Friars/ 4-8 St Martins (car parks to the rear only), Leicester, LE1 5PH:***
>
> *2. It is a condition of this licence that the following precautions shall be observed:*
>
> (a) *Any removal or disturbance of the remains shall be effected with due care and attendance to decency;*
>
> (b) *The ground in which the remains are interred shall be screened from the public gaze while the work is in progress;*
>
> (c) *The remains shall, no later than 31 August 2014, be deposited at the Jewry Wall Museum or else be reinterred at St Martins Cathedral [sic] or in a burial ground in which interments may legally take place. In the meantime shall be kept safety, privately and decently by the University of Leicester, Archaeological Society under the control of a competent member of staff.*
>
> *3. This licence merely exempts those from the penalties, which would be incurred if removal took place without a licence. It does not in any way alter civil rights. It does not confer the right to bury the remains in any place where such right does not already exist.*
>
> *4. This licence expires on 31 December 2013."*

47. The covering letter stated that, if amendment or variation was required, the applicant should contact the MoJ. This obviously implies that a licence can be amended, at least on application. The licence contained no requirement for public consultation. Ms Bernstein of the MoJ still saw it as an inherently speculative project, as did many others.

Skeletons exhumed on 5th September 2012

48. On the 5th September 2012, when the two human skeletons were exhumed with one bearing the unmistakable signs of *scoliosis* and trauma, excitement began to mount. These features, together with the archaeological context – the location in the choir of the Church, an irregular grave and no sign of a shroud or coffin – suggested, compellingly, that this skeleton was that of Richard III.

49. On 12th September 2012, the University arranged a press conference at which ULAS announced that its preliminary investigations indicated that the remains of Richard III had been found, but definitive identification of the remains could not be confirmed until mitochondrial DNA tests had been carried out. This announcement sparked

national and international interest. At the press conference, Ms Langley, the Society, the City Mayor and the Dean of the Cathedral also spoke. The Dean said it was the Cathedral's intention to continue to work with the Royal Household and the Society to ensure the dignified and appropriate reburial of the remains. It was again made clear that if, on DNA testing, the remains were proved to be those of Richard III, they would be reinterred in Leicester Cathedral.

50. This announcement also began the stirrings of controversy over the proposed place of re-interment. ULAS, in consequence, became concerned that the licence was not as clear as the application form had been as to where the remains of Richard III were to be reinterred. Mr Buckley enquired of the MoJ about a clarifying amendment, but was told that the licence should be read with the application form and the MoJ covering letter, and that it was clear. The MoJ said that ULAS had made its intention clear to the MoJ as to reburial, but the precise location was for ULAS. That put Mr Buckley's mind at rest. Mr Buckley also said in his witness statement that he was told that a licence could only be amended on application. (At the hearing, the contention of Counsel for the Secretary of State, Mr Eadie QC, was that the Secretary of State could amend the licence of his own motion).

The Council's plans for consultation process

51. The likelihood of the remains being those of Richard III prompted Ms Levitt of the Council to take up the question of consultation again. She said that it was agreed that she would be the lead officer on the reburial process, both as to whether the remains should be buried in Leicester, and if so, where and how. The remains should be treated as if they belonged to the Council. It should implement its policy on *"consulting key stakeholders"*. These were the Council, the Society, the Cathedral, the Royal Household, possibly the Council of Faiths, the Secular Society, the University *"and other funders"*. This would cover the principle of reburial, the manner of reburial and the location. She said, *"[p]rovided no major objections, we would request the cathedral to inter there…"*. The final decision would be with the Council, which would be mindful of public opinion. The first task was to develop a decision-making process, which she was to lead. She saw it as requiring of the Council the impartiality of an electoral returning officer. She referred to the strong local support for burial in Leicester Cathedral, but others supported York Minster, and Westminster Abbey. She stated that other candidates could emerge.

52. The Dean of the Cathedral was in touch with the Legal Office of the Church of England, which had provided an analysis of the legal situation, stating there would be a process for deciding where the remains should be re-interred. This would include consultation with the Royal Household. The Lord Lieutenant of Leicestershire, Lady Gretton, was also involved in discussions.

53. Ms Levitt confidentially briefed the City Mayor, Sir Peter Soulsby, on 20th September 2012 about this process. She envisaged a decision-making process group, including the Council, the Dean and the Lord Lieutenant as representing HM The Queen, with various expert bodies in support. Part of its work was to identify a decision-making body, which was not to be the Council because of its interest. She said that the

Council nevertheless had a duty to consult on significant matters and so there would be consultation as part of the process.

54. Mr Buckley of ULAS, concerned that the field should not be opened to all claimants, emphasised that the starting point had to be that reburial would take place in Leicester, unless some there were good reasons to the contrary. He made the point that ULAS was the licensee of the remains with a duty to rebury them, and the MoJ would have to be involved were the remains to be buried elsewhere. He did not go quite so far as to say that the Council had no role to play. He was keen, however, to emphasise what had been the original plan for reburial in Leicester Cathedral.

55. Ms Levitt had developed her thinking further by 3rd October 2012, when she presented another confidential briefing to the City Mayor of a proposed announcement of the Council's intentions in mid-to-late November. The joint announcement by the Council, ULAS and the Diocese was to be that re-interment would be in Leicester Cathedral, with a reasoned justification. That was to be followed by a process for considering claims from other locations, representations from those who felt they had a legitimate interest and the views of the Palace and Cathedral. There would be consultation *via* the Council's website; an advisory panel would then consider requests for re-interment.

56. Ms Levitt envisaged that requests for re-interment elsewhere than Leicester Cathedral would be decided upon by adapting the DCMS *"Guidance for the Care of Human Remains in Museums"*. This was thought to offer a reasonable approach, albeit that the remains were not in a museum. The decision would be made by the Council and the University. There would be an appeal process for disappointed claimants.

57. The Council's plans continued to develop, and become more specific as to what was to be done, both before and after the announcement about claims for alternative reburial locations. The decision-maker was then to be the Council in consultation with the University, and ultimately the City Mayor. However, the attempt to agree a memorandum of understanding with the University ran into opposition from ULAS, which contended that the Council had no responsibility for reburying or deciding on reburial for the remains. It argued that had been dealt with by the licence and/or was for the MoJ. Mr Buckley did not agree with the Council's proposals for handling competing claims for re-interment. In the end, nothing came of the Council's proposals for consultation, which were not made public. Reference was made in a draft City Council press release to a more general public consultation as follows: *"If and when the identity of the remains are confirmed [sic], there will be an opportunity for the public to comment on the plan [for re-interment in Leicester Cathedral]"*. This sentence was, however, removed from the final draft after Mr Buckley voiced objection to it.

Further contact with Royal Household

58. The MoJ Burials Team said it regarded it as desirable that there were no concerns on the part of the Royal Family about the location of reburial. Mrs Gohil of the MoJ

Burials Team contacted a member of staff of the Royal Household and then sent him an email on 16th October 2012, saying that, if the remains were those of Richard III, the MoJ would arrange a meeting between the Royal Household and ULAS, to discuss where the remains would be deposited if HM The Queen had any views she wished to raise. No concerns were raised. No-one in the MoJ including the Secretary of State ever indicated an intention to discuss the location of reburial with anyone other than the Royal Household.

Parliamentary interest

59. Parliamentary interest in the location of reburial first manifested itself in a written question in October 2012 from a Yorkshire MP who was told that *"the current plan"* was for the remains to be re-interred in Leicester Cathedral. This was confirmed by the MoJ to Mr Buckley as meaning that the terms of the licence stood and that there were no plans to changes them unless he applied to the MoJ to do so. The Second Church Commissioner also answered a question in Parliament confirming that the remains would be re-interred by convention in the nearest Christian church or cathedral at Leicester.

60. The Parliamentary Under-Secretary to the MoJ received an update on the licence at the end of October 2012. It said that the MoJ had agreed to meet a representative of The Queen and the University if the remains were those of Richard III to discuss their resting place, but emphasised that this was, however, *"the sole decision of the University"*. This was the line taken towards media inquiries, and was also the line taken by Mr Buckley in his many meetings and interviews to radio stations around the country.

DNA confirmation announced on 4th February 2013

61. Meanwhile, the steps to trace descendants of Richard III's sister, Anne of York, for *mitochondrial* DNA purposes had proved fruitful and on 4th February 2013, the University of Leicester announced that DNA matching that of Richard III's sister, Anne of York, had been taken from two descendants, an anonymous donor and a donor based in Canada, Michael Ibsen. The University also confirmed at the press conference that the University, the Council and the Dean of Leicester Cathedral were all agreed that re-interment should take place in Leicester Cathedral and that the Cathedral had been asked to progress the plans for re-interment.

Intervention by the City of York

62. On 6th February 2013, however, the City of York wrote to the Secretary of State for Justice making representations for the re-interment to take place in York Minster. They also wrote to The Queen in the same vein. The Secretary of State replied that the decision was for the University under the terms of the licence, but he trusted that in making their decision they would take account of the differing views and *"the current public debate"*.

63. The next day, however, on 7th February 2013, York Minster issued a statement supporting the wish of the Chapter of Leicester for re-interment in Leicester Cathedral. Not long afterwards, it changed its position to one of neutrality.

Parliamentary debate on 12th March 2013

64. The question of where Richard III should be reburied was considered to be sufficiently important to warrant a Parliamentary debate. The briefing note to the Parliamentary Under-Secretary referred to the desire of *"Yorkists"* to see the remains buried in York, and the tourist potential this would have for York or Leicester. There was reference to rival online petitions, some of which had called for a state funeral or burial in Westminster Abbey. Although the MoJ could amend the licence conditions, it was thought highly unlikely that it would do so. The University was said to be willing to consider representations. The briefing note said: *"We have kept the Palace informed of developments; they do not wish to be involved in any meetings. DCMS consulted the Palace in answering PQs on a royal funeral and burial in Westminster Abbey - they did not wish for either."* It pointed out that the issue had been raised in Parliament on a number of other occasions.

65. In the debate itself on 12th March 2013, Members of Parliament for various constituencies spoke supporting Leicester or York respectively. One MP spoke in favour of Bassetlaw as a half way house between Leicester and York. Some expressed concern that the decision should not be left to the academics of one university, reached behind closed doors. References were made to the supposed wishes of Richard III, to the level of interest across the country, and to the collateral descendants who had expressed an interest in the issue.

66. The Parliamentary Under-Secretary of State for Justice (Jeremy Wright MP) refused, however, to re-visit the question of the licence. He said that it was *"unusual"* to amend licences and the place of re-burial was solely a matter for the University of Leicester to decide. He emphasised that the exhumation licence was treated in the same way as any archaeological exhumation licence application would be. It was invariably the case that conditions were attached as to where the remains should be re-interred. It was now for the University to decide where the remains were laid to rest. York Minster had openly supported Leicester Cathedral. He said that the Church of England's *"default"* position was reburial in the nearest Christian church. The interest of the state was to ensure that there was a suitable location for the remains, and whatever might be said in favour of York, no one was suggesting that Leicester was unsuitable. Since Leicester University had said that it was willing to take representations, he hoped that what was said in favour of York would be considered by them.

Proposed meeting of 'interested parties'

67. During the debate, the Parliamentary Under-Secretary agreed that the MoJ would facilitate a meeting between interested parties and the University. York City Council followed this up, noting the widespread public interest. The Secretary of State replied on 18th March 2013 that his officials were in the process of arranging such a meeting,

while maintaining the position that it was for the University to make the decision under the terms of the licence. A briefing note for him of 14th March 2013 had said:

> *"Officials are now in the process of making the arrangements for a meeting and propose to invite the following: the Director of Archaeological Services at Leicester University; York City Council; Leicester City Council, the Chief Clerk to the Queen; the Richard III Society; the Church of England; the Roman Catholic Church and the Advisory Panel on the Archaeology of Burials in England."*

68. Although on 26th March 2013, the Claimant announced that it would be seeking judicial review of the grant of the exhumation licence, the MoJ pressed ahead with its proposal. It wrote to Mr Buckley on 4th April 2013:

> *"We would like to press ahead with the meeting as soon as possible as the volume of correspondence, parliamentary and media interest does not seem to be abating. I think that given the availability of key parties, we should aim to hold the meeting towards the end of April or early May. As well as the University of Leicester Archaeology Services, we propose inviting individuals representing the following:*
>
> *York City Council*
> *Leicester City Council*
> *The Richard III Society*
> *The Church of England*
> *The Roman Catholic Church*
> *The Advisory Panel on the Archaeology of Burials in England*
> *The Department for Communities and Local Government*
> *HM The Queen*
>
> *The meeting will be facilitated by a senior MoJ official and its aim will be made very clear, that is, to allow attendees to make representations and express any concerns that they may have but that ultimately, the decision on re-interment remains a matter for the University to decide. We hope that the meeting will answer questions and address concerns – while most of the correspondence we have received on this subject has been about where re-interment should take place, there has also been some criticism about lack of consultation in the light of the discovery of remains of a former King."*

69. On 23rd April 2013, the Secretary of State wrote to York City Council confirming that the University was willing to participate out of courtesy and not obligation; he was not sure that the proposal for a panel of experts would be useful at that stage, although experts would be invited to the meeting.

70. Mr Buckley, in his second witness statement, explained the ULAS approach to this meeting. It had never been suggested that relatives of Richard III or members of the wider public would attend. It was not to be a formal consultation exercise on the location of re-interment. Rather, it would enable ULAS to explain the scientific work it had done, the steps to comply with the licence and the reasons why Leicester Cathedral had been chosen as the place for re-interment. This included the continuing support of Ms Langley and the Society for re-interment in the Cathedral, whatever

other differences there now were. There was some suggestion, however, that the Society had changed to a more neutral position as between Leicester and York.

71. The suggested meeting, which Ms Bernstein envisaged would have been some time in June 2013, is of importance in the light of what appeared to be a suggestion by Mr Clarke, Counsel for the Claimant, that this is all his client was looking for. Pressed to explain, he clarified that he meant the Claimant would have been satisfied with such a meeting if it were able to receive representations from the general public and the collateral descendants, in the form of a consultation of them. Ms Bernstein confirmed, however, that neither she nor Mr Clifford had given Ms Langley any assurance that the wishes of the relatives would be given *"due weight"* under the terms of the exhumation licence. The suggested meeting, according to Ms Bernstein, did not indicate any intention on the part of the Secretary of State to consult on the reburial location, or to amend the licence as a result of the meeting. It was simply an effort to bring people together. The period elapsed after Richard III's death was well beyond the 100 years after death which was the period which triggered the MoJ practice of consulting relatives about exhumation and reburial.

JUDICIAL REVIEW PROCEEDINGS

72. The Claimant brought judicial review proceedings. These were lodged with the Court on 3rd May 2013. At the time, the Claimant was unaware of the proposals for the meeting which was then postponed in the light of the litigation.

73. On 15th August 2013, permission for judicial review was granted by the single judge (Haddon-Cave J) on paper. An oral hearing of the case was inevitable in view of the issues involved and public interest. The Secretary of State did not take up the suggestion that a panel of Privy Councillors and experts be appointed to advise on the location of re-interment.

74. The litigation, thus, comes before the Divisional Court for resolution. It should be emphasised that the case is about procedures, duties and powers. The one issue which is *not* for us to determine, is where the remains of Richard III should be re-interred. That matter must be resolved by the body which has the responsibility in law for making the decision.

THE CLAIM

75. By these Judicial Review proceedings, the Claimant challenges:

(1) The Decision of the Secretary of State for Justice on 3rd September 2012 to grant the Licence *"without consulting, or attaching conditions requiring the licensee to consult, as to how [or where] the remains of Richard III should be appropriately*

re-interred in the event that they were found" ("the Licence Decision").

(2) The Decision of the Secretary of State for Justice from 4th February 2013 onwards subsequently *"not to re-visit the grant of the Licence once it became clear that the University would not carry out an appropriate consultation"* ("the Failure to Revisit").

(3) The Decision of the Council on or about 4th February 2013 *"either to begin making arrangements for the re-interment of the remains of Richard III at Leicester Cathedral or to accede to University's arrangements in that regard"* ("the Council Decision").

(4) The Decision of the University of Leicester on 4th February 2013 *"to begin making arrangements for the re-interment of the remains of Richard III at Leicester Cathedral"* ("the Re-interment Decision").

76. The Claimant argues that there should have been a public consultation and/or investigation as to the appropriate place for Richard III's re-interment, either through the appointment of a panel of suitably qualified experts or through the solicitation of views from the public at large. The Claimant submitted that the King's identifiable living relatives *"should have had an opportunity to have their views considered"*. It was submitted that this duty arose from the Secretary of State's settled practice of seeking to obtain appropriate consent from relatives to the exhumation of identifiable remains, or from the unique circumstances of this case. Without such investigation and or consultation the Secretary of State had failed to ensure he was properly informed of all the relevant facts. The Claimant's Grounds also asserted that Leicester Cathedral was not the most appropriate place for re-interment, but did not assert that the decision was irrational.

77. The judicial proceedings were resisted by the Secretary of State, the University and the Council on a number of grounds. They contended that the issue of the exhumation licence was lawful and there was no duty to consult on any basis. The Interested Parties, the Members, Chapter and Councils of Leicester Cathedral and York Minster filed evidence, but indicated an intention not to appear by Counsel at the hearing itself.

Leicester City Council

78. The Council were joined as a Defendant following its late intervention and assertion at the first substantive hearing on 26th November 2013 that it was the *"legal sentinel"* of the remains and the sole body entitled to take the decision as to where the remains were to be reinterred. At the conclusion of that hearing, the Council's former Counsel, Mr Norman Palmer QC (Hon.), indicated, to considerable surprise, that the Council would make its decision after carrying out a public consultation. The effect of the Council's intervention was that the judicial review hearing had to be adjourned until 13th and 14th March 2014.

79. Subsequently, however, the Council announced that its previous position had been misconceived, and it had no role as *"legal sentinel"* at all and would not carry out a public consultation. The Claimant, undeterred by that *volte face*, nevertheless continued with the claim against the Council, even to the extent that the Council became its second target, ahead of the University.

Locus standi

80. We must first consider the question of standing to bring to this claim. The Defendants insist that the Claimant lacks a sufficient interest in the subject matter and therefore has no standing (*locus standi).*

81. A claimant in an application by way of judicial review must have *"sufficient interest in the matter to which the application relates"* (section 31(3) of the Senior Courts Act 1981). The phrase *"sufficient interest"* has traditionally been given a wide meaning. The direction of travel of the authorities since the landmark case of *Turner v. Secretary of State of the Environment* (1973) 28 P. & C.R. 123 (Ackner J) has been an increasingly catholic view of *locus standi* (see *e.g. R(Residents Against Waste Site Ltd) v. Lancashire County Council* [2007] EWHC 2558 (Admin)).

82. It is fair to say that the relationship of Mr Nicolay and the other collateral relatives to their ancestor, Richard III, is, on any view, attenuated in terms of time and lineage. The Claimant's interest - indeed, that of the 16th, 17th and 18th generation descendants - may not suffice for personal standing. However, the points raised have a broader public interest sufficient for the Claimant to have standing in this case as a public interest litigant.

THE LAW

83. This case touches upon some fundamental issues of administrative law regarding the circumstances in which the courts will intervene in the exercise of a statutory power by a public body.

The English Common Law principle of "fairness"

84. It is appropriate to start any legal analysis by examining the Common Law principle of fairness in this context. Where a statutory process is of itself insufficient to ensure the requirements of fairness are satisfied, the Common Law will generally intervene to ensure that the requirements of fairness are met. As Byles J observed in *Cooper v Board of Works for the Wandsworth District* (1863) 14 CB(NS) 190, 194:

> *"[A] long course of decisions… establish that, although there are no positive words in a statute that the party shall be heard, yet the justice of the Common*

Law will supply the omission of the legislature."

85. In *Lloyd v McMahon* [1987] 1 AC 625, 702-3, Lord Bridge of Harwich said:

> *"[I]t is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."*

86. The intervention of the Common Law pre-dates the development of the modern law of Judicial Review. It has its *genesis* in judgments such as those of Coke CJ in *Bragg's Case* (77 E.R. 1271 at 1275; (1615) 11 Co. Rep. 95b); Coke CJ in *Bonham's Case* (77 E.R. 646; (1610) 8 Co. Rep. 113) and Fortescue J in *Dr Bentley's case* (93 E.R. 698; (1723) 8 Mod. 148; (1723) 1 Str. 557).

87. The principle was first developed in the Victorian era to supplement *"sparse"* statutory regimes which conferred apparently untrammelled powers on officers of state. As Lord Loreburn LC said in *Board of Education v Rice* [1911] AC 179 at 182:

> *"Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds […] In such cases […] they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything."*

88. The Burials Act 1857 is a paradigm example of a sparse Victorian statute. Section 25 grants an ostensibly untrammelled power to the Secretary of State to grant licences for the disinterment and re-interment of human remains. It does not include any requirement for any particular processes or procedures to be followed by the Secretary of State when granting such licences as regards, *e.g.* consultation with relatives who might have an obvious and legitimate interest in the matter.

89. In Victorian times, detailed statutory codes were exceptional, and "the courts supplied the omissions, in the interests of justice to individuals, by importing common-law principles" (De Smith on Judicial Review, 7th edition, 2013, paragraph 6-026). It should be noted that that style of minimalist legislative drafting has gone out of fashion. Modern Parliamentary legislation tends to be detailed and complex and normally expressly prescribes the processes, procedures and evidence to be followed and taken into account when statutory decisions are made. That being the case, there may be less scope for courts to read into modern statutes implied procedural obligations than in relation to statutes of greater antiquity.

90. As a recently published text book on judicial review has put it, the Common Law's intervention is usually justified on the basis that Parliament is taken to have legislated in the knowledge of the Common Law duty to act fairly and the requirement of fairness, and on the assumption that decision-makers will act accordance with those requirements (*Judicial Review Principles and Procedure* by Auburn, Moffett and Sharland, 2013 Edition, paragraph 5.16). Where wide powers of decision-making are conferred by statute, it is presumed that Parliament implicitly requires the decision to be made in accordance with the rules of natural justice (Bennion on *Statutory Interpretation, 2nd edition*, p. 737). Parliament is not to be presumed to act unfairly: the courts will imply into the statutory provision a rule that the principles of natural justice should be applied (*Wiseman v. Borneman* [1971] AC 297, at p. 310, *per* Lord Guest).

91. Lord Browne-Wilkinson described this as a principle of construction requiring the courts to interpret even very wide words in a statute as implicitly limited by the presumption that Parliament intends the Common Law requirements of fairness to apply unless it has indicated to the contrary (*Pierson v. Secretary of State for the Home Department* [1998] AC 539, 573-4). Parliament does not legislate in a vacuum: statutes are drafted on the basis that the ordinary rules and principles of the Common Law will apply to the express statutory provisions (*ibid,* at 573-4). The duty of fairness governing the exercise of a statutory power is a limitation on the discretion of the decision-maker which is implied into the statute (*Bank Mellat (Appellant) v Her Majesty's Treasury (Respondent) (No. 2)* [2013] UKSC 39, *per* Lord Sumption at paragraph [35]).

92. The duty to act fairly or consult or take certain procedural steps may, of course, be expressly or impliedly excluded by the words of the statute itself. It should be noted, however, that *e.g.* the maxim of construction *expressio unius exclusio alterius* (the express mention of one thing excludes all others) can seldom, if ever, be enough to exclude the Common Law rules of natural justice (*R (West) v Parole Board* [2005] 1 WLR 350, *per* Bingham LJ at paragraph [29]). There is nothing in the Burials Act 1857 which would prevent the implication of a procedural obligation to consult, if the context required this in order to ensure that the decision was fair.

93. The Common Law principle of fairness is mirrored by the developing European principle of "*good administration*" (see *European Administrative Law* by Jurgen Schwarze, Sweet & Maxwell 1992 and authorities such as *Case T-83/91 Tetra Pak International SA v. Commission of the European Communities*; *Case T-231/97 New Europe consulting Ltd v. Commission*; and *Joined Cases T-33/984 and T-34/98 Petrotub v. Council*).

Intuitive judgment

94. In *R (Doody) v Secretary of State for the Home Department* [1994] 1 AC 531 at 560, Lord Mustill emphasised that the exercise of determining the requirements of fairness was "*essentially an <u>intuitive</u> judgment*" and highly dependent on context. In a well-

known and oft-cited passage, Lord Mustill summarised the principles to be derived from the authorities in six propositions (at page 560):

> *"(1) [W]here an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."*

Public law duties

95. The basic Common Law principle of fairness has found expression in public law in a number of ways, which limit or control the exercise of the power by government or public bodies by imposing certain duties on them before making administrative decisions, in particular, the duty to consult.

96. There are three particular public law duties relied upon by the Claimant in the present case:

1. A duty to consult.
2. A duty to carry out sufficient inquiry.
3. A duty to have regard to relevant considerations.

Duty to consult

97. A duty to consult may arise by statute or at Common Law. When a statute imposes a duty to consult, the statute tends to define precisely the subject matter of the consultation and the group(s) to be consulted. The Common Law recognises a duty to consult, but only in certain circumstances.

98. The following general principles can be derived from the authorities:

1. There is no general duty to consult at Common Law. The government of the country would grind to a halt if every decision-maker were required in every case to consult everyone who might be affected by his decision. *Harrow Community Support Limited) v. The Secretary of State for Defence* [2012] EWHC 1921 (Admin) at paragraph [29], *per* Haddon-Cave J).

2. There are four main circumstances where a duty to consult may arise. First, where there is a statutory duty to consult. Second, where there has been a promise to consult. Third, where there has been an established practice of consultation. Fourth, where, in exceptional cases, a failure to consult would lead to conspicuous unfairness. Absent these factors, there will be no obligation on a public body to consult (*R (Cheshire East Borough Council) v. Secretary of State for Environment, Food and Rural Affairs* [2011] EWHC 1975 (Admin) at paragraphs [68-82], especially at [72]).

3. The Common Law will be slow to require a public body to engage in consultation where there has been no assurance, either of consultation (procedural expectation), or as to the continuance of a policy to consult (substantive expectation) (*(R Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755, at paragraphs [41] and [48], *per* Laws LJ).

4. A duty to consult, *i.e.* in relation to measures which may adversely affect an identified interest group or sector of society, is not open-ended. The duty must have defined limits which hold good for all such measures (*R (BAPIO Ltd) v Secretary of State for the Home Department* [2007] EWCA Civ 1139 at paragraphs [43]-[44], *per* Sedley LJ).

5. The Common Law will not require consultation as a condition of the exercise of a statutory function where a duty to consult would require a specificity which the courts cannot furnish without assuming the role of a legislator (*R (BAPIO Ltd) (supra)* at paragraph [47], *per* Sedley LJ)

6. The courts should not add a burden of consultation which the democratically elected body decided not to impose (*R(London Borough of Hillingdon) v. The Lord Chancellor* [2008] EWHC 2683 (QB)).

7. The Common Law will, however, supply the omissions of the legislature by importing Common Law principles of fairness, good faith and consultation where it is necessary to do, *e.g.* in sparse Victoria statutes (*Board of Education v Rice* [1911] AC 179, at page 182, *per* Lord Loreburn LC) (see further above).

8. Where a public authority charged with a duty of making a decision promises to follow a certain procedure before reaching that decision, good administration requires that it should be bound by its undertaking as to procedure provided that this does not conflict with the authority's statutory duty (*Attorney-General for Hong Kong v Ng Yuen Shiu* [1983] AC 629, especially at page 638 G).

9. The doctrine of legitimate expectation does not embrace expectations arising (merely) from the scale or context of particular decisions, since otherwise the

duty of consultation would be entirely open-ended and no public authority could tell with any confidence in which circumstances a duty of consultation was be cast upon them (*In Re Westminster City Council* [1986] AC 668, HL, at 692, *per* Lord Bridge).

10. A legitimate expectation may be created by an express representation that there will be consultation (*R (Nadarajah) v Secretary of State for the Home Department* [2003] EWCA 1768 Civ), or a practice of the requisite clarity, unequivocality and unconditionality (*R (Davies) v HMRC* [2011] 1 WLR 2625 at paragraphs [49] and [58], *per* Lord Wilson).

11. Even where a requisite legitimate expectation is created, it must further be shown that there would be unfairness amounting to an abuse of power for the public authority not to be held to its promise (*R(Coughlan) v. North and East Devon Health Authority* [2001] 1 QB 213 at paragraph [89] *per* Lord Woolf MR).

Duty to carry out sufficient inquiry/Tameside duty

99. A public body has a duty to carry out a sufficient inquiry prior to making its decision. This is sometimes known as the 'Tameside' duty since the principle derives from Lord Diplock's speech in *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014, where he said (at page 1065B): "*The question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?*".

100. The following principles can be gleaned from the authorities:

1. The obligation upon the decision-maker is only to take such steps to inform himself as are reasonable.

2. Subject to a *Wednesbury* challenge, it is for the public body, and not the court to decide upon the manner and intensity of inquiry to be undertaken (*R(Khatun) v Newham LBC* [2005] QB 37 at paragraph [35], per Laws LJ).

3. The court should not intervene merely because it considers that further inquiries would have been sensible or desirable. It should intervene only if no reasonable authority could have been satisfied on the basis of the inquiries made that it possessed the information necessary for its decision (*per* Neill LJ in *R (Bayani) v. Kensington and Chelsea Royal LBC* (1990) 22 HLR 406).

4. The court should establish what material was before the authority and should only strike down a decision by the authority not to make further inquiries if no reasonable council possessed of that material could suppose that the inquiries they had made were sufficient (*per* Schiemann J in *R (Costello) v Nottingham City Council* (1989) 21 HLR 301; cited with approval by Laws LJ in (*R(Khatun) v Newham LBC (supra)* at paragraph [35]).

5. The principle that the decision-maker must call his own attention to considerations relevant to his decision, a duty which in practice may require him to consult outside bodies with a particular knowledge or involvement in the case, does not spring from a duty of procedural fairness to the applicant, but from the Secretary of State's duty so to inform himself as to arrive at a rational conclusion (*per* Laws LJ in *(R (London Borough of Southwark) v Secretary of State for Education (supra)* at page 323D).

6. The wider the discretion conferred on the Secretary of State, the more important it must be that he has all relevant material to enable him properly to exercise it *(R (Venables) v Secretary of State for the Home Department* [1998] AC 407 at 466G).

Duty to have regard to relevant considerations

101. A public body also has a duty to have regard to relevant considerations when making its decision. The decision-maker's duty to have regard to relevant considerations may require him to "hear the other side" and thereby take into account the affected person's views about the subject-matter (*R (Khatun) v Newham London Borough Council* [2005] QB 37, at [27] *per* Laws LJ).

THE BURIAL ACT 1857

102. Section 25 of the Burial Act 1857 is one of the last surviving vestiges of an Act which provided for Burial Boards, the acquisition of burial grounds, and their consecrated and unconsecrated parts. This provision has become of great importance in the exhumation of buried remains, not just of those more recently buried, but the more so for archaeological excavations. Its concern is with disturbance and exhumation, rather than ordaining the location of reburial; that is dealt with by conditions on the licence. The car park in question was not consecrated ground.

103. Section 25 provides:

> ***"25. Bodies not to be removed from burial grounds, save under faculty, without licence of Secretary of State.***
>
> *Except in the cases where a body is removed from one consecrated place of burial to another by faculty granted by the ordinary for that purpose, it shall not be lawful to remove any body, or the remains of any body, which may have been interred in any place of burial, without licence under the hand of one of Her Majesty's Principal Secretaries of State, and with such precautions as such Secretary of State may prescribe as the condition of such licence; and any person who shall remove any such body or remains, contrary to this enactment, or who shall neglect to observe the precautions prescribed as the condition of the licence for removal, shall, on summary conviction before any*

> *two justices of the peace, forfeit and pay for every such offence a sum not exceeding [level 1 on the standard scale].*"

104. In *R (Rudewicz) v Secretary of State for Justice* [2012] EWCA Civ 499, [2013] QB 410, Lord Neuberger MR said:

> "[30] *Section 25(ii) appears to confer an unfettered discretion on the Secretary of State, and it is, at least in the absence of special circumstances, inappropriate for the court to treat a statutorily conferred discretion with no express limitations or fetters, as being somehow implicitly limited or fettered*."
>
> [31] *[U]nless there is some justification for [treating the discretion as limited or fettered], it is for the Secretary of State to decide on what grounds and in what circumstances to grant a licence, and, apart from an obligation to act rationally, and otherwise in accordance with the general law (including that relating to human rights), there should be no operative fetter or presumption.*"

105. However, as Laws J observed in *R (Fewings) v Somerset City Council* [1995] 1 All ER 513 at 524A there is "*no such thing as an unfettered discretion"*. The Secretary of State has a duty when granting such licences to act rationally and in accordance with the general public law principles governing the exercise of a statutory discretion. Lord Neuberger did not intend to contradict those basic principles, and paragraph 30 has to be read as subject to them.

GUIDANCE

MoJ's guidance and practice

106. Ms Bernstein explained in her witness statement how s.25 of the Burial Act 1857 was applied by the MoJ Burials Team. Although there is no statutory division of this sort, the MoJ has two types of application form: (i) the exhumation of a named individual, usually from the next of kin in respect of someone buried less than 200 years ago, and generally less than 100 years ago; and (ii) where the remains were significantly older, "ancient" and of an unknown person, for archaeological purposes. The MoJ received annually about 1,200 applications in the first category and 200 in the second.

107. The MoJ provides guidance notes for applicants entitled "*Guidance Note on Application for the Removal of Remains"*. In the first category of applications, the MoJ's usual practice was to see that the consent of the next of kin - identified and prioritised by standard probate principles - had been obtained. It would consider whether any next of kin had a close relationship with the deceased *before* death. The

next-of-kin have to say whether they anticipate objections from other relatives, but the guidance emphasises that the MoJ will not become embroiled in family disputes, and that the licence will have to wait until all that has been sorted out. The consent of the owners of the ground from which the remains are to be removed, and of the ground in which they are to be reburied, would be required. Where the relatives of a named non-ancient person could not readily be traced, the MoJ would require the applicant to publicise the proposed exhumation.

108. In the second category of case - into which Ms Bernstein said the application for the exhumation licence in this case fell - the consent of the landowner from which the exhumation would take place was required. The applications were usually by professional archaeologists who would often contact interested persons, as ULAS did here with the Society. Information was required by the form about the details of the project rather than about the next of kin. Applications in respect of named ancient remains were very rare; she could only call one to mind. They fell to be considered on their individual merits.

109. Conditions would usually be imposed to ensure the decency of the exhumation and to avoid a risk to public health. The archaeologist would usually be allowed two years for the retention of the remains before he would be required by condition or precaution to reinter the remains in a lawful burial ground, or to deposit them in a museum or the like. Conditions could be amended, but Ms Bernstein was not aware of any amendments other than on the licence-holder's application. The precise location of re-interment was left to the licence-holder, since the MoJ's primary concern was with the decency of exhumation and subsequent treatment, which could be adequately catered for with the flexibility created by the sort of general wording found at the end of the licence at issue here.

110. Ms Bernstein said that there had never been a public consultation on either type of licence. She added that neither applications nor the licences were made public, as a matter of practice. There is no public register of either, as there is with planning permissions for example.

111. Various other documents were also relied upon on by the Claimant to show that consultation of the public or community or relatives was an accepted and established part of reburial of exhumed or discovered remains, or of claims for the return of remains, and, he submitted, should be in this case of a discovery of a named individual in his or her burial place. It is necessary to refer briefly to them.

Church of England and English Heritage guidance

112. The Church of England and English Heritage produced joint guidance in 2005 entitled *"Guidance for best practice for treatment of human remains excavated from Christian burial grounds in England."* It should be noted, however, that this is neither MoJ guidance, nor guidance adopted by it, nor guidance adopted by ULAS or the

Council. None purported or promised to apply it. It contains much of interest, but little of direct relevance to this case. The Claimant nevertheless put some weight on it.

113. The document restricted itself to Christian burials going back to the foundation of the Church of England in A.D. 597, and was principally concerned with remains now over 100 years old. Mr Clarke highlighted paragraph 18 which reads:

> *"Ethical treatment of human remains involves making decisions that take into account, via appropriate consultation, the views of individuals and groups with legitimate interests in those remains. These interests include those of the dead themselves and their surviving family and descendants, the Church and other bodies responsible for the care of the dead, the general public, particularly those with direct links to the place of burial, and the scientific research community, including archaeologists, osteologists, and medical and forensic scientists."*

114. The guidance explained that upon burial, responsibility for the body was effectively handed over to the Church. Even where the remains were over 100 years old and there was no legal obligation to trace next of kin, *"it would be ethical to accord views of living close family members strong weight"*. When 18th or 19th Century burial grounds were to be excavated, local publicity should be given to alert local people who might be living descendants of interred individuals so that their view could be heard.

DCMS guidance for Museums

115. The Department for Culture, Media and Sport issued *"Guidance for the Care of Human Remains in Museums"* also in 2005. By its title, however, it has no direct relevance to the issues here. It is important to have close regard to the purpose and context of this guidance. It states that it is primarily drafted in terms of claims for the return of human remains of overseas origin, but would apply to claims in relation to remains in a museum regardless of origin. Different issues arise where genealogical descendants or communities which have a strong cultural attachment to the bones of their forebears - excavated perhaps without any local permission - claim their return.

116. It is in that context that the acceptance in the guidance that "members of a family or wider community might wish to exert rights as to where human remains that relate to them are located and how they are treated" should be read. The open and constructive dialogue between museum and claimants with advisory panels of experts is apposite for those issues. Context explains the comment that if genealogical descendants can demonstrate "direct and close genealogical link to the human remains, their wishes would generally be given strong weight". The discussion in the guidance of the importance of the cultural community of origin may explain the references in some of Ms Levitt's thinking to Leicester as being the cultural community with whom there should be consultation. However, in our view, paragraph 3.3.2 read properly is of no assistance to the Claimant and of little relevance to the Council. Claims for remains over 300 years old were unlikely to succeed, and for remains over 500 years old were

unlikely "to be considered", in the absence of the demonstration of a very close and continuous geographical, religious, spiritual and cultural link.

117. Furthermore, it was not guidance which any body promised that it would follow or represented itself as following, even though Ms Levitt saw it as offering useful guidance, and the Council saw the decision on re-interment as consistent with that guidance. In our view, Mr Clarke was wrong to suggest that ULAS had accepted its relevance. The mere fact that it is the guidance of a Government Department does not make it relevant to the issues here.

The Council's museum guidance

118. The Council's own museum service produced in 2012 a second edition of its Guidance on *"The Curation, Care and Use of Human Remains"*. Mr Clarke pointed out that it referred back to the DCMS 2005 guidance. That is neither surprising nor relevant. The need for museums, facing claims, to pursue policies of openness, consultation and transparency, with a view to making negotiations as equitable as possible, is sound enough reason but not relevant to the issues here. The museums retain the decision-making power. The guidance also states that the licence, in relation to recently excavated remains, will state their intended future management of the remains, including appropriate reinterment. This does not advance the Claimant's case, or the line which Ms Levitt was at one time pursuing, although the Council also saw the decision on reinterment in the Cathedral as consistent with that Guidance.

The Commonwealth War Graves Commission

119. The Commonwealth War Graves Commission explained to the Claimant in a letter dated 12th April 2013 that if the remains of a soldier killed in the First World War were identified, every effort would be made to contact the nearest relatives, and their wishes would be taken into consideration in deciding where the casualty should be interred. In our judgment, the circumstances bear no real comparison to the passage of over five centuries since Richard III was killed at the Battle of Bosworth.

ANALYSIS

The meaning of the licence

120. Plainly, the licence permitted the remains of Richard III to be reinterred in Leicester Cathedral. There is no need to consider whether on its true construction it permitted their retention in the Museum, or burial in another burial ground, since that was not the intention of ULAS. Those precautions were to provide for the remains of the five unidentified remains exhumed in the same excavation.

121. However, that does not answer the question whether ULAS could reinter the remains of Richard III elsewhere than Leicester Cathedral without an amendment to the licence, and, in particular, whether re-interment in York Minster itself would require an amendment to the licence.

122. Read on its own and strictly, the licence would appear to give to ULAS the option of depositing any of the remains in the Jewry Wall Museum, or reinterring any of them in the Cathedral, or burying any of them *"in a burial ground in which interments may lawfully take place"*. But that is clearly not what it means. It cannot be read as permitting ULAS to deposit the remains of Richard III in the Museum, or as requiring re-interment in the Cathedral for the five unknown remains. The licence must be construed in the light of the circumstances known at the time of grant: the remains of Richard III might be one of the six sets of remains to be excavated. Provision for that contingency, however remote, needed to be made. The Cathedral was the contingent place for their re-interment. The options of Jewry Wall Museum and some other burial ground, (whatever that might mean), were plainly not the contingent plans for Richard III. In our judgment, the licence means that Leicester Cathedral is the only place in which ULAS can inter the remains of Richard III. That is also why the consent of the Cathedral needed to be obtained, and it was only for Richard III that it was obtained.

123. There is no reason why the application form, and the letter from the MoJ which accompanied the licence, should not be read together. The licence is not a document which is placed on a public register for the information of the public so that the public can act on it. The letter and form confirm that the meaning of the licence set out above is the one which both applicant and grantor understood and agreed. The consequence is that unless and until the Secretary of State amends the licence, if he has the power to do so, ULAS is obliged to reinter the remains in Leicester Cathedral.

Did the MoJ have power to amend the licence generally and in the absence of an application?

124. We accept Mr Eadie QC's uncontested submission on behalf of the Secretary of State that, if the Secretary of State considered that ULAS was proposing to reinter the remains of Richard III in an unsuitable place, say in an ordinary burial ground, but which nonetheless was assumed to comply with the terms of the licence, he could intervene, by amending the licence. He would not require an application from ULAS to empower him to do so. There is no statutory provision for amendment, nor requirement for an application to be made in order for any power of amendment to arise. However, the language of the Act does not preclude the Secretary of State amending a licence. He and the licence-holder may be dealing with the unknown when the licence is granted, and its terms may not be fit for what is in fact found. This necessary, but implied, power to amend requires, of its nature, no application for its lawful exercise.

The Claimant's challenge

125. It became clear early in the course of Mr Clarke's oral submissions that his real case was that the Secretary of State ought to have reconsidered the terms of the licence once the remains had been conclusively shown to be those of Richard III. However, the earlier bases of challenge, with the exception of the Article 8 claim, were not withdrawn.

126. The licence comprises two elements: the liberty to exhume and the reburial conditions. There has been no suggestion that the exhumation, which required a licence, was itself objectionable without consultation with the possible relatives or with the general public or any other body or person. There is also no issue but that reburial should take place within a Christian building. Absent a licence, the exhumation could not have occurred, and the remains of Richard III would not have been disinterred or identified. The licence, which enabled that to happen, would not have been granted without provision for the respectful and decent deposition of the remains identified or not.

Consultation before grant of licence

127. Mr Clarke's first argument was that before the MoJ accepted the proposed contingency for reburial in Leicester Cathedral, it should have consulted identified living relatives, the public more widely, and other interested bodies.

128. In our view, consultation at this early stage would have been premature and unnecessary. It was premature because the possibility the remains might be those of Richard III was remote. Unless and until the remains were identified, the consultation would have lacked purpose and meaning. In any event, as we have already indicated, the Secretary of State had the power to amend the licence at any stage of his own volition, without application, if that proved to be necessary. It is difficult to see, from what was then known, that there was any obvious area of information which needed to be covered before permitting what, on its face, was a perfectly proper, carefully crafted and considered proposal. It was in line with best practice, commanding local, Church, Society and Royal support. Moreover, public interest, and the interest of the distant relatives, might still have been aroused by later confirmation of identity in a way which would have brought about the complaint that such consultation was premature and should be undertaken again.

Consultation as condition of licence

129. Mr Clarke's variant on this argument was that the licence should not have been granted without a precaution (or condition subsequent) requiring consultations of the nature which he submits should have been carried out as part of revisiting the decision on the location of reburial, if and when the remains had been positively identified as those of Richard III.

130. To our mind Mr Clarke never properly addressed the consequences of this argument. If successful, either the licence would have to be quashed, or the reburial condition quashed. Quashing the licence would go far further than what is necessary even on the

Claimant's primary case. As we have indicated, there is no challenge to the exhumation, and to a Cathedral reburial. The challenge is only to the location of re-interment, and boils down to a contention that York Minster should have been considered through a public consultation process. Quashing the licence would strictly mean that the exhumations would have been carried out without a licence, which would be a criminal offence. Further, the vexed issue of control over the remains would then arise. Logically, no fresh exhumation licence could then be granted since the remains have been exhumed already. Equally, if the reburial precaution were to be quashed, it would leave the exhumation permission intact but devoid of a reburial requirement.

131. Thus, the Claimant's argument has to go beyond mere severance of what is said to be an unlawful precaution. It has to go so far as to require the writing into the licence of a requirement by the licensee to carry out consultation, or to require the MoJ to do so. Some may find it surprising were the Claimant to suggest that ULAS should carry out any consultation, since that would leave it as the final decision-maker, when its, naturally partisan, views on the place of reburial are well known.

132. We have heard no argument on the implications of this aspect. It goes far beyond the normal consequences of severance, *i.e.* in the limited range of circumstances in which an invalid part of an otherwise valid licence or permission is severed, and the remainder continues in effect. The Court would have to devise new wording, and it would have to be satisfied that, without that specific wording, no licence could rationally have been granted. Otherwise, it would be usurping the powers of the MoJ. This goes a considerable way beyond the permissible role of the Court in addressing the consequences of quashing part of a licence. The Court, on the logic of the Claimant's case, in effect, would be asked *post hoc* to impose a very different condition on the permission after the permission had been acted on. A licensee who has accepted and acted on a licence on the faith of a particular set of conditions will have altered their position, and may have done so to their material detriment. If the Court had the necessary power, the arguments against its exercise as a matter of discretion would be very powerful.

133. In any event for the reasons given in paragraph 128 above we reject the argument.

Article 8

134. As we have already indicated Mr Clarke sensibly abandoned a separate claim under Article 8 of the European Convention on Human Rights. It was doomed to fail.

Claimant's main case: obligation to revisit the reburial condition

135. Mr Clarke's main case, therefore, was that there was an obligation, principally on the part of the MoJ, to revisit or reconsider the licence once the remains had been

conclusively identified as those of Richard III. We do not need to consider how such an obligation might have arisen where there had been room for doubt about the remains because in the present case the DNA test put the matter beyond doubt. The obligation to reconsider would have arisen by mid-March 2013, and after the Parliamentary debate had shown that there were genuine differences of view about where the reburial should take place among representatives of public opinion.

Duty to carry out sufficient inquiry/Tameside argument

136. Mr Clarke characterised the Claimant's essential argument against the Secretary of State as, in reality, a *Tameside* challenge. He submitted that the Secretary of State had failed properly to inform himself, before taking the relevant decisions, by carrying out a public consultation as to where Richard III should be reburied. In this regard, he revised the order of the Claimant's Grounds which had previously put the duty to consult *simpliciter* and legitimate expectation at the forefront of the Claimant's case.

137. In our view, however, *Tameside* should not be used to introduce a consultation process by the back door. This does not mean to say that the information necessary to make an informed decision cannot itself be the product of consultation. It can. As Laws LJ made clear, the decision-maker's duty to call his own attention to considerations relevant to his decision "*in practice may require him to consult outside bodies with a particular knowledge or involvement in the case" (*see *R (London Borough of Southwark) v Secretary of State for Education (supra)* at page 323D).

138. Nor should *Tameside* be used as a proxy for what is, in truth, a process challenge. As Laws LJ again made clear, the duty on the decision-maker to call his own attention to considerations relevant to his decision, *"does not spring from a duty of procedural fairness, but from the decision-maker's duty so to inform himself as to arrive at a rational conclusion"* (see *R (London Borough of Southwark) v Secretary of State for Education (supra)* at page 323D).

139. It is important to emphasise that the test for a *Tameside* duty is fundamentally different from the test for a duty to consult. The test for a *Tameside* duty is one of rationality, not of process. The *Tameside* test can be formulated as follows: Could a rational decision-maker, in this statutory context, take this decision without considering these particular facts or factors? And if the decision-maker was unaware of the particular fact or factor at the time, could he or she nevertheless take this decision without taking reasonable steps to inform him or herself of the same? The test for a *Tameside* duty (*i.e.* the duty to carry out a sufficient inquiry prior to making a decision and as to what information must be obtained by the decision-maker prior to making the decision in question) is, therefore, higher than the test for whether consultation is required. In short, the *Tameside* information must be of such importance, or centrality, that its absence renders the decision irrational.

140. It is common ground that the Secretary of State did not revisit the exhumation licence at any stage. It is not suggested that the Secretary of State took a positive decision not

to revisit the licence condition because of any particular information he possessed. Rather, it is suggested that he failed properly to inform himself at the relevant time by carrying out appropriate consultation. Taking into account the above authorities, the Claimant's *Tameside* argument, properly viewed, can be formulated as follows: the Secretary of State failed properly to inform himself as to the views of the identified relatives and the general public and other bodies as to the preferred burial place for Richard III by carrying out a public consultation and this renders the decision not to revisit the licence irrational.

Two-stage inquiry

141. The court engages in a two-stage inquiry. First, the court must establish what material was before the decision-maker and what he or she knew when he made the decision. Second, the court must decide whether no reasonable decision-maker, possessed of that material, could have proceeded to make a decision without making further inquiries (*c.f.* Schiemann J in *R (Costello) v Nottingham City Council (supra)).*

What did Secretary of State know?

142. During the period in question *post*-4th February 2013 (*i.e.* the period when it is said he should have revisited his decision), the Secretary of State would have had considerable information before him.

143. He knew the following:

(1) Those responsible for organising and funding the project had identified Leicester as the place for re-interment of the remains should they be confirmed as those of Richard III and had obtained the consent of the Cathedral.

(2) The Council, as landowner and local authority for the area of exhumation and proposed reburial, had given its consent to exhumation and to the particular place of reburial.

(3) The preferred location accorded with best practice for the reburial of archaeological Christian human remains, namely, the nearest church or churchyard in the same Parish as the Friary.

(4) Leicester Cathedral was nearest to the place which Henry VII had chosen or approved for the burial, and later embellished, and where the body had lain for more than 500 years, and where Richard III was already commemorated.

(5) The Cathedral was close to the battlefield where the men who fought for and with Richard III were killed, and were probably buried.

(6) The Society, which had been the body most concerned with the reputation of Richard III for many years, was at that time in favour of Leicester Cathedral.

(7) The Palace and the Duke of Gloucester had been consulted and kept informed. The Palace had been consulted about a Royal funeral for Richard III and reburial in Westminster Abbey (a Royal Peculiar), but HM The Queen did not express a wish for either. The Secretary of State knew, therefore, that HM Queen was content with Leicester Cathedral as the reburial place and was not advocating an alternative. He would also, presumably, have been aware that Henry VII had approved of Richard III's burial site having paid for an alabaster tomb for him to be erected at Grey Friars in 1495 (see above).

(8) The Established Church, the Church of England, was content with Leicester Cathedral as the place of reburial. York Minster was not laying claim to the body but was deferring to Leicester Cathedral's claim. Whilst York Minster may now be adopting a more avowedly neutral stance, it is apparent that it still accepts Leicester Cathedral is the appropriate place of burial for Richard III. Neither is there any evidence that the Archbishop of Canterbury or Lambeth Palace saw fit to intervene in the matter.

(9) The Secretary of State himself was content that these remains of Richard III would be reburied in Leicester Cathedral, he having granted an exhumation licence to the University on that understanding.

(10) There could be no close relatives. In addition to the handful of named collateral 16th, 17th and 18th generation descendant subscribers to the Claimant, the potential number of descendants from Richard III might number in the millions.

(11) The proposal had provoked widespread debate and strong rival views were held regarding the eventual resting place of Richard III. This would have been all too apparent in particular from the widespread Media and Press reports, the work of the Society, the rival online petitions and from the trenchant views expressed by rival factions during, *e.g.*, the Parliamentary debate on12th March 2013. The fact that there was a great deal of strong public feeling on the subject was expressly acknowledged by the Parliamentary Under-Secretary of State for Justice (Helen Grant MP), in a letter to the MP for Richmond, Yorkshire (the Rt Hon. William Hague MP) dated 22nd March 2013.

Was the decision not to revisit rational without further inquiries?

144. The second stage of the Court's inquiry is to determine whether, knowing what he did, the Secretary of State's decision not to revisit the licence was rational without making further inquiries.

145. We conclude that it was. It could not be said that the original proposal for re-interment in Leicester Cathedral was irrational for all the reasons we have given. The Secretary of State would have been well aware of the passionate and deeply held

convictions in the local populaces of Leicester and York as to whether that issue should be re-visited. He would have been aware of the rival historical, geographical and tribal arguments, the variety of competing claims to entitlement, and the importance of the issue for local pride, tourism and standing. Much of this was, or would have been, predictable. It is difficult to see what more the Secretary of State needed, save perhaps for some flesh on the bones of the rival arguments. The fact that some sort of consultation, or further inquiries, might have been possible or desirable, does not mean that no reasonable or rational decision-maker could have been satisfied on the basis of the information already to hand (*c.f.* Neill LJ in *R (Bayani) v. Kensington and Chelsea Royal LBC (supra)*).

146. Mr Clarke was unable to point to any significant new factor of which the Secretary of State would have been unaware, and none emerged during the hearing. There was no direct evidence of any definitive wishes expressed by Richard III as to his place of burial, whether on the assumption that he would die in peace after a long reign, or on the assumption that he would lose the battle of Bosworth, and be killed along with his men. In our view, the suggestion that Richard III was to have endowed a chancery at York with 100 chaplains falls short of any definitive or overriding expression of where he wished to be buried.

147. The Secretary of State is not accused of being unaware of his powers. He declined, in reality, to intervene further, in the light of both the considerable general background knowledge which he had and the specific knowledge he had about the views of Sovereign, State and the Church. The offer of a meeting at the MoJ was not an acknowledgement that he did not have enough information, or an offer to intervene, or to change the licence.

Conclusion on Tameside

148. In our judgment, therefore, it cannot be said in public law terms that the Secretary of State failed to act as a reasonable or rational decision-maker when deciding not to revisit the exhumation licence in the light of the information which he already had. A panel of Privy Councillors and experts was not rationally necessary, though it may have been politic. Minister deals in politics; the Courts do not. The Courts deal in rationality.

149. In conclusion, therefore, in our judgment, there is no *Tameside* basis for quashing the decision.

Duty to Consult argument

150. The Claimant argues that the Secretary of State had a duty to consult in any event. Absent a statutory duty to consult, a claimant has to establish (i) a promise to consult,

(ii) an established practice of consulting or (iii) conspicuous unfairness (*c.f. R (Cheshire East Borough Council) v. Secretary of State for Environment, Food and Rural Affairs (supra).*

151. There was no promise to consult on the part of the Secretary of State. Mr Clarke put the duty to consult, therefore, on two main bases. First, he argued that the public law of England and Wales is not merely the law of the playground and *"finders-keepers"*; and it is the established approach of responsible public bodies, including the Secretary of State, to consult where there was the exhumation of identifiable remains. In this regard, he relied upon the various guidance issued by the MoJ, the Secretary of State, the DCMS and English Heritage (*supra*). Second, Mr Clarke argued that the unique and unprecedented nature of this find meant that it would be conspicuously unfair, in particular to the relatives, if no consultation was carried out.

Established practice to consult

152. In our view, on close reading, none of the guidance documents relied upon materially assists the Claimant. We have referred to the relevant guidance documents above, in particular (i) the MoJ guidance notes for applicants entitled *"Guidance Note on Application for the Removal of Remains*", (ii) the Church of England and English Heritage guidance entitled *"Guidance for best practice for treatment of human remains excavated from Christian burial grounds in England"*, (iii) the DCMS 2005 guidance entitled *"Guidance for the Care of Human Remains in Museums"* and (iv) the Council's 2012 guidance entitled *"The Curation, Care and Use of Human Remains"*.

153. None shows a practice to consult in circumstances such as the present. None shows an established practice on the part of the Secretary of State to consult long lost collateral relatives in the event of the archaeological discovery of the remains of a historical figure after 500 years. In our judgment, none gives rise to a legitimate expectation that collateral descendants would be consulted, after centuries, in relation to an exhumed historical figure.

Principle of 'Exceptionality'

154. Mr Clarke argued that a duty to consult arose because of the unique and exceptional nature of this case. He submitted that in the annals of the law and archaeology, the disinterring of the remains of a long lost King of England is almost certainly never to be repeated. Whilst this may well be true, it does not help the analysis. There may be other equally 'unique' circumstances or discoveries in other contexts which could rise to similar submissions. The law must, however, proceed on a principled basis. The fact that "*fairness*" may be essentially an "*intuitive*" judgment (c.f. *Doody*, *supra*),

does not mean that it should not be principled. The principle here can only be some sort of a free-standing principle of 'exceptionality', *i.e.* that a duty to consult arises in a certain category of as yet undefined but exceptional cases. We do not think that this is a sound basis for developing the law. The difficulty in defining the category or nature of the 'exceptionality' required demonstrates the paucity of this approach. There may be many different circumstances in different fields which could equally be termed 'exceptional'. We agree with Mr Eadie QC that such an approach would be objectionable in principle because it is uncertain and open-ended and, as such, inimical to good administration.

155. This case undoubtedly has unique and exceptional features which arguably call for special consideration. It is why the claim has reached this Court. The archaeological discovery of the mortal remains of a King of England after 500 years may fairly be described as *"unprecedented"*. The discovery touches on Sovereign, State and the Church. To the extent that these unique features call for special consideration, it may well be that the decision-maker is required by law to ascertain at least the views of Sovereign, State and the Church. In our view, however, at all material times in this case the Secretary of State was sufficiently aware of the views of Sovereign, State and the Church to be able to make an informed decision. This aspect of the case, therefore, really turns on *Tameside* (*supra*).

Open-ended consultation

156. There is a further obstacle to the Claimant's case on the need for public consultation. Mr Clarke was pressed by the Court on a number of occasions to clarify the nature, scope and scale of the 'public' consultation which the Claimant submitted should be carried out. He had difficulty in doing so. His fundamental problem was that he was not able to formulate any limit to the generality of the duty to consult. He eschewed the notion that the Secretary of State was obliged to 'seek out' the numerous people who could claim collateral descent from Richard III, as well he might, since this category could potentially amount to millions of people. Mr Clarke nevertheless stuck resolutely to his requirement for there to be a 'public' consultation. He said that the media interest was such that it would be sufficient for the Secretary of State to engage in public consultation by, *e.g.*, inviting representations from the public *via* a website. We do not think, however, that this is an answer to the need for specificity. In truth, the 'public' consultation regarded by the Claimant is entirely open-ended and not capable of sensible limit or specificity, in the context of potentially millions of collateral descendants of Richard III. Further, in order to articulate how such a complex consultation would be carried out, a detailed process would have to be prescribed in a manner akin to legislation.

157. For these reasons, in our view, the Claimant's 'exceptionality' argument fell foul of both precepts articulated by Sedley LJ, namely that (i) a duty to consult cannot be open-ended and must have defined limits which hold good for all such measures and (ii) the Common Law will not require consultation as a condition of the exercise of a statutory function where a duty to consult would require a specificity which the courts

cannot furnish without assuming the role of a legislator (*c.f. R (BAPIO Ltd) v Secretary of State for the Home Department (supra)*).

158. Further, there is no sensible basis for imposing a requirement for a general public consultation, with leaflets, on-line petitions, publicity campaigns, nor for advertisements trying to ascertain who is a relative and then weighing their views against the general public, when there are, in reality, only two possible contenders (Leicester and York), and the rival arguments are clear and known to the decision-maker as explained above.

Conclusion on duty to consult

159. For these reasons, in our judgment, there was no duty on the Secretary of State to consult in this case.

160. No separate issues arise under the duty to have regard to relevant considerations.

University of Leicester's position

161. Miss Proops, Counsel for the University, argued that that the University of Leicester should not be a defendant to the proceedings because, at all material times, it was not acting as a public body and, in any event, any duty the Secretary of State had to consult was 'non-delegable'.

162. In our view, neither the University generally, nor ULAS in particular, can be said to have been exercising a public function at any stage in relation to the exhumation, retention and re-interment of the remains of Richard III. The University was under no public law duty to consult. The s.25 licence was sought by ULAS as a private body and granted to it as a private body. The only potential duty to consult lay on the grantor of the licence, the Secretary of State, when exercising his public law duty under s. 25 of the Burials Act 1857.

163. Accordingly the claim in Judicial Review against them was bound to fail.

Leicester City Council's position

164. The Council's intervention as the *"legal sentinel"* of Richard III's bones was unnecessary, unhelpful and misconceived (as it, itself, ultimately acknowledged). It is clear that the Council had no legal duty to consult nor power to intervene once (a) the licence had been granted and (b) Richard III's remains had been removed from its land. Accordingly, it was not necessary for the Council to be joined as a defendant to these proceedings. The claim against them must fail also.

RESULT

165. For the reasons set out above, in our judgment, there are no public law grounds for the Court interfering with the decisions in question. In the result, therefore, the Claimant's application for Judicial Review is dismissed.

Postscript

166. Since Richard III's exhumation on 5th September 2012, passions have been roused and much ink has been spilt. Issues relating to his life and death and place of re-interment have been exhaustively examined and debated. The Very Reverend David Monteith, the Dean of Leicester Cathedral, has explained the considerable efforts and expenditure invested by the Cathedral in order to create a lasting burial place *"as befits an anointed King"*. We agree that it is time for Richard III to be given a dignified reburial, and finally laid to rest.