



In the High Court of Justice
Queen's Bench Division
Administrative Court

CO Ref: CO/5313/2013

In the matter of an application for Judicial Review

BEFORE THE HONOURABLE MR JUSTICE HADDON-CAVE

B E T W E E N:

THE QUEEN
(on the application of THE PLANTAGENET ALLIANCE LIMITED)
Claimant

- and -

SECRETARY OF STATE FOR JUSTICE
First Defendant

THE UNIVERSITY OF LEICESTER
Second 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

UPON the Claimant's application for (1) Permission to bring Judicial Review proceedings against the First and Second Defendants, (2) an extension of time to bring such proceedings pursuant to CPR rule 3.1(2)(a); and (3) a Protective Costs Order

AND UPON consideration of the Statement of Facts and Grounds for Judicial Review, the Acknowledgements of Service and Grounds for Resisting the Claim, the witness statements and exhibits and other documents lodged by the Claimant, the First Defendant, the Second Defendant, the First Interested Party and the Second Interested Party

IT IS HEREBY ORDERED AND DIRECTED BY THE HONOURABLE MR JUSTICE HADDON-CAVE THAT:

- 1. The Claimant's application for Permission to bring Judicial Review proceedings against the First and Second Defendant is granted on all Grounds.**
- 2. Time for bringing such Judicial Review proceedings be extended as necessary.**
- 3. The First and Second Defendant shall, within 21 days, in accordance with their respective duties of candour, each give disclosure of all correspondence, notes and other documents relevant to (i) the circumstances surrounding the original application and grant of the Licence and (ii) all subsequent discussions and exchanges concerning the remains of Richard III and their re-interment.**
- 4. There shall be a Protective Costs Order whereby the First and Second Defendants shall be prevented from recovering their costs of these proceedings from the Claimant.**
- 5. The Claimant's own costs of these proceedings shall be capped at a level to be set by the Court. The Claimant shall apply to Mr Justice Haddon-Cave sitting as the Vacation Judge in Court 37 in the week of 23rd September 2013 to set the cap level, on notice to the other parties.**
- 6. The substantive hearing of these proceedings to be set down for hearing next term (estimate 1 day). Skeletons to be exchanged 1 week before the substantive hearing.**

REASONS:

1. The archaeological discovery of the mortal remains of a former King of England after 500 years is without precedent.
2. In my judgment, it is plainly arguable that there was a duty at common law to consult widely as to how and where Richard III's remains should appropriately be re-interred. I grant permission to the Claimant to bring Judicial Review proceedings against the Secretary of State for Justice and the University of Leicester on all Grounds.

Background

3. On 22nd August 1485, Richard III was killed at the Battle of Bosworth. His body was taken by supporters of the victorious Henry VII to the nearby town of Leicester and buried in Gray Friars Church. Richard III's death brought to an end the Wars of the Roses and the Plantagenet dynasty, and heralded the advent of the Tudor era. Richard III has remained a historical figure of significance and controversy.

4. In 2012, his remains were discovered buried under a municipal car park owned by Leicester City Council, on the former site of Gray Friars Church (destroyed in 1538 during the Dissolution of the Monasteries). The discovery was the result of inspired, determined and meticulous work by members of the Richard III Society (notably. Ms Phillipa Langley), the University of Leicester Archaeological Services (headed by Mr Richard Buckley) and Leicester City Council.
5. In September 2012, the University of Leicester Archaeological Services applied to the Secretary of State for Justice for an exhumation licence in the following terms:

“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”.

6. 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 (20 & 21 Vic., cap. 81) for the removal of remains of *“persons unknown”* from the site and for such remains no later than 31st August 2014 *“to be deposited at the Jewry Wall Museum or else be reinterred at St Martins Cathedral or in a burial ground in which interments may legally take place”*.
7. On 5th September 2012, two human skeletons were excavated, one of which bore signs of scoliosis. On 12th September 2012, the University of Leicester Archaeological Service announced that its preliminary investigations indicated that the remains of Richard III had been found, but identity of the remains could not be confirmed until mitochondrial DNA tests had been carried out. The University of Leicester indicated that any remains of Richard III would be re-interred at Leicester Cathedral.
8. On 4th February 2013, the University of Leicester announced that DNA results had confirmed beyond reasonable doubt that these remains were, indeed, those of Richard III.

The Challenge

9. The Claimant issued Judicial Review proceedings on 3rd May 2013 challenging:
 - (1) The Decision of the Secretary of State for Justice on 3rd September 2012 to grant the Licence *“without consulting, or attaching 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”*.
 - (2) The Decision of the Secretary of State for Justice on 4th February 2013 and subsequently *“not to re-visit the grant of the Licence once it became clear that the University would not carry out an appropriate consultation”*.
 - (3) The Decision of the University of Leicester on 4th February 2013 *“to*

begin making arrangements for the reinterment of the remains of Richard III at Leicester Cathedral”.

10. The Secretary of State for Justice and the University of Leicester resist the challenge on the merits and allege delay and lack of standing on the part of the Claimant.

Delay

11. A party bringing judicial review proceedings must do so “*promptly*” and, in any event, within three months of the decision being challenged (CPR 54.5). I am satisfied that there has been no unreasonable delay by the Claimant in bringing proceedings in this case. I am also satisfied that it would be appropriate to grant an extension of time to allow the Claimant to the challenge to the Secretary of State’s Decision to grant the Licence of 3rd September 2012.
12. In my judgment, there were good reasons for an immediate challenge not being brought to the original Decision of 3rd September 2012. The University of Leicester made clear at a press conference on 12th September 2012 that DNA tests would be required to confirm the identity of the remains. It stated in terms: “[w]e are not saying that we have found Richard III”. In a press release dated 26th October 2012, the University of Leicester said: “...it would be premature to speculate on the outcome of the investigation”. It was clear that there could be no guarantee that the remains were those of Richard III until DNA results were obtained. In these circumstances, it would have been premature to issue proceedings prior to 4th February 2013.
13. Once the positive DNA results were announced on 4th February 2013, those seeking to challenge the Decisions took steps to garner support, obtain legal advice and organise their challenge. I am satisfied that, in all the circumstances, those supporting the Claimant acted with reasonable promptness and cannot reasonably be criticised for lodging the challenge just within the three-month deadline.

Standing

14. A claimant seeking to bring judicial review proceedings must demonstrate that it has “*sufficient interest in the matter to which the application relates*” (section 31(3) of the Senior Courts Act 1981). The phrase “*sufficient interest*” is given a wide meaning. The Claimant is a campaigning organisation incorporated on 21st March 2013 by the 17th great-nephew of Richard III, Mr Stephen Nicolay. It represents a group of collateral descendants of Richard III who are aggrieved at the decisions taken regarding his re-interment without consultation.
15. I am satisfied that the Claimant, and its subscribers, have sufficient interest and standing to bring these proceedings on all Grounds, both on conventional principles, and in the unusual circumstances of this case which involve the discovery of the proven remains of a former monarch (see the general principles enunciated in *R(Argyll Group plc) v. Monopolies and Mergers Commission* [1986] 1 WLR 763 and 773; *R(Greenpeace Ltd) v. Her Majesty’s Inspectorate of Pollution* [1994] 4 All ER 329; *R(Residents Against Waste Site Ltd) v. Lancashire County Council* [2007] EWHC 2558 (Admin); *R (Blackfordby and Boothorpe*

Action Group Ltd) v. Leicestershire County Council; and Walton v The Scottish Ministers [2012] UKSC 44; 2012 S.L.T. 1211 Lord Reed at paragraphs [83] to [84]).

Amenability

16. I am satisfied that the University of Leicester is, for present purposes, acting as public authority and amenable to judicial review in respect of its Decision under challenge (*c.f. Ali v. Head Teacher and Governors of Lord Grey School* [2004] QB 1231).

Merits

17. In my judgment, the merits of the Claimant's challenge are clearly arguable.

18. Counsel for the Plantagenet Alliance submit that the law of England is not simply based on "*finders keepers*", particularly where the remains of a former King of England are concerned. There is obvious force in this submission.

19. The Claimant's challenge is put in a number of different basis, but the core submission is that the Secretary of State for Justice had a duty in law to consult 'relevant interests', including descendants, as to how, and where, the remains of Richard III should be reburied, but he failed to comply with that duty prior to issuing the Licence or at any time thereafter. The Claimant submits that the 'relevant interests' are: (i) the citizens of the UK who have an interest in the fate of the rediscovered body of a historically important anointed former monarch of the realm; (ii) the living collateral descendants of Richard III; (iii) the wishes of Richard III himself, in so far as they can be ascertained or inferred.

Burial Act 1957

20. Section 25 of the Burial Act 1857 confers an unfettered discretion on the Secretary of State to decide to decide whether to grant a licence on what terms; and, in the absence of special circumstances, it is inappropriate for the court to treat a statutorily conferred discretion with no express limitations or fetters as being somehow implicitly limited or fettered (*per* Lord Neuberger MR in *R(Rudewicz) v. Secretary of State for Justice* [2013] QB 410 at paragraph [30]).

21. The Secretary of State, however, has a duty when granting such licences to act rationally and in accordance with the general law. A duty arises at common law to consult before making decision law where there is a promise to do so, or a legitimate expectation that there will be consultation.

Propositions

22. In my judgment, the following propositions, in particular. are arguable:

- (1) There was a legitimate expectation that the Secretary of State would, prior to granting a Licence, consult widely to how, and where, Richard III's remains should be appropriately re-interred, in the event that they were discovered during the proposed archaeological dig.
- (2) The category of appropriate consultees is potentially very wide and includes those listed by the Claimant, namely (i) the citizens of this

country who have an interest in the place of reburial of the remains of a King of England; (ii) the living collateral descendants of Richard III; (iii) the wishes of Richard III himself, in so far as they can be ascertained or inferred; together with (iv) ecclesiastical bodies with an interest in the resting place of the remains of Richard III; (v) civic bodies with an interest in the remains of Richard III; and (vi) HM The Queen.

- (3) The Secretary of State's duty to consult was non-delegable and, in any event, could not properly be delegated to a party or licensee who was not independent or had a personal interest in the outcome, such as the University of Leicester.
- (4) The Secretary of State failed to carry out any, or any proper, consultation regarding the re-interment of Richard III's remains prior to issuing the Licence on 3rd September 2012.
- (5) The Secretary of State failed, thereafter, to re-visit his decision to grant the Licence on or after 4th February 2013 once it became clear that (i) Richard III's remains had, indeed, be found; (ii) there was growing concern and controversy as to where they should be reburied; but (iii) the University of Leicester nevertheless intended to proceed with a re-interment in Leicester Cathedral without any consultation having first been carried out.
- (6) The University of Leicester, as a responsible public body, should not have begun making arrangements for the re-interment of the remains of Richard III at Leicester Cathedral, prior to an appropriate consultation being carried out.

Evidence

23. In my judgment, the following particular points are arguable on the evidence and materials before me:

(1) Guidance

24. First, official guidance on the treatment of excavated human remains was issued under the *aegis* of the English Heritage entitled "*Guidance for best practice of treatment of human remains excavated from Christian burial grounds*" (2005). The Guidance was drawn up by a panel of experts including personnel from the Home Office. It is clear from a fair reading of the Guidance that good practice and 'ethical treatment' of human remains requires:

- (1) "*appropriate consultation*" so that the views of individuals and groups with legitimate interests in those remains may be taken into account in any decisions;
- (2) consultation of the "*the general public*" where appropriate;
- (3) taking steps to trace and consult descendants of interred individuals "*so that their view may be heard*"; and

(4) taking steps to determine “*the individual wishes of the dead*”.

25. Relevant passages are to be found, in particular, at paragraphs 18, 20 and 21 of the Guidance:

“18. 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 the burial, and the scientific research community, including archaeologists, osteologists, and medical and forensic scientists.

“20. Nevertheless, even for remains over 100 years old, where there is no legal obligation to trace the next of kin (Annex L1), it would be ethical to accord views of living close family members strong weight. When excavation of 18th- or 19th-century burial grounds is planned, reasonable steps, such as advertisements in local newspapers, should be taken at the start of project planning to alert local people who may be descendants of interred individuals so that their views may be heard.

21. The great majority of archaeological excavations, however, deal with the remains of long-dead individuals of unknown identity. Under these circumstances it is clearly impossible to trace living relatives or to determine the individual wishes of the dead (beyond the general ethos of the Christian theology under whose rites they were buried).”

(2) *Knowledge*

26. Second, the Secretary of State for Justice was told when the Licence was sought that there was the possibility that the human remains of Richard III would be found at the site. The Secretary of State was, therefore, aware of the possibility of the dis-interment of someone who was not only a named individual with potentially traceable lineage and descendants, but also a former monarch and a significant historical figure, whose re-interment was likely to be a matter of legitimate national interest. It appears that the Ministry of Justice had some appreciation of the significance of the matter at the time (but failed to act on it). On 12th January 2011, the Head of the Burials Team at the Ministry of Justice (Mr Robert Clifford) wrote in an e-mail to Ms Phillipa Langley of the Richard III Society as follows: “*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.*”

(3) *Failure to apply the Guidance*

27. Third, notwithstanding the above, the Secretary of State failed to apply the Guidance, or carry out any consultation prior to granting of the Licence. It is not clear why, given that the obvious ‘sensitivities’ were apparently known and appreciated. It may be because it was at that stage thought “*unlikely*” that the King’s remains would be found (see the statement by Parliamentary Under-

Secretary of State for Justice, Jeremy Wright MP, in the Parliamentary debate in the House of Commons on 12th March 2013 (*Hansard*, 29WH)). Nevertheless, the Secretary of State should, at least, have placed a condition or *locus poenitentiae* on the Licence that, in the event that Richard III's remains were in fact found, no re-interment could take place, unless and until the Secretary of State had first carried out appropriate consultation.

(4) *Secretary of State's 'practice'*

28. Fourth, it is said by the Head of the Coroners, Burials, Cremation and Inquiries Policy Team at the Ministry of Justice (Ms Judith Bernstein) that the Secretary of State's practice is only to "*consult*" relatives of an indentified in cases where that individual has been buried "*recently*" and, for these purposes, recently means "*within the last 100 years*". There would appear to be two answers to this point. First, this assertion does not square with the guidance. Annex L1 to the Guidance in fact states that: "*The consent of the next of kin is usually dispensed with where the remains were buried 100 years or more previously...*". But, as the Guidance makes clear, even with older remains there is an 'ethical' duty to take "*reasonable steps*" to alert local people who may be descendants "*so that their views may be heard*" (see paragraph 20 set out above). Second, in any event, the circumstances of this case were, by any standards, unprecedented and obviously (or arguably) called for widespread consultation.

(5) *Consultation idea dropped*

29. Fifth, there is evidence that a plan to consult interested parties was mooted at an early stage by the University of Leicester, but then appears to have been quietly dropped. In an e-mail dated 25th September 2012, the Head of University of Leicester Archaeological Services (Mr Richard Buckley) wrote *inter alios* to the Head of Leicester Arts and Museums Services (Ms Sarah Levitt) another member of the University (Mr Richard Taylor) stating: "*I accept that there are conflicting views of where the reburial should be and that these need to be taken into account.*" Mr Taylor replied: "*We should work together to make sure that we retain as much control as possible. I think that the question is 'Leicester is the plan, are there reasons why not?' rather than 'Where should he be reinterred?'*". The Claimant has not (yet) been provided with a copy of Ms Levitt's reply. Further, an undated press release prepared by the University of Leicester (which has come into the possession of the Claimant) states under the heading "*What about alternative locations to Leicester?*" as follows: "*If and when the identity of the remains are confirmed, there will be an opportunity for the public to comment on the plan.*" This sentence does not appear in the press release as published on 14th January 2013. It is not clear why.

(6) *Public feeling*

30. Sixth, there can be little doubt as that the matter has given to a great deal of strong public feeling. This was expressly acknowledged by the Parliamentary Under-Secretary of State for Justice (Helen Wright MP), in a letter to the MP for Richmond, Yorkshire (the Rt Hon. William Hague MP) dated 22nd March 2013. Public interest is particularly strong in the two main geographical areas which assert historical claims to where Richard III should be reburied. 26,553 people have signed a petition that the remains of Richard III should be re-interred at York Minister. 8,115 people have signed a petition that the remains of Richard III

should be re-interred at Leicester. The benefit in terms of prestige and increased tourism to the city or place or institution which eventually secures these royal remains is obvious. It is said that the foot-fall at Leicester Cathedral has increased 20-fold since the discovery.

(7) *Parliamentary debate*

31. Seventh, the question of where Richard III should be reburied was considered to be sufficiently important to warrant of a Parliamentary debate. A passionate debate took place in the House of Commons on 12th March 2013, involving Members of Parliament for the constituencies of Gainsborough, York Central, Bosworth, Selby and Ainsty, Leicester South, Kingswood, and York Outer (*Hansard*, 12th March 2013, 22-30WH). The Under-Secretary of State for Justice (Jeremy Wright MP) refused, however, to re-visit the question of the Licence. He simply 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.

(8) *Belated attempt at consultation*

32. Eighth, in what appears to somewhat belated recognition of the need to consult, in April 2013, the Ministry of Justice sought to ‘facilitate’ a meeting of ‘interested parties’ to discuss the question of the re-burial of Richard III (whilst still maintaining its position that ultimate decision as to the burial place was solely for the University of Leicester under the Licence). The Ministry of Justice invited the following parties to attend: 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 and HM The Queen. No descendants of Richard III were invited. The meeting was ‘postponed’ following the launch of these proceedings.

(9) *Article 8*

33. Ninth, the Claimant’s claim includes an argument based on Article 8 of the ECHR (‘family life’). In the absence of a close personal or even close familial relationship, it is normally difficult to see how Article 8 rights can be directly engaged (see *R(Rudewicz) v. Secretary of State for Justice (supra)* at paragraph [30]). It is clear from European jurisprudence, however, that the views of a deceased person as to his funeral arrangements must now be taken into account (*per* Cranston J in *R(Burrows) v. HM Coroner for Preston* [2008] EWHC 1387 (Admin)). For this reason, and in view of the unusual circumstances of this claim by traceable descendants of a famous Royal figure, it may be said that Article 8 has some role to play.

(10) *Unprecedented*

34. Tenth, this case is unprecedented. It involves the remarkable, and unprecedented, discovery of remains of a King of England of considerable historical significance, who died fighting a battle which brought to an end a civil war which divided this country. The obvious duty to consult widely arises from this singular fact alone. It was obvious that there would be intense, widespread and *legitimate* public interest and concern in many quarters as to the treatment and final resting place of Richard III’s remains. Whilst for many individuals the discovery remains an irrelevance, nevertheless, institutions of state, organisations and citizens of this

country, as well as descendants, could legitimately feel that they should have been consulted or had a say in the matter, in particular those from competing parts of the country claiming association with Richard III and the Wars of the Roses. The discovery of Richard III's remains discovery touches upon our history, heritage and identity. The national perspective was put elegantly in a letter written by the Mayor of Middleham (Councillor Tammi Tolhurst) to the Parliamentary Under-Secretary of State for Justice (Helen Wright MP) dated 12th April 2013:

“Richard III was a Monarch of this country. He was the last Plantagenet King and the last King to die in battle. He was a person of great historical significance. He is part of our heritage. These facts make his discovery and final resting place a matter of national importance.”

Disclosure and Duty of candour

35. The Claimant has sought production of all documents relevant to the circumstances surrounding the grant of the Licence and subsequent discussions about the re-burial place in accordance with the ‘duty of candour’ owed by the Secretary of State for Justice and the University of Leicester. The Claimant has managed to obtain some limited, but redacted, disclosure from them under Freedom of Information requests. In my judgment, it would be appropriate for the Secretary of State for Justice and the University of Leicester to make full disclosure in accordance with their respective duties of candour, and I so order.

Protective Costs Order

36. In my judgment, this is a suitable case for a Protective Costs Order (to prevent the Defendant from recovering their cost of the proceedings). The relevant principles are set out in *R(Corner House Research) v. Secretary of State for Trade and Industry* [2005] WECA Civ 192 at paragraph [74]. In *Morgan v. Hinton Organics* [2009] EWCA Civ 107, the Court of Appeal said that a “flexible approach” should be adopted to the guidance in *ex parte Corner House* (see at paragraph [39]).

37. I am satisfied that:

- (1) The issues raised in these proceedings are of general public importance.
- (2) The public interest requires that these issues are resolved.
- (3) The Claimant is a campaigning body and has no real private or financial interest in the outcome of the case.
- (4) Having regard to the relative financial resources of the Claimant and the Defendants and to the amount of costs that are likely to be involved, it is fair and just to make the order.
- (5) If a Protective Costs Order is not made, the Claimant will probably discontinue the proceedings and will be acting reasonably in so doing.

38. I make the order accordingly. I have reserved the question of cap to myself since I am sitting as the Vacation Judge in the last week of September.

Final comments and recommendation

39. It is ironic that the Wars of the Roses appear to be returning whence they started, the Temple. Legend has it that John Beaufort and Richard Plantagenet picked the symbolic red and white roses in Inner and Middle Temple gardens (*c.f. Henry VI, Part 1, Act 2*).

40. I would, however, urge the parties to avoid embarking on the (legal) Wars of the Roses Part 2. In my view, it would be unseemly, undignified and unedifying to have a legal tussle over these royal remains. This would not be appropriate, or in the country's interests. The discovery of Richard III's remains engages interests beyond those of the immediate parties, and touches on Sovereign, State and Church.

41. For these reasons, I would strongly recommend that parties immediately consider referring the fundamental question - as to where and how Richard III is reburied - to an independent advisory panel made up of suitable experts and Privy Councillors, who can consult and receive representations from all interested parties and make suitable recommendations with reasonable speed.

Signed :

Date: 15th August 2013

THE HON. SIR CHARLES HADDON-CAVE
