THE BARE BONES OF THE ARGUMENT

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The Litigation

The judicial review regarding the burial (or re-burial) of Richard III has come to an end, unless there is an appeal. If anyone should care to read the full judgment, which runs to 40 pages and 166 paragraphs, the neutral citation number of the case is [2014] EWHC 1662: the full title would take too much space here. Argument was heard by three judges of the High Court over two days in March and judgment was delivered on Friday 23 May 2014. In short, the court unanimously dismissed the twin challenges brought by the Plantagenet Alliance, against (1) the Secretary of State for Justice's issue of an exhumation licence without consulting as to how or where Richard's remains should be re-interred; and (2) the decision by the

University of Leicester to begin making arrangements for the re-interment in that city. In practice the ruling means that the late King will be buried in Leicester Cathedral.

Strangely the legal argument was not really about where Richard III's bones should be buried; but understandably the public thought that it was; and it was predictable that, when the judgment featured on BBC TV's *Look North* the same evening, several of those interviewed in the streets of York said *Well, he was Richard of York, wasn't he? So he ought to be buried in York*. This displays the usual cricket-based assumptions that English aristocratic titles – like the pre-revolutionary French - have territorial significance, and that the Wars of the Roses were fought between the counties of Yorkshire and Lancashire. These assumptions are false; but we shall see that the High Court shared the same naïve view of history. Fortunately, this was not germane to the legal issues raised by the proceedings.

The informed bystander (or 'man on the Clapham Omnibus' as we used to call him) may well be puzzled by two aspects of the judgment. First, the Plantagenet Alliance initially obtained permission from a single judge to bring its challenge, but the panel of three judges eventually decided that there was nothing in it; and second, despite the failure of the challenge, the taxpayer will have to pay the costs incurred by the Government and Leicester University in resisting it. Why?

The answer to the first of these puzzles is that judicial review is always in two stages in England and Wales (not so in Scotland). An applicant must first obtain permission (or 'leave' as we used to call it). He must demonstrate, not that he is right but that he has an arguable case; and he must also show that he has a 'sufficient interest' to bring the matter before the court (what we used to call in the now-forbidden Latin, *locus standi*). Incidentally, short 'skeleton' arguments must also be filed, but I have heard enough jokes already about this already.

On 15 August 2013 the Plantagenet Alliance obtained permission to bring their judicial review from Mr Justice Haddon-Cave, who thought that it had a sufficient interest because it had *self-evidently* raised an issue *of national importance*. He also said that *the discovery of Richard III's remains touches upon our history, heritage and identity*. Perhaps, but the panel of three (which included Haddon-Cave) held unanimously that the Alliance had only recently been formed, by a handful of people who were collateral descendants of Richard III, and that *calculations of the number of [such] collateral descendants varies between one and well over ten million worldwide.* Moreover, it is noticeable that at the permission stage, the Judge clearly had some sympathy with the argument that there ought to have been some consultation between the defendants and other interested parties with regard to the place of re-burial, whereas it was eventually held that there was no duty to consult; and that those who had suggested otherwise had simply muddied the waters.

The second puzzle relates to costs. It is important to realise that in this country (unlike the United States, for example), the normal rule as to costs in civil proceedings is that 'costs follow the event' – in other words the loser pays the winner's costs as well as his own; but in this case Mr Justice Haddon-Cave made a

Protective Costs Order in favour of the Alliance at the original permission hearing. The effect was to prevent the Ministry of Justice and the University of Leicester from recovering their costs, even if they were eventually successful. On the other hand, it also meant that, if the Alliance were to succeed, it could recover its costs in full from the two defendants, unless the court imposed a costs cap. I would imagine that the average taxpayer might look askance at the idea that he had to *pay* for this issue to be aired, even if he agreed that it was of any interest to him (or her).

The Ministry of Justice, supported by the University, went back to court in October to ask the same judge who had made the Protective Costs Order to discharge it. The Judge refused; but he did impose a cap of £70,000 on the costs recoverable by the Alliance, if it should win. The end result, since the Alliance lost, is that the Government and the University will have to bear their own costs – and that would appear to mean the taxpayer. However, at least we do not have to pay the costs of the Alliance, which were estimated at £200,000, though some of the work undertaken by its lawyers was done under a Conditional Fee Agreement and some on a *pro bono* basis (excuse the Latin, which seems to be unavoidable here).

And we may not have heard the last of it! In a postscript to its judgement the court added:

> Since Richard III's exhumation on 5 September 2012, passions have been roused and much ink has been split. 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 as dignified reburial, and finally laid to rest.

Fine words; but it is not impossible that the Alliance may seek to take this case to the Court of Appeal and the Supreme Court; and it is even conceivable that it will ultimately complain to the European Court of Human Rights in Strasbourg. Mention was made during the course of argument of Article 8 of the Convention on Human Rights (which prohibits interference by a public authority with private and family life), though the High Court opined that any such challenge was *doomed to fail*. So the weary Titan that is the British taxpayer may yet have more burdens to bear. As Mr Justice Haddon-Cave at one point remarked, *excursions to the Court of Appeal may affect the overall costs bill.*

The Law

In the eyes of the judges, the case had little to do with the right burial place for Richard III. What, then, was it about? Judicial review is nowadays seen by them as a co-operative venture between the executive branch of government and the judiciary, to ensure the highest possible standards of administration. From the point of view of the average litigant, of course, it is no such thing: it is more like a form of

unarmed combat, while the legal profession sees it as a kind of medieval joust, with prizes for the champions in the form of fees.

From a strictly legal point of view, the case turned on the question of whether the Ministry acted lawfully when it granted the licence to exhumate and specified burial in Leicester; whether the University of Leicester acted properly in acting in pursuance of the licence; and in each case whether there was a duty to consult about the matter. The parts played in the affair by Leicester Cathedral, York Minster and Leicester City Council also came under scrutiny.

It is also relevant to note that Victorian draftsmen had a short way with a statute, when compared with their modern descendants, who are inclined not to use one clause where several will do. So, it was at least unusual in 1857 to make express provision for consultation in relation to decision-making, whereas now it is commonplace; but in the interim, the courts have decided that fairness requires appropriate consultation in some circumstances, even in the absence of a statutory requirement. The central question for the court in this case, therefore, was whether it was fair for the Ministry and the University to take the decisions they did without consultation. It decided that it was. The burial can therefore proceed in Leicester.

The History

Given that the principal legal issue was the parameters of the common law duty to consult, the court did not find it necessary to express a view on the question of whether Leicester or York was the best place to re-inter Richard III's bones, though the University of Leicester was the Second Defendant, Leicester City Council had become the Third Defendant, the Cathedral of Leicester was the First Interested Party and York Minster was the Second Interested Party. However, by way of background, the three judges do explain how Richard's skeleton came to be found in Leicester in the first place, and devote six pages and 27 paragraphs to a summary of late 15th century politics. This is where I take issue with them. Whilst their exposition of the law is legally binding, their explanation of history is not; and in my view, it closely resembles Sellars and Yeatman's brilliant *1066 and All That* (published in 1930), without being as funny.

First the judges say that Richard's death 'marked the end of the Middle ages' and 'the beginning of the Early Modern period of English history'. This would have been considered an old-fashioned and limited view, if it had formed part of an undergraduate essay in the 1960s. They also refer to the 'Wars of the Roses', as if that was still an accurate and appropriate way of describing the troubles which afflicted the country in the later years of Henry VI's reign, rather than a Tudor coinage. As for their view of Richard III, one might almost think that they had taken evidence from the Richard III Society, without it being subject to cross-examination, or indeed any critical analysis.

The court informs us that *Tudor propagandists in the 16th century portrayed [Richard] in a negative light*. Well yes, they did; but they were not the first to do so. Dominic Mancini's *Usurpation of Richard III* (which first came to light in 1933) is an impartial and eye-witness account by an Italian humanist of the critical events of May-June 1483. It shows that, even before Richard was crowned king, his actions had evoked 'fear, insecurity and distrust' amongst his future subjects. The late Maurice Keen, who knew as much as anyone about 15th century England, wrote

> No one had said anything quite like that when Richard II or Henry VI lost their thrones, because the men who rose against them were actuated in part at least by resentment at genuine misgovernment. The usurpation of 1483 bore no such justification.[1]

The court also has a very limited view of the historiography which is favourable to Richard III, since there were many writers who sought to defend him, long before the foundation of the Richard III Society in 1924. Sir George Buck, Master of the Revels to James I, mounted a full-scale attack on the hostile Tudor tradition in 1646, while the attempt to rehabilitate Richard was carried forward by William Winstanley in *England's Worthies* (1684); Horace Walpole in his *Historic Doubts on the Life and Reign of Richard III* (1768); Caroline Halstead in her *Life of Richard III* (1844); Alfred O. Legge in his *The Unpopular King* (1885); and Sir Clements R. Markham in *Richard III: His Life and Character* (1906).[2] It is simply not true to say, as the court does, that interest in Richard III's reign and character only revived in the 20th century.

It is usual to take into account the deceased's instructions or wishes, when considering questions of burial; but, of course, it was not easy to establish what Richard III's wishes were. The court remarked, no doubt correctly, that there was no direct evidence, and added that *the suggestion that Richard was to have endowed a chancery [sic] at York with 100 chaplains falls short of any definitive or overriding expression of where he wished to be buried.* However, the use of the word 'chancery' here, when 'chantry' was clearly intended does not inspire confidence. It may be nothing more than clerical error, but it may provide further evidence of historical ignorance.

There is no mention in the judgment of the circumstantial evidence regarding the King's wishes. In my view, this points to the conclusion that he would not have wanted to be buried in either York or Leicester; and that he might well have chosen Westminster Abbey, or Windsor, or Fotheringhay. Westminster Abbey had become the usual place of burial for English monarchs in the 13th century. Edward III, Richard II and Henry V had all been buried there, though Henry IV was buried in Canterbury and Henry VI and Edward IV in Windsor. However, Richard III's father and namesake, the 3rd Duke of York, his mother Cecily Neville and his brother

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[1] M.H.Keen, *England in the Later Middle Ages* (Routledge, London and New York, 2nd edition, 2003).

[2] These works are all discussed by Paul Kendall in his introduction to *Richard III, the Great Debate* (London, the Folio Society, 1965).

Edmund, Earl of Rutland were all buried in the family church at Fotheringhay in Northamptonshire, along with Edward of Norwich, 2nd Duke of York, who had been killed at Agincourt. Accordingly, there is good reason to think that Richard III might have chosen the church at Fotheringhay as his last resting-place.

The court did not need to say much about the history, but since it chose to do so, it should have called for expert evidence, especially since it repeatedly described the case as unprecedented, which it wasn't. There are cases from a different but similar jurisdiction where this has been done, and very effectively. In the case of Re Holy Trinity Bosham (decided in the Consistory Court of the Diocese of Chichester on 10 December 2003), the Judge refused a faculty which would have permitted the excavation of a grave, thought to belong to King Harold Godwinson, who was killed at Hastings in 1066. In that case expert evidence was received from a host of witnesses, including Professor James Campbell, who is a leading authority on Anglo-Saxon history; and the judgment of the Worshipful Mark Hill, Chancellor, is a model of scholarship.