

All at Sea: When Duty meets Austerity in Scheduling Monuments in English Waters¹

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Introduction

This article examines the current policy and legal framework surrounding the scheduling of submerged monuments in English waters, its application and the implications for the conservation of underwater cultural heritage arising therefrom. It also considers the way in which Historic England (“HE”) undertakes its role, as specialist statutory advisor to the Secretary of State for the Department of Culture, Media and Sport (“DCMS”), to inform decisions on the scheduling of monuments underwater. Set in the context of diminished resources resulting from the government’s continuing austerity programme, the current role of executive non-departmental public bodies such as HE is undoubtedly extremely challenging.² That “challenge” can be manifested variously: however, basic obligations must be fulfilled, and be fulfilled in accordance with the requirements of administrative law. The discussion below focuses on the extent to which, firstly, the increasingly applied judicial requirement to provide an applicant with adequate reasons for a decision should apply to scheduling decisions and secondly the circumstance where advice given to a minister is rooted in a policy apparently at odds with DCMS’ and HE’s otherwise declared policies and possibly contrary to the statutory purposes behind the scheduling regime. Put at its simplest, does advice to inform a particular scheduling decision from a specialist statutory advisor, which is apparently based on the cost to that advisor, stand up to legal scrutiny, when it would appear to run contrary to declared policy?

Background

The amphibious landings in Normandy on 6 June 1944 undoubtedly were a pivotal moment in European history. Indeed it has been claimed that the present day EU was founded on its blood soaked beaches.³ Both onshore and offshore at Normandy, relics of that momentous event remain, now valued as cultural heritage and driving a local tourist industry.⁴ Artefacts from that day also lie just off the UK’s shores, largely

unseen and forgotten. Two of these sites are the wreck of His Majesty's Landing Craft (Tank) 427 ("LCT 427") and an assemblage of armoured vehicles ("the Assemblage of Armoured Vehicles"), deposited on the seabed when their Royal Naval Armoured Tank Landing Craft 2428 ("LCT(A) 2428") capsized on passage to the invasion beaches. Both sites were forgotten but their recent rediscovery prompted an attempt to secure their protection through preservation in situ as Scheduled Ancient Monuments under the Ancient Monuments and Archaeological Areas Act 1979 ("the 1979 Act"). This in turn resulted in a surprising controversy over the formulation and application of a policy for the scheduling of submerged monuments in English waters.

When considering protection for underwater cultural heritage there are two principal mechanisms open to regulators. An historic shipwreck wreck can be designated under the Protection of Wrecks Act 1973 ("the 1973 Act"). Shipwrecks and other forms of underwater cultural heritage could also be scheduled under the 1979 Act.⁵ The 1973 Act was passed as a direct consequence of the looting of wrecks of historical interest. Designation and licensing are the chosen mechanisms of control.⁶ The Act authorises the Secretary of State⁷ to designate as a restricted area the site of a vessel of historical, archaeological or artistic importance⁸ lying wrecked in or on the seabed.⁹ There is no further definition of these criteria in the Act but non-statutory guidance has been issued¹⁰ and the criteria therein reflect those used for scheduling monuments under the 1979 Act. The objective is to protect the restricted area itself from unauthorised interference and not merely the vessel or its contents. It is an offence, within a restricted area, to tamper with, damage or remove any object or part of the vessel or to carry out any diving or salvage operation.¹¹ Further operations within the area, including public visiting by divers on suitably robust sites, are then controlled by the issuing of a licence, authorising only certain specified activities. Where a licence is granted, it will be subject to conditions or restrictions, appropriate to each individual site.¹² Alternatively underwater cultural heritage can be scheduled under the 1979 Act.¹³ In principle, the 1979 Act has significant advantages over the 1973 Act. The Act works by the scheduling of monuments.¹⁴ The definition of a "Monument"¹⁵ encompasses, inter alia, buildings, structures or work, cave or excavation, vehicle, vessel, aircraft or other movable structure.¹⁶ Thus the Act is far more flexible in its possible application than the 1973 Act and, in particular, can apply to flooded landscapes such as quarries, cave dwellings and fish traps.¹⁷ To be scheduled, the monument must be of "national importance".¹⁸ Once scheduled, it is an offence to, inter alia, demolish, destroy, alter or repair a monument without "scheduled monument consent".¹⁹ In practice, such consent is rarely given, except for rescue excavations, and it is the practice of the heritage agencies to pursue a policy of preservation in situ, rather than encourage active investigation of monuments by excavation, which is seen as destructive. This principle is now enshrined as a cornerstone of the Valletta Convention.²⁰

The Sites

The Assemblage of Armoured Vehicles

On the evening of 5 June 1944, enroute to “Juno” Beach in Normandy, LCT(A) 2428²¹ developed engine trouble and suffered weather damage. Abandoned and leaking, she was taken in tow but capsized, depositing her cargo of two Centaur IV CS tanks, two D7 armoured bulldozers²² and a 4x4 vehicle on the seabed, some 10km to the South of Selsey Bill on the South coast of England. Subsequently LCT(A) 2428 was sunk by gunfire, presumably as a derelict²³ posing a danger to navigation and lies some 7km to the East of the vehicle assemblage.²⁴

In 2008 the first systematic survey of the site was conducted over five days by avocational divers from the Southsea Branch of the British Sub Aqua Club (“Southsea BSAC”) operating under the Nautical Archaeology Society’s “Adopt a Wreck” scheme.²⁵ In 2011 a further survey of the site was commissioned by English Heritage.²⁶ This survey concluded that the assemblage of armoured vehicles were of significance and that there was a level of medium to high risk of further damage due to anchoring and legitimate salvage activity by visiting divers.²⁷

LCT 427

His Majesty’s tank landing craft LCT 427²⁸ sank at 03.03 hours on 7 June 1944 at Spitbank Gate as she approached Portsmouth, having delivered her cargo of Sherman DD tanks²⁹ to “Gold” Beach on D-Day. LCT 427 collided with the battleship HMS Rodney,³⁰ which was steaming out to sea. The small LCT offered no obstacle to this large capital ship and was sliced completely in two. All 13 crew of LCT 427 were lost in the tragedy. Relative to the loss of life occurring across the English Channel this was regarded as a minor incident. Indeed for two months LCT 427 was simply listed as “missing” and when this administrative error was resolved the matter was simply regarded as an unfortunate accident with no need for further investigation or formal inquiry. LCT 427 had literally slipped into physical and historical obscurity, with relatives not being informed of the circumstances or location of her loss.³¹ In 2011 avocational archaeological divers from Southsea BSAC obtained permission to investigate an unidentified anomaly lying upright in the main shipping channel leading to Portsmouth and Southampton. To their surprise they found the two parts of LCT 427 some several hundred metres apart. Lying at an average depth of 30m, both parts are in a remarkable state of preservation, with the craft’s equipment and armament, including ammunition, still in place.³²

Site Context and Protection

Originating from actual involvement in D-Day, both these sites are unique time capsules of this pivotal event. This is especially true of the assemblage of armoured vehicles, since the ability to successfully place armour on the invasion beaches in order to breach enemy coastal emplacements and avoid troops being pinned down on the beaches, unable to get off the beachhead, had been identified as a key

requirement following the disaster of the “Dieppe Raid” in 1942.³³ The Centaur tanks and armoured bulldozers were specialist equipment specifically developed to avoid another bloody repulse of invading Allied forces on D-Day. In particular the Centaur IV CS tanks are extremely rare survivors of this epic historical event. The A27L Centaur, notoriously underpowered and unreliable, has been described as “a tank that should never have been built”.³⁴ It was deemed unfit for front line service as a main battle tank but saw combat in a specialised role on D-Day. Some 80 Centaurs were fitted with a 95mm howitzer,³⁵ designated as “Centaur IV CS”, issued to the Royal Marines Armoured Support Group³⁶ and used to neutralise concrete bunkers on the beachhead in close support of the first waves of invading forces. As the invading forces successfully moved inland this specialised role evaporated and within a fortnight the Centaurs IV CS tanks were withdrawn from service.³⁷ The tanks are therefore uniquely associated with D-Day and today only two other examples are known to survive, both located in France.³⁸ The submerged examples are the only ones present in the UK.

Following the archaeological surveys and assessments of both sites Ms Alison Mayor³⁹ sought recognition of and protection for their cultural significance as rare survivors of their type and as direct participants in the events of D-Day by having the sites scheduled as ancient monuments.⁴⁰ Doing so would afford access for ongoing monitoring and survey while at the same time permitting continued public access by divers.

Scheduling was thought to be particularly appropriate for the assemblage of armoured vehicles due to their relatively robust construction, while perhaps less so for the site of LCT 427, given that the degree of public access was already constrained by the requirement to obtain permission to dive in the main shipping channel for Portsmouth and Southampton harbours. The scheduling applications were made in December 2011 but the determinations of the applications were subject to significant delay amounting to over four years. This was apparently caused by policy deliberations within the management of HE.⁴¹ In the summer of 2015, in response to concern expressed about this delay to HE by its advisory panel on Historic Wrecks⁴² and the Nautical Archaeology Society,⁴³ HE confirmed that it had recently formulated a policy that scheduling under the 1979 Act below mean low water would not be considered, apparently irrespective of the merits of any individual application.

The Scheduling Process

The Secretary of State for DCMS has a power under s.1(3) of the 1979 Act to schedule a monument and such scheduling is the principal mechanism for protecting a monument under the 1979 Act. As the policy guidance published by DCMS⁴⁴ makes clear this power is discretionary and encompasses monuments located below

the Mean Low Water Mark⁴⁵ (“MLWM”) out to the boundary of English territorial waters.⁴⁶ This enables the UK to discharge its international obligations,⁴⁷ under both the Convention Concerning the Protection of the World Cultural and Natural Heritage 1972⁴⁸ and the European Convention on the Protection of the Archaeological Heritage 1995.⁴⁹ It is also noteworthy that DCMS’ policy guidance contains no caveats as to the inadvisability of scheduling monuments below the MLWM. As the policy guidance from DCMS makes clear: “In practice, the Secretary of State usually considers recommendations put forward by [Historic England] together with the implications of designating Scheduled Monuments.”⁵⁰ While the Secretary of State’s discretion cannot be exercised exclusively or automatically upon the basis of HE’s advice, since that would be an unlawful fettering of the discretion,⁵¹ nevertheless the recommendations from HE are likely to be highly influential, if not predominantly so, upon the exercise by the Secretary of State of this discretion whether to designate or not. Indeed the courts have consistently recognised that specialist agencies, such as HE possess an expertise with which they should be very “slow to interfere”.⁵² This caution by the courts not to substitute its judgement for that of a discretionary decision maker is reflected in the fact that they will afford such regulators considerable latitude when evaluating the lawfulness of any exercise of statutory discretion in a specialist field.⁵³ This approach was recently

unanimously approved of by the Court of Appeal,⁵⁴ which emphasised that an “enhanced margin of appreciation” will be extended to a regulator where specialist judgement is involved in matters of scientific, technical and predictive assessments.⁵⁵ Doubtless this approach would also be applied not only by the courts to the Secretary of State’s decision, but also by the Secretary of State himself when considering HE’s recommendation as to whether or not to schedule. Consequently, as an expert body, HE’s advice, while neither binding nor unquestionable, would usually be accepted.⁵⁶ However such latitude has its boundaries. The discretion in question must be genuinely exercised in evaluating each application on its merits. It also places a clear duty upon the decision-maker to advance a clear and accurate explanation of the reasoning underpinning the decision.⁵⁷

DCMS and HE Policy Guidance

Before exercising this discretion to schedule, the Secretary of State will have regard to a number of non-statutory criteria.⁵⁸ These are set out in DCMS’ policy guidance document and it is acknowledged that they are not definitive and that the Secretary of State must take into account any other material considerations. In turn the rationale for HE’s recommendations on scheduling is set out in its Scheduling Selection Guides. These cover a range of heritage aspects, the most appropriate in this context being “Designation Scheduling Selection Guide Maritime and Naval”⁵⁹ and “Designation Scheduling Selection Guide Ships and Boats: Prehistory and Present”.⁶⁰ Again these guides are intended only to be indicative of the broad approach of HE to advising the Secretary of State on applications for scheduling. They also specifically caution that they are subordinate to DCMS’ policy on scheduling and that scheduling is not intended to produce a complete compendium

of nationally important sites⁶¹ but rather to capture a representative sample of such sites.⁶² The guides also acknowledge that monuments vary considerably in character and that they can be protected by a variety of mechanisms, including arrangements with stakeholders and that HE's objective is to recommend the most appropriate mechanism for protection for each asset.⁶³ Indeed identifying the best form of management for any particular site is expressly stated to be the "primary concern" when considering how management of the site in question can best be achieved.⁶⁴ This clearly implies an individual assessment by HE as to the most appropriate mechanism for protecting a site, using in this individual assessment the broad approaches identified in the selection guides and contemplates scheduling as a potential management tool.⁶⁵

The Application of Scheduling Policy Underwater

HE's Historic Wreck Panel met in July 2015 and was informed that "[Historic England] will not be promoting the scheduling of permanently submerged wrecks in the marine zone".⁶⁶ It was not all together clear exactly what this denoted, in that "not promoting" scheduling could simply mean taking a passive, reactive stance rather than a proactive one in considering the possibility of scheduling. However correspondence received subsequently by Ms. Alison Mayor in respect of her application to schedule LCT427 provided greater clarification. On 9 November 2015 Ms. Mayor received an email from He's Designation Team Leader (South) Listing Group apologising for the delay in responding to her application but stating that:

"... this case then got caught up in a much wider discussion at Senior Management level about the appropriateness of scheduling in the sea. This has only very recently resulted in a Historic England policy that we will not recommend the scheduling of such assets. This therefore means that we are not able to recommend LCT427 for scheduling either."⁶⁷

This clearly indicates that HE would not recommend scheduling a site below the MLWM in any circumstances, irrespective of the merits of the individual application. This interpretation was confirmed when subsequently Ms. Mayor received a copy of HE's recommendations to the Secretary of State in respect of her application to schedule LCT 427.⁶⁸

HE's Recommendations: LCT 42769

The advice, dated 18 November 2015, confirmed that consideration of the matter had been completed in May 2014 but a decision had been placed on hold pending a wider policy discussion within HE considering scheduling below the MLWM and that as those discussions were now concluded the application could be determined. Having identified potential threats to the site from dredging and fishing,⁷⁰ the site

was assessed against the non-statutory criteria as set out in the DCMS policy guidance and HE's selection guide on "Designation Scheduling Selection Guide Ships and Boats: Prehistory and Present".⁷¹ The advice concluded that the wreck meets the criteria for scheduling but "... as it is HE policy not to apply the 1979 Act to remains below Mean Low Water Mark it cannot be recommended for scheduling".⁷² The advice then goes on to state that amongst the reasons for the decision, under the criterion "Policy" that "It is HE policy not to use the 1979 Act to schedule below the Mean Low Water Mark and therefore the wreck cannot be scheduled".⁷³ This would appear to establish beyond doubt that HE's policy of not scheduling below the MLWM was used as an absolute bar to scheduling, no matter what the merits of the individual application and that no exceptions were being contemplated. The advice was then subject to an internal review, presumably as part of a normal HE process. In case any doubt remained as to the correctness of this interpretation, the "Countersigning Comments" seem to have placed the matter beyond dispute by stating, inter alia, that "After discussion with colleagues across the organisation it has now been agreed that we will not consider scheduling sites that are permanently submerged for the time being".⁷⁴

The reasons for this policy were iterated in the "Countersigning Comments". These were that the 1979 Act had not previously been used below the MLWM, so there was no precedent for such use; that there was no appetite in NPCD75 for such scheduling; that it is unhelpful to introduce another level of protection in a "complex zone" where HE's focus is the application of the Protection of Wrecks Act 1973 ("the PWA1973"); that scheduling duplicates the Protection of Military Remains Act 1986 ("the PMRA 1986"); the high costs of assessment and post-designation management; that Marine Planning is beyond the terrestrial planning system with different mechanisms and finally, that protection for such sites is being sought through entry on the Marine Record along with the development of a protocol with the Marine Management Organisation ("MMO").

The cogency of this reasoning is considered below, but from the above statements it would not be unreasonable to draw the conclusion that this previously undisclosed policy amounts to an absolute prohibition upon consideration of scheduling, irrespective of the circumstances of each application. HE effectively pre-determined any decision, vis, no site will be scheduled below the Low Watermark, notwithstanding that its published policy, which is not limited to terrestrial application by the 1979 Act or its published policy guidance, is to recommend the best form of management for a site as a "primary concern".⁷⁶ Therefore what appears to have occurred is the evolution of a policy, as yet unstated, by HE to not consider scheduling any monuments underwater, irrespective of the merits of the application. This policy exists within the Secretary of State's declared policy of contemplating the scheduling of such monuments and which makes no mention of the restrictive policy outlook now taken by HE. It would appear that there is now a substantive dichotomy of policy between DCMS and its statutory advisors. In part this appears to have been

driven by financial resource implications for HE, in that it not only acts as a statutory advisor to the Secretary of State as to whether scheduling of a site is advisable, but also, should such scheduling occur, then acts as the executive body responsible for assessing and monitoring the scheduled ancient monument. HE is thus in an invidious position, in that its purely advisory functions on scheduling have potentially adverse financial implications for it as an executive agency. To that extent HE's concerns for its financial resources as an executive agency have, perhaps inevitably, tainted its advisory function to the Secretary of State. The question then arises as to whether this fettering of its discretion by HE has legal implications for the validity of advice proffered by HE on scheduling applications and what, if any, are the policy implications?

Subsequently, on the 3 December 2015 Ms Mayor received an email confirming that having considered HE's recommendation, the Secretary of State for DCMS had decided not to add HM Landing Craft Tank 427 to the Schedule of Monuments. The decision letter gave no express reasons for this decision: presumably the reference to HE's recommendations was intended to convey the explanation that the Secretary of State had adopted HE's reasoning.

HE's Recommendations: Assemblage of Armoured Vehicles⁷⁷

On 1 April 2016 Ms Mayor received confirmation that, having considered HE's recommendation, the Secretary of State for DCMS had decided not to add the vehicle assemblage to the Schedule of Monuments. Again the decision letter gave no express reasons for this decision but presumably a reference therein to HE's recommendations was similarly intended to convey the explanation that the Secretary of State had adopted HE's advice. By way of contrast HE's advice to the Secretary of State in respect of this site was somewhat limited. The advice was replete with conclusions such as "... scheduling is not the appropriate mechanism", "scheduling them is not appropriate in this instance at this time" and "scheduling is not deemed to be the appropriate management regime".⁷⁸ Additionally the advice concluded that "while scheduling could be used to recognise their significance, it would not assist their management, and indeed could hamper such management ...".⁷⁹ No explanation was given as to how or why scheduling would not assist and could hamper the site's management. While these conclusions would leave an objective reader in no doubt as to what conclusions the Advice reached, it would be impossible to discern why HE came to its conclusion that scheduling was not appropriate and could hamper management of the site.

Furthermore, despite acknowledging that the site "is at risk from fishing and sports diving which has resulted in some damage to the site" the advice also stated, again without giving reasons, that their "significance is better recognised through enhancement of the marine record, flagging of this significance to appropriate bodies

(e.g. the MMO, MCA, UKHO and Port and Harbour Authorities etc.)”.⁸⁰ Finally, and somewhat bizarrely in the circumstances, the advice asserted that “However, these vehicles could be managed through natural environment designations”.⁸¹

The Legal Framework

The Duty to Consider each Application on its Merits

The fundamental principles governing the exercise of a statutory discretionary power are long established. While this area of law remains one of the most kinetic, these basic tenets can be regarded as well settled. A decision maker, charged with a statutory discretion, must consider each issue upon its individual merits. A policy can be legitimately developed and that policy may set an extremely high bar against a particular authorisation being granted, but the policy on a discretionary judgement cannot amount to an absolute prohibition in all circumstances, or a refusal to consider an issue upon its individual merits as a potential exception to the established policy norm. In short, a discretionary decision maker may develop a policy but cannot close its mind to considering departure from that policy in each individual case. This principle is simply illustrated by the case of *R. v London County Council ex p. Corrie*.⁸² A local Bye-Law required written permission from the Council for the sale of articles in any public park. The Council adopted a policy, by way of resolution, of refusing all applications for permission to sell articles. Mrs Corrie, who wished to sell pamphlets, sought judicial review of the Council’s refusal, relying on this policy, to consider her application for permission. The Court held that the Council had a discretion whether or not to grant permission for such sales. While the Council could lawfully adopt such a policy nevertheless that policy could not be used to fetter its discretion. The Council’s use of the policy to refuse to contemplate ever granting permission fettered its discretion to such an extent that there was in reality no possible exercise of discretion whatsoever.⁸³ Each case, while it must be measured against the existing policy, had to be considered on its merits and the policy could not be used to justify refusal in all circumstances without consideration of each application.⁸⁴

An even closer analogy can be found in the recent case of *R. (on the application of McMorn) v Natural England*.⁸⁵ The case concerned a challenge to Natural England’s refusal to grant a licence to kill a small number of Buzzards and to destroy four nests. A licence is required to kill or capture them under the Wildlife and Countryside Act 1981, and the claimant applied to Natural England (“NE”) for such a licence on five separate occasions between 2011 and 2014. The basis of these applications was the claim that the buzzards were causing significant damage to his pheasant “poults” by killing and disturbing them. By way of background Ouseley J. pointed out that the Claimant had been granted licences by NE to kill a number of herring and great

black-backed gulls on the farms in 2011 and 2013, and, also in 2013, to kill three cormorants, in respect of damage done to partridge and fishing interests respectively.

While NE had a discretionary power to refuse or grant a licence, the generic policy on culling birds was set by the Department for Environment, Food and Rural Affairs ("DEFRA"). DEFRA had a specific policy on culling certain birds but not on raptors, such as Buzzards. The applicable policy guidance was therefore the generic one on birds. This contemplated culling where appropriate. In the absence of a specific raptor policy by DEFRA NE developed an undisclosed policy which, in effect, amounted to a mind-set where culling raptors could not be contemplated. Thus a policy dichotomy opened up where Defra's policy contemplated culling in certain circumstances whereas NE's undisclosed policy did not contemplate such a possibility. NE's policy was both undisclosed and differed substantially from DEFRA's publicly stated policy position, which was intended to be the dominant policy statement. The Court held that NE had acted unreasonably, in a *Wednesbury*⁸⁶ sense, in fettering the exercise of its statutory discretion.

The analogy of the *McMorn* case to the policy dichotomy between DCMS and HE on scheduling below the MLWM is clear. DCMS' stated policy on scheduling expressly contemplates scheduling below the MLWM, as indeed does HE's publicly stated policy in its Selection Guides. Neither policy guidance draws any distinction between scheduling above the MLWM (terrestrial and foreshore) and below it. However HE's hitherto undisclosed and currently unstated policy⁸⁷ is not to consider the possibility of scheduling below the MLWM, notwithstanding its own policy position stated in its Selection Guides and the fact that HE's policy is intended to be subordinate to DCMS' policy statement. HE, in formulating its advice to the Secretary of State, is therefore relying upon an unstated policy, which it has formulated itself, which fundamentally counters the policy of DCMS, to which it is meant to be subordinate: it differentiates between scheduling above and below the MLWM and refuses to countenance the possibility of the latter. HE's policy thus appears entirely inconsistent with that of DCMS, its own publicly stated policy and fetters its discretionary judgement in formulating that advice by refusing to contemplate scheduling below the MLWM.

Alternatively it could be argued that in rigidly applying its policy of not considering scheduling below the MLWM without giving any consideration to whether the circumstances of the application merited a departure from that policy, HE had in effect predetermined its advice upon the application. Predetermination has been described as "... a surrender by a decision maker of its judgement by having a closed mind and failing to apply it to the task".⁸⁸ In determining whether predetermination has occurred one must be careful to distinguish between predetermination and predisposition. Where, as here, a policy exists, an administrative decision maker will be naturally predisposed to applying that policy. This is quite legitimate and indeed to do otherwise would in effect negate the whole purpose of developing a policy framework. What is not acceptable is that the

decision maker makes its mind up at too early a stage without balancing the policy against the merits of departing from that policy in the circumstances of the individual application.⁸⁹ It would appear that once HE had decided to introduce this new policy that no scheduling below the MLWM would occur, all applications for such scheduling were to be rejected, irrespective of their merit. That would constitute predetermination. Accordingly HE appears to have failed to exercise correctly its statutory function of advising the Secretary of State fairly.

However, when considering the legality of the application of this policy position by HE, the matter is not quite a straightforward comparison to the above principles. Had HE been making the scheduling decision its refusal to consider even the possibility of scheduling LCT 427 due to the wreck's location⁸⁶ So named after the decision in *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 K.B. 223 which established the principle that a decision is unreasonable when it is one no rational person could have made in the circumstances.

below the MLWM would clearly be an unlawful fettering of its statutory discretion⁹⁰ and a predetermination of the application. However it is the Secretary of State for DCMS who makes the decision whether or not to schedule,⁹¹ HE merely having a statutory advisory role. Thus, while HE may have fettered its discretion and predetermined its advice it is not the decision maker, the Secretary of State is. Consequently two questions arise. First, is HE's blanket application of policy in itself ultra vires its statutory duties under the National Heritage Act 1983 ("the 1983 Act")? Second, can this fettering of discretion and predetermination by HE therefore taint the Secretary of State's decision of whether or not to schedule? Under the 1983 Act⁹² HE has a statutory duty, so far as practicable, to secure the preservation of ancient monuments in England⁹³. Before scheduling any monument the Secretary of State is required to consult HE.⁹⁴ There is no corresponding express statutory duty on HE to advise the Secretary of State in response to this consultation but arguably such a duty can be implied from HE's statutory duty to secure the preservation of ancient monuments in England. Given HE's policy decision not to consider the possibility of scheduling any sites below the MLWM, irrespective of the merits of each application for scheduling, it can be argued that HE has not discharged this duty under the 1983 Act to secure the preservation of ancient monuments in England and has additionally fettered its discretion in such a manner as to undermine the purpose of the power given to it by that Act to advise the Secretary of State.⁹⁵ Additionally its reliance upon an undisclosed policy in formulating its advice may constitute unreasonableness or irrationality within a *Wednesbury* sense. To that extent it may be argued that HE has potentially not properly exercised its statutory duties in formulating its advice to the Secretary of State.

To what extent could such an improper exercise of advisory functions potentially taint the Secretary of State's decision?⁹⁶ In deciding whether or not to schedule a

monument of accepted national importance the court in *R. v Secretary of State for the Environment ex p. Rose Theatre Trust Co*⁹⁷ accepted that the Secretary of State has a very wide discretion, stretching beyond the stated non-statutory criteria.⁹⁸ Moreover, it has been noted above that the advice of a specialist statutory advisor carries significant, if not predominant weight, since the courts acknowledge their expertise in the matter and afford an enhanced margin of appreciation to discretionary decisions based on such specialism in technical matters. Nevertheless, to the extent that the Secretary of State relied upon HE's advice, formulated on an inconsistency with his own policy, he may thus have been departing from that policy without a reasoned justification for so doing. If it could be established that the Secretary of State had afforded such predominance of weight to HE's recommendation, based as it was on a previously undisclosed and contradictory policy to his own and a refusal to consider the application individually, then it is arguable that the Secretary of State had taken into account advice which was indeed legally flawed. In turn this may vitiate his own decision.⁹⁹ Conversely if the Secretary of State could demonstrate that HE's refusal to countenance scheduling below the MLWM had been discounted and regard paid purely to HE's evaluation of the merits of the application, if any, by a local authority planning officer to its planning committee, though in the event it was found not to have occurred, then the decision could be upheld.¹⁰⁰ As ever in a judicial review of administrative decisions much would turn upon interpretation of the wording of the decision letter.¹⁰¹

The Duty to give Reasons

The 1979 Act does not expressly provide for the giving of reasons for the Secretary of State's decision whether or not to schedule. Nor generally does the Common Law imply such a duty in respect of administrative decisions.¹⁰² However there has been a discernible drift by the Courts towards increasingly requiring reasons to be given for administrative decisions in certain circumstances.¹⁰³ This drift has predominantly centred upon decisions adversely impacting personal liberty, economic benefits or obligations and more recently matters concerned with, broadly, environmental regulation and protection. While the decision not to schedule this site involves no adverse impacts upon such interests or obligations, nevertheless there is a clear public interest in securing appropriate conservation of underwater cultural heritage if heritage is to be understood as a component of a broader definition of environment.¹⁰⁴ In particular the courts have increasingly required the stating of reasons where their absence would render any right of review nugatory. As the Supreme Court has recently stated, the right to make representations, which the Secretary of State's decision letter conferred upon Ms. Mayor by inviting a request to review the decision not to schedule, is somewhat valueless unless one has advance knowledge of the considerations that may lead to an adverse administrative decision.¹⁰⁵ This judicial drift has possibly now reached its zenith when the Court of Appeal recently affirmed that the enhanced margin of appreciation afforded by the courts to specialist public bodies when evaluating the lawfulness of their decision

making in technical or scientific matters carries with it a corresponding burden to provide a full and accurate explanation of all the relevant facts.¹⁰⁶ Although this duty was articulated in the context of a duty to assist the court with a “full and accurate explanations of all the facts relevant to the issue [of lawfulness of the decision]”¹⁰⁷, it is submitted that, in the light of the Supreme Court’s observations that advance knowledge of the reasons underpinning an administrative decision is a prerequisite of an appeal, this duty to provide a clear and accurate explanation of reasoning must logically also extend to a recipient of such an administrative decision.¹⁰⁸ Otherwise any right of appeal may indeed be rendered nugatory.

Additionally the courts have also required the provision of reasons on the basis of the Common Law presumption that where an Act confers a discretionary administrative power it will be exercised in a manner which is fair in all the circumstances.¹⁰⁹ This presumption has been justified as leading to better decision-making by ensuring the decision maker receives all relevant information, that it is properly tested and that it requires decision-makers to listen to persons who have something relevant to say, thereby

promoting congruence between the decision-makers and the law which governs their actions.¹¹⁰ This Common Law duty of procedural fairness will extend to provision of reasons, where their absence means worthwhile representations cannot be made without knowledge of such reasons.¹¹¹ Where reasons must be provided they should at least constitute a genuine and reasoned discussion in sufficient detail to enable a response to be formulated.¹¹² It is not necessary that all the reasoning behind the decision is revealed but the grounds on which the decision is reached should be set out clearly.¹¹³ It would appear that the Secretary of State’s decision letter, accompanied by HE’s Advice by way of explanation, falls far short of this standard for both sites. In particular the paucity of reasoning in HE’s advice, upon which the Secretary of State based his decision on the assemblage of armoured vehicles, made Ms. Mayor’s subsequent request for a review of the decision extremely difficult to formulate.¹¹⁴ In such circumstances this might well lead a court to requiring sufficient reasons to be adduced that would enable an effective review of scheduling decisions to be conducted. Such an approach would be contrary to that taken in *R. v Secretary of State for the Environment Ex p. Rose Theatre Trust Co*¹¹⁵ but, as noted above, subsequent cases are strongly indicative of a significant change in judicial attitudes.

Acknowledged Risks to the Site of the Armoured Vehicles

There is a long history of divers recovering souvenirs from wrecks, especially those of a historical nature, which appears to date from the earliest days of hard hat diving.¹¹⁶ The tradition was readily adopted by recreational Scuba divers from the 1950's onwards but following a public outcry at the end of last century over the practice in relation to wartime military wrecks¹¹⁷ the maritime archaeological community and the recreational diving organisations have pursued an extensive public education initiative to reduce the practice.¹¹⁸ This initiative, combined with activation of the Protection of Military Remains Act 1986,¹¹⁹ appears to have diminished the problem¹²⁰ but such souvenir hunting still occurs and constitutes a risk to this site which was been expressly acknowledged by HE in its advice. It also remains the case that, in the absence of statutory protection through scheduling, such recoveries of artefacts by divers are lawful acts of salvage.¹²¹ The vehicles were cargo from LCT(A) 2428 and the courts have long recognised that the recovery of items of cargo, including cargo from sunken warships,¹²² constitutes a legitimate act of salvage.¹²³ Furthermore, while most commercial salvage is contractual,

neither permission from the owner nor the existence of a contract is a prerequisite to salvage. Salvage may be entirely 'ex contractu'.¹²⁴ Provided therefore that the necessary statutory requirements, such as reporting the recovery to the Receiver of Wreck¹²⁵, are complied with there is no impediment to divers recovering items from the vehicles, irrespective of the damage such removals would inflict on the archaeological integrity of the site. It may be the case that in concluding that the site's significance "... is better recognised through ... flagging of this significance to appropriate bodies (e.g. the MMO, MCA, UKHO and Port and Harbour Authorities etc.)".¹²⁶ HE was under the impression that such salvage required some form of prior consent. In particular this may have been the case in respect of marine licensing, given the reference to the MMO,¹²⁷ which administers marine licensing in English waters. A marine licence is required for the use of any vessel or floating container, such as a lifting bag used by divers to recover objects by adding buoyancy, to remove any object from the sea bed.¹²⁸ On the face of it that requirement would encompass any removal of artefacts from the tanks. However the MMO's interpretation of this requirement is that the removal of objects by a diver "by hand", without the use of a floating container, does not require a marine licence.¹²⁹ Consequently divers may lawfully recover whatever items from the vehicles that they can carry by hand and notification of the site's significance to the organisations and authorities identified in the Advice does nothing to afford protection to the site from this risk.¹³⁰ It would appear therefore that HE may have misdirected itself in law in that its conclusions may be, in part, predicated upon a misunderstanding of salvage law and the marine licensing regime. Alternatively HE may have failed to take into account a material consideration i.e. that voluntary salvage using recovery by hand of artefacts from the vehicles is a lawful activity that does not require consent from either the owner or the MMO and is not predicated upon the existence of a salvage contract. In turn, in placing reliance on the Advice Report from Historic England in

respect of this particular aspect, the Secretary of State may have misdirected himself and failed to take into account a material consideration.

Natural Environment Management

The most challenging assertion made by HE in their Advice is the statement that the “vehicles could be managed by natural environment designations”.¹³¹ These designations are unspecified, which necessarily, then, requires the appellant to undertake an exercise in speculation as to what HE might be contemplating. A “natural” environment designation would usually not contemplate a vehicle since, by definition, it is not flora, fauna or geology. In that respect, a number of designations and devices are considered in the context of their utility and potential, if unlikely, fit.

The decision takers could perhaps have been considering that certain site designations which permit prohibitions or restrictions on activities which may result in harm to natural features, such as priority species and habitats, may then provide a non-targeted but ancillary benefit to benthic archaeology. Certainly there is the possibility that damaging activities such as bottom-trawling or salvage operations in territorial waters might equate to a plan or project requiring an appropriate assessment under the requirements of the Habitats Regulations;¹³² or that the activity might be occurring within a Marine Conservation Zone

(“MCZ”),¹³³ outlined below. That however would make protection of a heritage feature wholly dependent upon the alignment of a serendipitous course of events. As it transpired, the areas in which the vessel/vehicles lie are not a part of a Special Area of Conservation and in this particular case a check with the Devon and Severn Inshore Fisheries and Conservation Authority¹³⁴ confirmed that no natural environmental designations in force at the coordinates of the vehicles.

An additional possibility is that confusion has arisen as a result of the difference between Marine Protected Area (“MPA”) definitions set out in the Marine and Coastal Access Act 2009 (“MACAA”) and the Marine (Scotland) Act 2010 (“MSA”). Regarding the former, s.117(c) of MACAA makes provision for the designation of a MCZ for the purpose of conserving “... features of geological or geomorphological interest”. However, the MSA provides for the designation of a “historic marine protected area” (“Historic MPA”) to protect a “marine historic asset of national importance”¹³⁵ in addition to those MPAs which are focused upon the ‘familiar’ natural environment designations. ¹³⁶ Additional designation requirements for Historic MPAs are set out in s.73, including in s.73 (5) a definition of a marine historic asset which includes both vessels and vehicles and/or their remains.¹³⁷ The MSA adopts a broader protective scope than the MACAA, such that the latter could not be used to manage the protection of tanks, bulldozers or landing craft, whatever their heritage value.

A final possibility might perhaps contemplate an Environmental Impact Assessment (“EIA”), even though this is not a wholly natural environment-focused measure. While heritage is specifically contemplated by the Regulations,¹³⁸ their application is parasitical upon an application for development which would fall into the categories specified in the Annexes to the EIA Directive. Were there to be development proposed for a site where there was a scheduled monument then, according to Schedule 1 of the EIA Regulations¹³⁹ the area would be a sensitive area and immediately trigger the necessity for an EIA. In the absence of that designation, unless there were other features compelling an EIA, a systematic evaluation might not take place. At any rate, even if there were an EIA, it is not to say for certain that adequate protection would be secured through planning or marine licensing conditions applied as a result. The key issue there though is that there is absolutely no protection conferred unless that is some way referential to a development project. It is difficult to envisage a development project affecting the Selsey Bill site other than perhaps pursuant to extractive dredging.¹⁴⁰ The site of LCT 427 would be likely to engage the marine licensing regime pursuant to Part 4 of the MACAA to the extent that there might be maintenance dredging required to the shipping channel.¹⁴¹ In both cases however, the lack of an applied protective designation for the features would mean that there would be no automatic consideration by the competent authority. It would thus appear that, without more detailed explanation, HE’s assertions in respect of the protective potential of natural environment designations are at best questionable and at worst obfuscating.

Rationale

While it is not possible to disentangle the full rationale for HE’s change of policy towards the use of the 1979 Act below MLWM, since this has been not fully publicly articulated, some observations can be usefully made on the reasoning set out in the Counter Signing Comments in HE’s advice on LCT 427.¹⁴² The most striking comments were that the 1979 Act had not previously been used below the MLWM so there was no precedent for such use and that scheduling duplicates the PMRA 1986. The former comment is inaccurate as the 1979 Act has been used to schedule wrecks in both England, Scotland and Wales. It was first used underwater in Scotland for the protection of seven wrecks of the German High Sea Fleet in Scapa Flow, scheduled as two groups of 3 and 4 wrecks on 23 May 2001.¹⁴³ The 1979 Act was chosen specifically as a protection mechanism as the sites were robust and the administrative complications of licensing the many divers that visit each of the wrecks would have been prohibitive. The Scottish experience has been largely positive and no more expensive than protecting the sites under the 1973 Act. In Wales the wreck of the *Louisa* located within Cardiff Bay was scheduled on 27 December 2001, over two years after it became submerged at all times by the

impoundment of Cardiff Bay in November 1999.¹⁴⁴ When English Heritage published its initial policy for management of marine archaeology in 2001,¹⁴⁵ it noted that whilst the 1979 Act could be used to protect monuments on the seabed, it had not yet been used to this effect.¹⁴⁶ However it did note that Historic Scotland had made it their policy to use the 1979 Act in preference to the 1973 Act where marine sites are established diver attractions that provided local economic benefits or where the 1973 Act would be restrictive in a way counter-productive to the long term wellbeing of the site.¹⁴⁷ It also stated that it would monitor the success of the application of the 1979 Act in Scotland and would consider its use as part any review of the statutory and management framework.¹⁴⁸ This monitoring would appear to have confirmed the Scottish success because on 8 November 2013 English Heritage scheduled a “Phoenix Caisson” that formed part of the “Mulberry” floating harbour which is located in the Straits of Dover, approximately 660m to seaward of the low water mark.¹⁴⁹

The latter comment (i.e. that scheduling duplicates the PMRA 1986) reveals a profound misunderstanding of the origins and objectives of the 1986 Act. The objective of the 1986 Act is to protect the last known resting place of military personnel lost in the service of their country from unauthorised disturbance.¹⁵⁰ Beyond that it has no heritage management objectives or powers. Consequently the Ministry of Defence (“MOD”) undertakes no monitoring, surveys or archaeological assessments of such military remains designated under the 1986 Act, nor does it currently have the capacity to do so.¹⁵¹ Consequently the Act, as presently administered, provides no heritage management facilities beyond this prohibition and MOD does not see either the Act or indeed itself as having a proactive heritage management function beyond this prohibition of unauthorised disturbance. Consequently MOD cannot be viewed as a capable heritage management organisation for in situ underwater cultural heritage. It is also worth noting that, while in this specific instance LCT 427 could be protected under the 1986 Act that Act has no application to wider

underwater cultural heritage such as civilian vessels¹⁵² and aircraft or manmade flooded structures such as caves. All in all it is difficult to avoid the conclusion that the assertion that the 1986 Act simply duplicates the 1979 Act (and presumably also the 1973 Act) appears to have its foundation more in a desire to pass the costs of heritage management onto another government department rather than in a studied appraisal of the respective heritage management capacities of the two Acts.

It is also difficult to understand the rationale behind the comments that “... it is unhelpful to introduce another level of protection in a ‘complex zone’ where HE’s focus is the application of the Protection of Wrecks Act 1973 ...” and that there are “... high costs of assessment and post-designation management”. While the 1973 Act differs from the 1979 Act in that the former prohibits unauthorised diving or

salvage operations directed to the exploration of a designated wreck, the latter does not prohibit access by divers. However both Acts prohibit unauthorised intrusive or damaging activities and in recent years English Heritage sought to increasingly afford public access to wrecks designated under the 1973 Act by facilitating the grant of licences for divers to visit suitably robust sites, a policy that HE is continuing. Thus in practice the regulatory objectives of the two Acts have increasingly coincided. It is thus difficult to understand why the use of the 1979 Act, on suitably robust sites that can sustain public access, should be any more disadvantageous than use of the 1973 Act. Equally, control of any intrusive activities on scheduled monuments could be regulated by Scheduled Monument Consent, with conditions attached, in the same manner as Licences are granted with conditions under the 1973 Act. Indeed, in that the 1979 Act does not require the processing of licences for visiting as the 1973 Act does, the burden of heritage management on HE is eased, while prohibition of intrusion or damage is achieved.

Nor, despite the reference to “the high costs of assessment and post-designation management” does there appear to be any significant disparity of costs between the two statutory mechanisms. HE receives archaeological assessments from its diving contractor for archaeological support¹⁵³ but it is difficult to see how the costs would not be identical for sites protected under the 1973 Act or the 1979 Act. Furthermore it would appear that HE has failed to consider how monitoring and survey for Scheduled Monuments could be achieved by use of avocational archaeological volunteers. HE, through its predecessor English Heritage, has considerable experience of using avocational archaeological divers to monitor, survey and even intrusively investigate sites designated under the 1973 Act.¹⁵⁴ Avocational teams, licensed annually by HE, conduct such archaeological operations and submit annual reports. Indeed HE can be said to be a world leader in the utilisation of avocational teams, some of whom have achieved results of international significance.¹⁵⁵ Such avocational monitoring and surveying could similarly be utilised in respect of Scheduled Monuments underwater. Monitoring would require no authorisation, while surveying and any intrusive activity could be authorised by Scheduled Monument Consent with conditions attached for submission of annual reports in a comparable manner to the 1973 Act.¹⁵⁶ This avocational resource is of considerable benefit to HE, much more so in the age of public funding austerity which the UK is currently enduring, and HE’s apparent failure even to contemplate its utilisation for Scheduled Monuments below MLWM is all the more disappointing given its extensive use for designated wreck sites under the 1973 Act.

Finally the comments that “... the Marine Planning is beyond the terrestrial planning system and approaches are different” and that “protection for such sites is being sought through entry on the Marine Record and the development of a protocol with the Marine Management Organisation” (“the MMO”) are

highly suggestive of an unnecessarily limited and terrestrially focused vision for the use of the 1979 Act. That the legislature intended the 1979 Act to be utilised underwater is beyond dispute.¹⁵⁷ Furthermore MACAA, which introduced the new marine planning system, did not in any way amend this intention. Thus the utilisation of scheduling under the 1979 Act is not solely predicated on the nature of either the terrestrial or the marine planning systems and is clearly intended to continue to operate in both the terrestrial and marine spheres, notwithstanding the introduction of the new regulatory framework for marine planning.¹⁵⁸ Nor can it be said that this new marine planning system affords the same degree of protection as scheduling. Marine planning is given effect primarily through the accompanying marine licensing system. A marine licence is now required for a “marine licensable activity”.¹⁵⁹ While such licensable activities encompass development projects¹⁶⁰ they are subject to a number of significant exceptions,¹⁶¹ such as navigational maintenance dredging by Harbour Authorities,¹⁶² and do not encompass damaging activities such as anchoring or the recovery of objects by hand. Consequently the marine planning system, the marine licensing system and the development of protocols with the MMO do not afford the degree of protection that scheduling would do so. Furthermore even if damaging or intrusive activities were prohibited by designation under the PMRA 1986, that Act would not provide for heritage management through site monitoring, so unauthorised intrusion or environmental threats such as erosion of the seabed would not be detectable. In short neither entry on the Marine Record nor the development of protocols with the MMO can provide the degree of protection or site management that a more imaginative use of the 1979 Act could afford.

Conclusion

It would appear that as a result of budgetary pressures, HE has attempted to amend its policy in relation to scheduling below MLWM so as to use a blanket refusal to consider such an option, irrespective of the individual circumstances of the site in question or the merits of the application to schedule. In doing so HE evolved a policy within a policy, HE’s new policy being seemingly based primarily upon the perceived implications for its resources. The resulting dichotomy of policy between DCMS and its statutory advisers is at best confusing to both the marine archaeological community and the public, at worst it may be ultra vires. At times of unprecedented public funding austerity statutory agencies such as HE need to build support amongst their public constituencies. Formulating such an approach is potentially alienating and does not seem well designed to achieve this.

The 1979 Act also appears to offer a versatile instrument for managing underwater sites. Indeed on suitably robust sites the 1979 Act may fit HE’s public access agenda better than the 1973 Act, delivering the public access that HE desires, without the resource implications generated pursuant to the granting of licences for visiting under the 1973 Act. Moreover there seems little reason why the 1979 Act could not be used in conjunction with avocational resources in a similar manner to the 1973

Act. This then throws into question HE's declared "focus" on the 1973 Act below the MLWM. The potential of the 1979 Act below the MLWM may have been inadvertently overlooked and a comparative reappraisal of the two Acts by HE may now be appropriate.

The applicants in the scheduling process described in this article remain none the wiser as to the underlying reasoning of the decisions not to schedule.¹⁶³ However the duty to give reasons seems to have evolved to a point where it is, to a greater or lesser degree, a uniform requirement, whatever the matter under consideration by the statutory agency. This judicial drift is attributable to a greater willingness to apply this requirement by analogy in circumstances where there is no express legislative requirement to do so. It would seem to be clear from the contemporary judgments discussed above that HE and the Secretary of State should now conform to this evolving Administrative Law orthodoxy.

Finally both these matters and the *McMorn* and *Mott* cases appear to have revealed a surprising gap in statutory agencies' awareness relating to the constraints imposed upon the formulation of policies and decision-making thereunder by the basic principles of Administrative Law. As austerity continues and public funding becomes even more restricted, stakeholders are likely to turn even more frequently to a potential judicial review process to protect what they view as priorities for continued funding. Such challenges, based upon Administrative Law, to policies driven by financial constraints may therefore become even more prolific, notwithstanding the obstacles to an application.¹⁶⁴ It may well be the case that staff development programmes in the public sector could beneficially incorporate awareness training in the evolving tenets of Administrative Law.

References:

1 The authors are grateful to Ms Alison Mayor, Southsea BSAC, Ms Sarah Clarke, Chief Scientific Officer, Devon and Severn IFCA and Mrs Julie Williams, Senior Lecturer, Business School, Plymouth University for their assistance in the preparation of this article and to Dr Thomas Appleby, Associate Professor, University of the West of England, for reading a draft of this article and his invaluable comments thereon. The views stated herein remain the sole responsibility of the authors.

2 Budget cuts of 10% over four years 2015/2016 to 2019/2020 were announced by HE in its Annual Report & Accounts 2015/16; see

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/538874/26335_R_Historic_England_Annual_Report_8_July_1_.pdf

3 <http://www.theguardian.com/commentisfree/2014/jun/06/britain-fight-europe-beaches-d-day-eu-heroic-conflict>

4 See, for example, *D-Day Wrecks of Normandy*, M. James, ISBN 0-9531856-05

5 Indirect protection for underwater cultural heritage of a military nature can also be afforded under the Protection of Military Remains Act 1986.

6 For a detailed account of the Act see "Legal Protection of the Underwater Cultural Heritage" S. Dromgoole (ed.), *Kluwer Law International* (1999) Ch.12; P. Fletcher-Tomenius and M. Williams "A Diving or Salvage Operation? ROV's & the Protection of Wrecks Act 1973" *International Maritime Law* (1999) Vol.6 (10) pp.270-272.

7 For the purposes of the 1973 Act the term "Secretary of State" now denotes, in England the Secretary of State for DCMS.

8 S.1(1)(b).

9 s.1(1); As only a “vessel” can be designated other forms of underwater cultural heritage, such as aircraft and landscapes, cannot be protected under the Act.

10 See further Advisory Committee on Historic Wreck Sites, Report for years 1999 and 2000 Department for Culture, Media and Sport March 2002 Annex E pp.40–41.

11 s.1(3).

12 See further: <https://content.historicengland.org.uk/images-books/publications/accessing-englands-protected-wreck-sites-guidance-notes/heag075-guidance-notes-for-divers-and-archaeologists.pdf/> .

13 Interestingly the courts have stopped short of determining whether or not a public right to swim or dive in tidal waters exists (*Blundell v Catterall* 5 B & Ald 268; *R. (on the application of Newhaven Port and Properties Ltd) v East Sussex CC and Newhaven Town Council* [2015] SC 7 at 25). Even if such a right exists the Crown could presumably withdraw consent. However, the preponderance of statutory regulation, in the form of the 1973 and 1979 Acts, as well as the Protection of Military Remains Act 1986, indicates little faith can be placed in such a mechanism for protecting underwater cultural heritage.

14 Under s.53 a monument situated in, on or under the seabed within the seaward limits of UK territorial waters may be scheduled.

15 Curiously although the title of the Act refers to “Ancient” monuments there is no age limit and post-1945 structures have been scheduled.

16 s.62(7).

17 For an account of the Act in so far as it may be applied to underwater archaeological remains see S. Dromgoole (ed.), Ch.12.

18 This term is undefined.

19 s.2(1); consent may be granted subject to conditions: s.2(4).

20 European Convention on the Protection of the Archaeological Heritage (revised) ETS No.143.

21 A Lend-Lease LCT Mk.5 designed for use by the first invasion wave, modified with additional armour protection for the crew stations and on the bows, while a heavy wooden ramp allowed the two tanks to fire forward;

https://en.wikipedia.org/wiki/Landing_craft_tank#Conversions_and_modifications .

22 A Caterpillar D7 Bulldozer to which armoured plating was fitted by J. Holding Ltd. Hatfield. WW2 tanks and Bulldozers 10km South of Selsey Bill, Case Number 1412109, Advice Report, Historic England, 24 March 2016 p.4.

23 A vessel abandoned at sea by Master and crew without hope of recovery; *The Aquila* 1 C.ROB 38 (1798) per Sir W. Scott at 40.

24 A vessel abandoned at sea by Master and crew without hope of recovery; *The Aquila* 1 C.ROB 38 (1798) per Sir W. Scott at p.4;

http://www.maritimearchaeologytrust.org/uploads/publications/LCT2428_FINALREPORT_WEB.pdf pp.10–11 .

25 See further <http://www.nauticalarchaeologysociety.org/content/adopt-wreck-award> .

26 This survey also encompassed the site of LCT(A) 2428; see further

http://www.maritimearchaeologytrust.org/uploads/publications/LCT2428_FINALREPORT_WEB.pdf .

27 This survey also encompassed the site of LCT(A) 2428; see further

http://www.maritimearchaeologytrust.org/uploads/publications/LCT2428_FINALREPORT_WEB.pdf , p.28

28 A Mark 3 LCT, 350 gross tons, built in 1943 by Arrol Williams & Co Ltd Partick. See further <http://www.wrecksite.eu/wreck.aspx?78873> .

29 An amphibious version of the ubiquitous Sherman tank known as duplex drive Sherman (DD).

30 Nelson Class, 34,270 tons, launched in 1925 by Cammell-Laird, Birkenhead and scrapped 1948 after extensive war service. http://ww2db.com/ship_spec.php?ship_id=859 .

31 <http://www.southseasubaqua.org.uk/diving-projects/kedge-hook-lct-427>

32 Mindful of the probable presence of human remains no attempt was made to enter the two sections but there is no reason to doubt a similar or even better state of preservation within.

33 An operation to seize and hold for a limited period the French port, the operation was a costly failure for Allied forces, which were largely pinned down on the invasion beaches, suffering heavy casualties and unable to seize their objectives inland. This failure is viewed as heavily influencing the strategy for subsequent Allied amphibious assaults, including the provision of specialised equipment such as amphibious armour and armoured vehicles designed to neutralise defensive concrete emplacements and bulldozers to create access off the beaches. See further “The Dieppe Raid: The Story of the Disastrous 1942 Expedition” R. Neillands, 2005 Indiana University Press, Bloomington,

IN; "Churchill's Secret Weapons: The Story of Hobart's Funnies" P. Delaforce, 2006 Robert Hale, London

34 J. Rickard (7 March 2012), Cruiser Tank Mk VIII, Centaur (A27L).
http://www.historyofwar.org/articles/weapons_cruiser_tank_mk_viii_centaur.html . In fairness to the design, when fitted with a significantly more powerful engine and designated as the A27M Cromwell, the tank became a successful mainstay of British armoured forces. See further https://en.wikipedia.org/wiki/Cromwell_tank.

35 https://en.wikipedia.org/wiki/Ordnance_QF_95_mm_howitzer .

36 https://en.wikipedia.org/wiki/Royal_Marines_Armoured_Support_Group .

37 https://en.wikipedia.org/wiki/Royal_Marines_Armoured_Support_Group .

38 One at the Musee des Blindes at Samaur and the other at Pegasus Bridge, Benouville, Normandy.

39 Project Leader at Southsea BSAC for both sites.

40 No application was made in respect of the site of LCT(A) 2428 itself. For its work on these and other submerged sites associated with D-Day, Southsea BSAC has received unprecedented recognition for an avocational archaeological group, winning the NAS' "Adopt a Wreck Award" in 2009, 2010 and 2012, the BSAC's "Duke of Edinburgh Prize" in 2009 and 2011 and its Jubilee Trust's "Peter Small Award" in 2008, 2010 and 2013.

41 Created by s.32 of the National Heritage Act 1983 the Historic Buildings and Monuments Commission for England was commonly referred to as "English Heritage". On 1 April 2015 the Commission changed its common name from "English Heritage" to "Historic England". The terms "English Heritage" and "Historic England" are used interchangeably in this paper.

42 Minutes of the 9th meeting HISTORIC WRECKS PANEL held at 11am on Monday 8 June 2015 in Kenilworth and Stokesay Meeting Rooms, Waterhouse Square, London, EC1.

43 Personal Communication Email 27 August 2015 Historic England to Nautical Archaeology Society.

44 Scheduled Monuments and nationally important but non-scheduled monuments: DCMS October 2013. This document sets out DCMS policy on Scheduled Monuments. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/249695/SM_policy_statement_10-2013_2_.pdf .

45 Scheduled Monuments and nationally important but non-scheduled monuments: DCMS October 2013. This document sets out DCMS policy on Scheduled Monuments. Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/249695/SM_policy_statement_10-2013_2_.pdf , p.11 .

46 i.e. 12 nautical miles from the UK's declared baselines.

47 P.3

48 <http://whc.unesco.org/en/conventiontext/> .

49 ETS 143.

50 P.4 para.8.

51 See, for example, *Stringer v MHLG* [1970] 1 W.L.R. 1281.

52 *Levy v The Environment Agency* [2002] EWHC 1663 (Admin) per Silber J at [78]–[80]; see to same effect *R. (on the application of Edwards) v The Environment Agency* [2005] EWHC 657 (Admin) per Lindsay J at [92] where the Court noted its entitlement to give "real weight" to the evidence of the statutory agency "in the absence of a clear refutation"; *R. v Inland Revenue Commissioners ex parte Preston* [1985] A.C. 835 per Lord Templeman at [864]E–F; *R. v. Social Fund Inspector ex. Parte Ali* (1994) 6 Admin L.R. 205 per Brooke J at [210]E–F.

53 *Levy v The Environment Agency* [2002] EWHC 1663 (Admin) per Silber J at [23]; *R. (on the application of Edwards) v The Environment Agency* [2005] EWHC 657 (Admin) per Lindsay J at [92].

54 *R. (on application of Nigel Mott) v The Environment Agency* [2016] EWCA Civ 564.

55 *R. (on application of Nigel Mott) v The Environment Agency* [2016] EWCA Civ 564 per Beatson LJ at [69] and [74], citing with approval the judgment in *Levy v The Environment Agency* [2002] EWHC 1663 (Admin).

56 In *R. (on application of Nigel Mott) v The Environment Agency* [2016] EWCA Civ 564 the Court emphasised that while decisions of a regulator in highly technical matters were not immune from Judicial Review, nevertheless the burden upon an applicant in such cases is a "formidable one", per Beatson LJ at [73].

57 This aspect is discussed further below.

58 These non-statutory criteria are Archaeological and Historic interest; Period; Rarity; Documentation and finds; Group value; Survival / condition; Fragility / vulnerability; Diversity and Potential

59 English Heritage, February 2013

60 English Heritage, May 2012

61 In the authors' experience this limitation on scheduling is not widely understood and this misapprehension may have gone some way in fuelling the widespread concern expressed in the marine archaeological sector over this issue.

62 "Designation Scheduling Selection Guide Maritime and Naval" pp.9–10.

63 P.9.

64 "Designation Scheduling Selection Guide Ships and Boats: Prehistory and Present" p.7.

65 The Maritime and Naval guide also states that scheduling can extend out from the coast to the limit of UK territorial waters while acknowledging that the difficulties of monitoring and managing such sites has meant that scheduling has not been "widely used" but that it may be pursued in the future. "Designation Scheduling Selection Guide Maritime and Naval" p.9.

66 The Panel asked for the policy to be reconsidered.

67 The authors are grateful to Ms Mayor for making this correspondence available to them.

68 The authors are grateful to Ms Mayor for making this document available to them.

69 Advice Report, 18 November 2015, Case No.1408027.

70 Advice Report, 18 November 2015, Case No.1408027 at p.1.

71 Advice Report, 18 November 2015, Case No.1408027.

72 Advice Report, 18 November 2015, Case No.1408027 at p.3.

73 Advice Report, 18 November 2015, Case No.1408027.

74 Advice Report, 18 November 2015, Case No.1408027 at p.4.

75 HE's National Planning and Conservation Department, now called the Planning Group.

76 "Designation Scheduling Selection Guide Ships and Boats: Prehistory and Present" p.7.

77 Advice Report, 24 March 2016, Case No.1412109.

78 Advice Report, 24 March 2016, Case No.1412109 at p.2.

79 Advice Report, 24 March 2016, Case No.1412109 at p.2.

80 Advice Report, 24 March 2016, Case No.1412109 at p.2.

81 Advice Report, 24 March 2016, Case No.1412109 at p.2.

82 [1918] K.B. 68.

83 Per Avory J at [74]; see to the same effect *Stringer v Minister of Housing and Local Government* [1970] 1.W.L.R. 1281 per Cooke J at [1289].

84 Per Darlington J at [73].

85 [2015] EWHC 3297 (Admin), High Court, Ouseley J, 15 November 2015.

87 Thereby depriving an applicant of information relevant to the formulation of the application, as in *McMorn*.

88 R. (on the application of *Persimmon Homes*) v *Vale of Glamorgan Council* [2010] EWHC 538 per Beatson J at [116].

89 R. (on the application of *Lewis*) v *Redcar and Cleveland BC* [2008] EWCA Civ 747 per Longmore LJ at [107].

90 Compare *R. (on the application of McMorn) v Natural England* [2015] EWHC 3297 (Admin) per Ouseley J at [208].

91 S.1(1).

92 S.33(1).

93 By virtue of s.1(1) of the National Heritage Act 2002 this duty is extended to ancient monuments located within territorial waters adjacent to England.

94 S.33(3)(b) of the 1983 Act.

95 Compare *R. (on the application of McMorn) v Natural England* [2015] EWHC 3297 (Admin) per Ouseley J at [208].

96 The Secretary of State could not simply accept HE's advice without conducting his own evaluation, since that would not be an exercise of his discretion but rather an ultra vires substitution of HE's judgement for his own; see further *Stringer v Minister of Housing and Local Government* [1970] 1.W.L.R. 1281 per Cooke J at [1289]

97 [1990] 1 Q.B. 504.

98 Per Schiemann J at [515].

99 The court in *R. (Persimmon Homes) v Vale of Glamorgan Council* [2010] EWHC 538 clearly accepted this was possible in the context of advice

100 A further issue arises as to whether members of the public could bring judicial review proceedings. In the *Rose Theatre* case Schiemann J ruled that a member of the public lacked standing (*locus standi*) to bring proceedings. However later case law would suggest that this was an overly restrictive approach and that society's interest in the Rule of Law that decision makers cited within their statutory powers conferred standing upon individuals with the knowledge and experience to contest the matter; see further *R. v H.M. Inspector of Pollution Ex p. Greenpeace Ltd (No.2)* [1994] 3

All E.R. 329; *R. v Secretary of State for Foreign and Commonwealth Affairs Ex p. World Development Movement* [1995] 1 W.L.R. 386.

101 Unfortunately the somewhat terse explanation in the decision letter that “Having considered [HE’s] recommendation, the Secretary of State for Culture, Media and Sport has decided not to add HM Landing Craft Tank 427 to the Schedule of Monuments” makes it difficult, if not impossible, to discern whether the Secretary of State did indeed conduct his own evaluation of the merits of the application.

102 *R. v. Secretary of State for the Home Office Ex P. Doody* [1994] 1 A.C. 531 at 564 per Lord Mustill.

103 For a comprehensive discussion of this process see P. Craig Administrative Law 7th ed. Sweet & Maxwell London 12-028 0 12-035.

104 For example, Heritage is reflected generally in the sensitive area designation definition for EIA purposes and, specifically, scheduled monuments within the 1979 Act are referred likewise. See Reg. 2(1) of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (SI 2011/1824). The governing Directive, 85/337/EEC as subsequently amended and consolidated, includes “material assets and the cultural heritage” in art.3 as factors upon which direct and indirect impacts of a project should be systematically assessed.

105 *R. (on application of Bourgass) v Secretary of State for Justice* [2016] 1 All E.R. 1033 at 1058 per Lord Reed; see also to the same effect *R. v Secretary of State for the Home Office Ex p. Doody* [1994] 1 A.C. 531 at 563 per Lord Mustill.

106 *R. (on application of Nigel Mott) v The Environment Agency* [2016] EWCA Civ 564 per Beatson LJ at [56] and [63]–[64].

107 *R. (on application of Nigel Mott) v The Environment Agency* [2016] EWCA Civ 564 at [56].

108 In the context of landscape conservation (an AONB) note the observation of Laws LJ that interested parties and the public are entitled to know why a planning authority’s was what it was; *R. (on the Application of CPRE Kent) v Dover DC* [2016] EWCA Civ 936 at [20].

109 *R. (on the application of Bourgass) v Secretary of State for Justice* [2016] 1 All E.R. 1033 at [1058] per Lord Reed.

110 *R. (on the application of Osborn) v Parole Board* [2014] A.C. 1115 at [1149]–[1150] per Lord Reed.

111 *R. v Secretary of State for the Home Office Ex P. Doody* [1994] 1 A.C. 531 at [560] per Lord Mustill.

112 *R. (on application of Bourgass) v Secretary of State for Justice* [2016] 1 All E.R. 1033 at [1058] per Lord Reed; the degree of particularity given for a decision will depend upon the nature of the issues falling for decision; *R. (on the Application of CPRE Kent) v Dover DC* [2016] EWCA Civ 936 per Laws LJ at [32].

113 *R. (on application of Alconbury Developments Ltd) v Secretary of State for Environment, Transport and the Regions* [2001] 2 W.L.R. 1389 at [1442] per Lord Clyde; see also *Levy v The Environment Agency* per Silber J at [21]. The appropriate time for assessing the lawfulness of the reasoning is that of the making of the decision and a court should guard against any ex post facto evidence or explanation being advanced by way of subsequent explanation; *R. (on application of Nigel Mott) v The Environment Agency* [2016] EWCA Civ 564 per Beatson LJ at [39] and [56]–[57].

114 A point strongly made in the Review submission, together with a request that the matter be remitted to HE for a statement of reasons to be provided prior to the Review being conducted.

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116 ‘*The First Treasure Divers*’ J. Bevan (2010) Aqua Press: Southend-on-Sea; ‘*Maritime Law of Salvage*’ G. Brice, 3rd Ed. (1999) Sweet & Maxwell: London paras 4-02–4-07.

117 “War Graves and Salvage: Murky waters?” M. Williams, *International Maritime Law* (2000) 7(5), pp.151–158.

118 The initiative primarily consists of a Code of Conduct entitled “Respect Our Wrecks”; see further http://www.bsac.com/core/core_picker/download.asp?id=10203 .

119 “Protecting Maritime Military Remains: A New Regime for the United Kingdom” M. Williams, *International Maritime Law* (2001) 8(9)pp.288–298.

120 Personal Communication, Ms Alison Kentuck, Receiver of Wreck, 10.6.2016.

121 The site could not be designated under s.1(1) of the Protection of Wrecks Act 1973 as it is not the site of “... a vessel lying wrecked on or in the seabed ...”; similarly it could not be designated a vessel under PMRA 1986 but could be designated as a Controlled Site under that Act as it contains the remains of a vessel, which, under s.9(1), includes any cargo of a sunken vessel.

122 HMS Thetis (1833) 3 Hagg. 14 (recovery of cargo of gold from sunken warship).

123 “Maritime Law of Salvage” G. Brice, 3rd Ed. (1999) Sweet & Maxwell: London paras. 3-28–3-29, 4-66–4-68, and 4-163–4-165. See also Columbus — *America Discovery Group v Atlantic Mutual Insurance Co* [1995] A.M.C. 1985 at pp.2007–2008.

124 *The Five Steel Barges* (1890) 15 P.D. 142 per Sir James Hannen at 146; also referred to as “voluntary” salvage.

125 Merchant Shipping Act 1995 s.236.

126 Advice Report, 24 March 2016 Case No.1412109 at p.2.

127 Marine Management Organisation.

128 Marine and Coastal Access Act 2009 ss.65(1) and 66(1)(8).

129 <https://www.gov.uk/guidance/do-i-need-a-marine-licence#diving-activities> .

130 Notification to the UK Hydrographic Office might restrain anchoring by large vessels, as the site could be marked on charts as an obstruction but would not prevent dive or fishing charter boats from anchoring. The reference to harbour and Port Authorities is more than a little puzzling, since the site is some 5.39 nautical miles offshore.

131 Note 66 at p.2.

132 The Conservation of Habitats and Species Regulations 2010 (SI 490/2010) s.61, implementing Directive 92/43/EC on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206/7).

133 MCZ’s are designated under Part 5 of the Marine and Coastal Access Act 2009.

134 Ms Sarah Clarke, Chief Scientific Officer, Devon and Severn IFCA, personal communication, July 2016.

135 At the time of writing, there are details of seven Historic MPAs available from Historic Environment Scotland. See for e.g. <https://www.historicenvironment.scot/advice-and-support/listing-scheduling-and-designations/marine-heritage/historic-marine-protected-area-records/> (last accessed August 2016)

136 Marine (Scotland) Act 2010 s.67.

137 S.73(5)(a)(b)

138 The Marine Works (Environmental Impact Assessment) Regulations (SI 2007/1518) (as amended), Sch.3 para.2(c) “... material assets and the cultural heritage ...”; slightly different to the onshore version: Sch.4, para.3 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (SI 2011/1824): Information for inclusion in environmental statements includes “material assets, including the architectural and archaeological heritage ...”.

139 The Marine Works (Environmental Impact Assessment) Regulations 2007/1518 (as amended), para.2(c)(ix): to include “... any landscape of historical, cultural or archaeological significance”.

140 Referential under SI 2007/1518 to Annex II 2(c) of Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (OJ 2011 L 26/1).

141 Although it is likely that such dredging would be “exempt” pursuant to s.75 of the MACAA as being undertaken by a Harbour Authority.

142 In relation to the Assemblage of Armoured Vehicles the paucity of explanation advanced makes the discerning of a rationale underlying the advice provided by HE virtually impossible.

143 See <http://portal.historicenvironment.scot/designation/SM9298> .

144 <http://www.coflein.gov.uk/en/site/405916/details/LOUISA/> . The wreck, which is located on the river Taff, was scheduled because impoundment for a land reclamation scheme for Cardiff Bay removed the site from UK waters such that the site could not be designated under the 1973 Act. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/197296/SEA6_Archaeology_Wessex.pdf

145 “Taking to the Water: English Heritage’s Initial Policy for The Management of Maritime Archaeology in England” P. Roberts and S. Trow, 2001

146 para 7.1

147 para 7.8

148 para 7.9

149 The unit was scheduled because of its connection to Operation Overlord and that operation’s significance to national and world history and also because it was a component of an innovative feat of engineering that made Overlord possible and because of it is remarkably intact: <https://historicengland.org.uk/listing/the-list/list-entry/1415588> .

150 For the origins of the Act and subsequent development of policy see M. Williams (2000) and M. Williams (2001).

151 The only published archaeological assessment of a wreck protected under the Act was conducted on HMSub A7 by civilian volunteers under the

SHIPS project (<http://www.promare.co.uk/ships/>) See further P. Holt, "HM Submarine A7 An Archaeological Assessment" BAR British Series 6132015, Archaeopress Oxford.

152 The 1986 Act can be applied to merchant vessels lost in convoy due to enemy action but not otherwise. See further *R. (on the application of Fogg) v Secretary of State for Defence* [2006] EWCA Civ 1270 per Sir Anthony Clarke MR at [30]–[37] and M. Williams, "Merchantman or Quasi-Warship?" *International Maritime Law* (2007) 13(2) pp.112–124.

153 <https://historicensland.org.uk/advice/hpg/consent/marinelicensing/> .

154 See further D. Parham and M. Williams, "Public Involvement in Maritime Archaeology" *Proceedings of 3rd International Congress on Underwater Archaeology*, J. Henderson (ed.), pp.470–474 RGK: Bonn 2012

155 As evidenced by the work of the South West Maritime Archaeology Group (<http://www.swmag.org/>).

156 S.2(4) permits the attachments of conditions to Scheduled Monument Consent.

157 S.61(7)(c).

158 By way of contrast Part II of the 1979 Act, the designation of Areas of Archaeological Importance, applies only to a terrestrial context.

159 MACAA 2009 s.65(1).

160 S.66(1).

161 See further Marine Licensing (Exempted Activities) Order SI 2011/409, as amended by Marine Licensing (Exempted Activities) (Amendment) Order 2013 SI 2013/526.

162 Article 18A of the Marine Licensing (Exempted Activities) Order SI 2011/409, as amended.

163 At the time of writing, September 2016, a decision upon Ms Mayor's request for a review of the decision not to schedule the assemblage of armoured vehicles is awaited. Ms Mayor's request for a statement of reasons underpinning HE's Advice in respect of the application to schedule also remains unanswered.

164 A process well illustrated by *R. (on the Application of CPRE Kent) v Dover DC* [2016] EWCA Civ 936.