

Examination of the legal status of archaeologically-recovered material in England

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Declaration of originality

I, Haggai Mor, hereby confirm that the text and inferences presented in this thesis are my own original work. Where I have obtained information from other sources, references have been made to clearly indicate this in the text.

Data protection statement

The use of any data or information obtained or analysed in part or as a whole for the purpose of this research has been conducted in compliance with UCL Data Protection Policy as applied in September 2018 (http://www.ucl.ac.uk/archaeology/research/ethics/data_protection). The thesis presented here complies with the Data Protection Act 1998 and the General Data Protection Regulation (GDPR), May 2018. This research and the collection of data were registered with the UCL Data Protection & Freedom of Information Administrator on June 2016, reference No. Z6364106/2016/06/45 social research.

As this amended version of the thesis is submitted at the end of 2020 in electronic format only due to Covid 19 restrictions, the information obtained during two interviews, originally intended to be included in appendix B, now have to be omitted from this version. The data is available per a specific request from Prof. Dominic Perring at UCL IoA.

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Academic disclosure

For the purpose of full disclosure in academic research, it is stated here that during the first half of the research for this thesis Mr D. Perring was an interviewee, and in December 2015 he agreed to take on the role of primary supervisor as my previous supervisor had retired. The material originally intended to be presented in appendix B included minutes of continuous correspondence, supervisory meetings, comments on draft papers and general discussions, but now have to be omitted from this version as explained above.

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Abstract

In this thesis, I explore the legal status of archaeologically-recovered material obtained during development-driven fieldwork. To address this research, the contract and practice relating to development-driven archaeological work is analysed through a number of case studies, as well as pertinent property law, court cases, Acts of Parliament, national policies and international regulations and conventions, that form the corpus of legal literature relevant to archaeological work undertaken in England.

My research has shown that ownership of, and title to, archaeologically-recovered objects transfers from landowners to archaeologists during the course of CRM-based (Cultural Resource Management) pre-development archaeology projects, on the condition that the landowner does not assert an intention to maintain title to the objects. Archaeologically-recovered objects belong to the organisation holding them, under the stipulation that the work was carried out under a valid contract. Contractual archaeological investigations resulting in lawful possession of recovered items imply an entitlement to the possession of the recovered material by virtue of the collection and retention of the items being a well-known practice that has been taking place for many years. As such, archaeologists' practice of obtaining and retaining objects discovered during fieldwork constitutes an implied contractual term incorporated into all pre-development archaeological field investigative work undertaken in England. Archaeology industry guidelines and policies applicable to projects which take place in England should thus be amended to accurately reflect this position and resolve perceived uncertainties regarding title to collections of recovered items.

A concomitant issue addressed in this thesis concerns access to and use of material, data and information which remain with the archaeology contractor because the amount of accumulated material exceeds the storage capacity of museums. This situation, in combination with perceived legal uncertainties, hinders the use of recovered material in a way which is beneficial to society. Here I use case studies and analysis of scholarly literature to illustrate and examine these issues.

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Annotation of pertinent terminology

The list below elucidates certain concepts and terms used in this research paper which form an imperative part of the discussion that follows. It represents neither a list of legal definitions nor an exclusive professional list for archaeologists – it is merely an abridged explanation of some key terms used here so as to form a mutual ground for discussion:

- Accession [as per museums]: refers to the act of adding a new object into an existing collection. By accessioning an object, the museum accepts full responsibility for safekeeping the item including any and all ethical or legal issues which may arise due to the museum having possession of (or discarding) the accessioned object (Arts Council England)
- Accreditation: The Accreditation Scheme run by the ACE ‘sets nationally agreed standards for museums in England. It defines good practice and identifies agreed standards, thereby encouraging development. It is a baseline quality standard that helps guide museums to be the best they can be, for current and future users’ (Arts Council England) Accreditation is not a legal requirement; it is a system for ensuring standards and allocating public funding (note that it is unclear whether archaeology contractors may deposit recovered material at un-accredited museums).
- Archaeologist: for the purpose of this paper the definition used is – an employee who carries out analysis of obtained data and objects in order to present the findings, either in a report or a publication. In 2000, the UK Parliament ratified the 1992 Valletta Convention on the Protection of the Archaeological Heritage (Revised) (this came into force in 2001). Article 3(ii) of the Valletta Convention requires signatory states to ensure that archaeological excavation projects are carried out

only by ‘specifically authorised persons’. To date, however, the term ‘archaeologist’ is not legally defined as a profession in the UK (for referencing see the discussion of the Valletta Convention in chapter three below). This means that, from a purely legal perspective, archaeology contractors may employ anyone they wish to work on excavation projects, and that there is no legal or public policy obligation on developers to hire a reputable archaeology contractor in order to satisfy planning application conditions. (In particular see Historic England 2015 at s37, p.11, use of the term – ‘a competent person’. Also Rescue Planner 2019 for further discussion regarding discharging planning conditions based on these requirements. This section refers explicitly to legal requirements).

- Archaeology contractor (units): companies which operate under contract for commercial purposes, notwithstanding the fact that most are listed as not-for-profit charities. Archaeology contractors work in a consultancy capacity for their clients, producing reports of their investigations in order to satisfy conditions imposed by planning authorities. Today, most archaeology contractors are accredited by the Chartered Institute for Archaeologists (CIfA). This is not a legal or public policy requirement, however, and anyone who wishes to operate an archaeology consulting company may legally do so, without concern about what would happen to the archaeological material recovered during the investigation (however, note the Historic England publication (2015), at s37, p.11, use of the term ‘a competent organisation’ and their advice that planning conditions should not be discharged until there has been ‘analysis, publication & dissemination and deposition of resulting material’).
- Archaeology: the process of developing a narrative of past cultural events through the examination and interpretation of available data (Shanks & Tilly 1996, 3).

Archaeological investigations taking place under contract (as in work which is carried out for a fee), as part of planning-related development applications, is conducted in accordance with standards referred to as the Cultural Resource Management (CRM) strategy or approach (Cleere 1984; see further discussion below). By and large, archaeological projects do not occur in a vacuum. Most archaeology, both academic and commercially driven, is aimed at producing a product, generally in the form of acquiring and assimilating knowledge in reports or publications. The tangible part of archaeological archives, the recovered objects, can therefore be regarded as the by-product of the process of creating the story of the past through the analysis of obtained data (Merriman & Swain 1999, 250).

- Archaeological archive repositories: repository institutions aimed at preserving the entirety of archives (all information, records and material collected and retained) generated during archaeological fieldwork. An archaeological archive facility can be either a designated institution such as a museum or the London Archaeological Archive Resource Centre (LAARC), or the term can also refer to the storage facility provided by archaeology contractors due to lack of available suitable archive repository (Brown 2015). Most are publicly funded.
- Bailment: a situation whereby one party has possession of goods belonging to another party (Palmer 1991, 18-19). The person (or entity such as an archaeology contractor) with actual possession is the bailee and the person with the right to possession in the future (on termination of the agreement, for example) is the bailor. ‘Bailment is commonly regarded as the separation of ownership and possession.’ (Chambers 2008, 47). When archaeologists take possession of objects discovered in someone else’s land they become bailees, while the developer, landowner or leaseholder becomes bailor. In the scenario discussed here, the status of bailor lasts

for a limited duration, whilst the recovered objects are still on site, after which title to the items transfers to the bailee by virtue of lawful possession as an implied term of the contract (see discussion in chapter seven). In situations in which the contract that led to the bailment is unclear or void (for example when I pick up someone else's suitcase at the airport by mistake) the duties of the bailor and bailee will be defined according to the law of tort (per decision in *Scipion*¹; and see below regarding trespass to goods; for further discussion of this see Bridge 2002, 34; *Morris*²; but also see Palmer 1991, 44-63, for the opposing view regarding involuntary bailment).

- Conversion: this arises when the initial taking possession of goods is lawful, such as in bailment, but subsequently there is an interference with the title or ownership of the chattel (for example refusing to return, losing or destroying a borrowed item). The interference, the denial of a certain right, constitutes conversion (see Bridge 2002, 52-56; also; *Lancaster*³). For example, when archaeologists take objects collected during fieldwork to the lab for analysis, this is bailment, but discarding the objects prior to notifying the landowner could potentially amount to conversion. 'An action lies in conversion for loss or destruction of goods which a bailee has allowed to happen in breach of his duty to his bailor' (Tort (Interference with Goods) Act 1977, section 2(2)). The obligatory deposition (as per the NPPF, Ministry of Housing, Communities and Local Government 2012, at paragraph 199, footnote 64) of archaeological archives at a designated repository, as opposed to returning the recovered material to the landowner, could be regarded as conversion if landowners can prove that they have title to the objects. O'Keefe & Prott (1989,

¹ *Scipion Active Trading Fund v. Vallis Group Ltd.* [2020] EWHC 795 (Comm.)

² *Morris v. C. W. Martin & Sons* [1966] 1 QB at 716

³ *Lancaster and Yorkshire Railway Co. v. MacNicoll* [1918] 88 LJKB 601, per Atkin, J.

419) have argued that this obligation in the NPPF should be regarded as nationalisation of private property by the state, as is the case in Scotland, in which case it would not constitute conversion (for the rule in Scotland see Treasure Trove Scotland – <https://treasuretrovescotland.co.uk/> (accessed in July 2017)).

- Cultural Resource Management (CRM) strategy: CRM is not law *per se*, it is rather an approach that planning authorities may implement, but which they are not legally bound to. In its simplistic form, CRM can be defined as the type of archaeological investigations colloquially known as Rescue, Commercial or Salvage Archaeology (Hutchings & La Salle 2018). Taken as such, CRM can be seen as a form of archaeology that is driven by ‘external’ factors such as the commercial aim to satisfy planning conditions imposed by local authorities, as opposed to archaeology motivated by an ‘internal’ academic research agenda (the different views regarding CRM and its impact on contemporary archaeology are discussed further in chapters three and five). The CRM approach was brought to Europe in the late 1970s by H. Cleere (Cleere 1987, 54) as a system for ensuring that operational standards are met throughout the archaeological investigation process (ideally from initial planning through to archiving and publication). Today, CRM is the method governing over 97 per cent of all archaeology-related work undertaken in England (Hutchings & La Salle 2016, s13). In this respect CRM can be regarded as a fifth-tier administrative tool (after Turpin & Tomkins 2007, 12). The Town and Country Planning Act 1990 (TCPA 1990) is the statute (with many subsequent amendments), in which section 106 of the Act authorises Local Planning Authorities (LPAs) to impose development planning approval conditions prior to allowing proposed development. Statutory Instrument 2018, No. 566 is the regulation and the Planning Circular 11/95 is the policy implementation of EEC

directive 11/85 (Precautionary Principle, originally implemented as PPG16 in 1990). The National Planning Policy Framework (NPPF) 2020 (current) sets the Government's agenda and the *Historic Environment Good Practice Advice in Planning 2* (Historic England, 2015) specifies the purpose, aims and method of planning conditions that local authorities should place on proposed land development. None of these documents, however, specifically refers to CRM, not explicitly and not as an overall aim.

- England: the TCPA 1990 makes clear distinctions as to the jurisdictions in which it is to be applied (certain sections of the Act are not applicable in different parts of the UK). Consequently, in this thesis I am referring specifically to England as a legal entity as per the definition used in the TCPA 1990, although with one crucial exception – the process of the UK leaving the EU and its impact on the application of important historic environment protection legislation such as the ‘Precautionary Principle’ (see below). The UK is leaving the EU as a singular legal entity, at the time of writing; consequently, the impact of this process will not be restricted to England. How this will be implemented in new planning legislation remains to be seen.
- Heritage: as the definition used by Prott and O’Keefe: ‘cultural heritage consists of manifestations of human life which represent a particular view of life and witness the history and validity of that view. The expression of culture or evidence of a way of life may be embodied in material things’ (Prott & O’Keefe 1992, 307). In contrast to having property rights to an object, people can exploit, alienate and exclude others from their heritage only to a limited degree (one cannot own one’s heritage because no property rights can be associated with it, e.g. heritage cannot be sold (see Clarke & Kohler 2005, 180)). This notion is important for this paper because

the value of archived archaeological material is derived from the information it contains in relation to aspects of people's heritage. Therefore, and to be more specific, in the context of this paper, 'heritage' refers to the technical definition of information encapsulated within tangible objects that can be owned and which may form a part of 'any structure, work, site, garden which in English Heritage's opinion is of historic, architectural, traditional, artistic or archaeological interest' (National Heritage Act (England) 1983 (ch.47, s33(8)). Concurrently, in this paper the term 'heritage' specifically refers to cultural attributes associated with items to which property legislation applies.

- National Planning Policy Framework (NPPF): the NPPF sets the government agenda regarding land development and its impact on the environment (see above under CRM). Originally published in 2012 (Ministry of Housing, Communities and Local Government 2012), a consultation version was published in 2018 by the Department for Communities and Local Government (DCLG), and now the NPPF replaces PPG16 and the Planning Policy Statement 5. The latest version of the NPPF was published in 2020. The legal authority of the NPPF is based on the previous statutory regime, in particular through the Ancient Monument and Archaeological Areas Act 1979 (AMAA) and the Planning (Listed Buildings and Conservation) Act 1990. In 2006, the responsibilities for heritage-related issues were vested in the Department for Communities and Local Government (DCLG), thus, once an application for new development is submitted to a local planning authority, ultimate responsibility for the matter passes from the Secretary of State for the Environment to the DCLG. The NPPF has only one reference to the archive generated in the process of planning applications – in the latest published version (June 2020) archaeological archives are referenced in footnote 64 to paragraph 199

(originally as footnote 30 to paragraph 141 in the 2012 version, this was changed to footnote 56 to paragraph 195 in the 2018 document). It reads: ‘Copies of evidence should be deposited with the relevant historic environment record, and any archives with a local museum or other public depository’ (footnote 64 to paragraph 199 in the 2019/20 version; available at <https://www.gov.uk/government/publications/national-planning-policy-framework--2> (accessed in March 2020)).

- Ownership: ownership is both complex and relative; it is the end result of a process of accumulation of legal rights as relating to a ‘thing’ (per Pollock 1894). Honoré has metaphorically called it ‘the bundling together of sticks’ (Honoré 1961, 370). According to Honoré, ownership can be defined as ‘the greatest possible interest in a thing which a mature system of law recognises’ (*ibid*) (so the ‘sticks’ or rights, in your bundle define whether you have superior right, or ownership, to a thing). Ownership can also be divided – many people can own a single object simultaneously and to an equal, or varying, level (following Honoré, we can say that the bundle can be divided so different people can have a different number of ‘sticks’, while all being joint possessors of the bundle as a whole). Under the common law, there is an emphasis on examining the lawfulness, or otherwise, of possession so that ownership of a chattel can be determined as: ‘vesting in the person with the best entitlement to possess it’ (Bridge 2002, 29; see also Honoré 1993, 370). More pertinently: ‘The English law of ownership and possession, unlike that of the Roman law, is not a system of identifying absolute entitlement, but of priority of entitlement.’ (*Waverley*⁴).

⁴Waverley Borough Council v. Fletcher [1995] QB 334, per Auld LJ, at p.345

- Possession: this is composed of two elements, having control over an object and having the intention to maintain that control (as opposed to ‘abandoning’) (for a review of possession see Palmer 1998, chapter three; for discussion of abandonment see Hudson 1998, chapter 23; for a review of possession of chattels on land see Tay 1964; Bennet 1998, chapter 11 and Goodhart 1928 regarding *Bridges*⁵). In order to have intention to control a thing, one must be aware of the thing’s existence, however, having control over land connotes possessing whatever is in the land (per decision in *Elwes*⁶). Objects *in* the land are to be regarded as part thereof and are indistinguishable from the land until they are discovered, so some interference has to happen to the land before the item in it comes into legal being (per the decisions in *Elwes*⁷; *Sharman*⁸; *Waverley*⁹; see also Pollock 1894). ‘Chattels cannot be possessed before they come into existence (by virtue of being made or discovered) or after they have perished. They do not, however, appear from nothing and they commonly disappear, sometimes leaving tangible remains’ (Bridge 2002, 16). In respect of the issues discussed here, it is important to emphasise that the objects that archaeologists recover cannot be separately owned before they are discovered in the ground because they are considered to be part of the land and therefore are owned by, because they are in the possession of, the landowner (per the decisions in *Elwes*¹⁰; *Sharman*¹¹; *Waverley*¹²; for an in-depth discussion of this see Pollock & Wright 1888). Nonetheless, landowners’ *possession* of everything in the land must not be confused with *title* to objects that have been discovered and extracted from

⁵ *Bridges v. Hawksworth* [1843-60] All ER Rep 122

⁶ *Elwes v. Briggs Gas Co.* 1886 [1886] 33 Ch D 562

⁷ *Elwes v. Briggs Gas Co.* 1886 [1886] 33 Ch D 562

⁸ *South Staffordshire Water Co. v. Sharman* [1896] 2 QB 44 at 47

⁹ *Waverley Borough Council v. Fletcher* [1995] QB 334

¹⁰ *Elwes v. Briggs Gas Co.* 1886 [1886] 33 Ch D 562

¹¹ *South Staffordshire Water Co. v. Sharman* [1896] 2 QB 44 at 47

¹² *Waverley Borough Council v. Fletcher* [1995] QB 334

the land – the discovery and extraction create ‘new’ legal entities (per decision in *Tucker*¹³; see also Pollock 1894 for thorough analysis of this point; discussed further in the Legal Research at chapter seven).

- Precautionary Principle: the name given to wide scope environmental damage mitigation or prevention policies instigated by the European Commission (EC, the executive branch of the European Union (EU). Boehmer Christiansen and Haigh (chapters 1 and 13, respectively, in O’Riordan & Cameron 1994) argue that the precautionary principle evolved out of the German concept of *Vörsorgeprinzip*, meaning a framework for good housekeeping and responsibility for maintaining natural systems (p.16). Today, these policies primarily concern the bureaucratic aspects of how to administer measures for assessing potential impact that proposed development work might/would have on the natural environment and who should fund such measures (for further discussion see O’Riordan & Cameron 1994; Fisher, Jones & Schomberg 2006). The EC Environmental Liability Directive 2004/35/EC, which includes the policy colloquially known as ‘polluter pays’, was ratified by the Maastricht Treaty article 130(r). ‘Polluter pays’ refers to a legal principle whereby those who produce pollution should be responsible for paying to mitigate or offset its effects, instead of the owner of the land where the pollution occurred (Haigh 1994, 236). It should be noted that Thomas (2019, 330) and Cooper-Read (2015, 39) argue that the precautionary principle should not be applied to development-driven archaeology (see below). These policies and legislative framework are discussed further at chapter four, but note that all the discussion here applies at the

¹³ *Tucker v. Linger* [1883]. 8 App. Cas. 508

time of writing (prior to the UK leaving the EU). Which, if any, of these policies will be implemented after the UK leaves the EU remains to be seen.

- Preservation by record: the principles of the ‘preservation by record’ method and its consequent archive are integral and necessary parts of all CRM-based work (Merriman & Swain 1999, 256). Here, the use of the term ‘preservation by record’ refers specifically to the mechanical aspects of archaeological work, e.g. the extraction, collection, recovery and recording of contextual and quantitative measurements of discovered objects. This thesis does not examine the purpose of extracting discovered objects, it is only concerned with the fact that this is common practice in archaeology (see Carver 2011, 81). In this thesis, the term refers explicitly to the practice, not to the philosophical and ethical debates surrounding it (see Thomas 2019, 330). The investigative method referred to as ‘preservation by record’ aims to extract information during excavation work and to save the data and a sample of the obtained artefacts in perpetuity for future use (a method advocated by Pitt-Rivers (1888, 3), but the term itself came into use after the Frere et al. (1975) and Cunliffe (1982) reports and particularly after the publication of Planning Policy Guidance 16 (1990); Bradley 2015, 24)). It should be noted that Thomas has argued that this term can be archaic and misleading (Thomas 2019, 330) and should be replaced by ‘record and advance understanding’ (Thomas 2019, 338), as it is referred to in paragraph 199 of the NPPF 2020. Whichever terminology is used, archaeological excavation necessitates the recovery of discovered objects in order to extract information from them, so objects unearthed during excavation form an essential part of the data used by archaeologists – this is the method that generates archaeological archives (Drewett 2004, 120). The archive generated through ‘preservation by record’ or ‘record and advance understanding’ types of

archaeological investigative method is a source of information that is meant to be kept as the evidence supporting the proposed interpretation of the site, enabling future re-examination of the evidence and the saving of important artefacts (see Frere et al. (1975) and Cunliffe (1982), also Thomas 2019).

- Property: following Pollock's explanation that in legal term 'property' refers to 'the entirety of an object's possible legal relations to persons' (Pollock 1894, 321) this is the definition used here. The concept of property is of central importance in societies where there is a robust legal system, but it also hinders acceptance of the notion that there are certain intangible things to which property does not adequately pertain (Prott & O'Keefe 1992, 309; Honoré 1993, 370; see above for discussion of ownership). The importance of this sentence to the issues discussed here is that the application of property law to intangible cultural manifestations of things, such as cultural heritage which cannot be possessed *per se*, is excluded from this paper. Here I am only dealing with things to which property legislation can be applied (the tangible 'product' of archaeology), not to intangible concepts such as 'the past' that cannot be legally owned (see Nicholas & Bannister 2004 regarding indigenous people's right to own their heritage. Such concepts should, at some point, be discussed in the context of the indigenous populations living in the UK, but this discussion is beyond the remit of this paper).
- Title: short for Entitlement, 'title' refers to property rights held over an object. A married couple can have equal title to objects in their possession, so the term can relate to shared control, or shared entitlement to possess the thing (this is, clearly, a simplified discussion of a complex legal concept, for further in-depth discussion see Bridge 2002, at chapter five; and see above for discussion of ownership). Title is often used as a synonym for ownership, but a person can have title to something

(future entitlement to possess) without being its owner, that is, without having the best possible (immediate) claim to its possession, as can happen with leasing land for life (on renting a car, the rental company has title and the person hiring it has the immediate right to possess; see above discussion of bailment, Palmer 2015 regarding repatriation of stolen art, also the decision in *The Winkfield*¹⁴). Furthermore ‘title is relative. When a court deals with competing claims to possession, it decides which of the claimants has the better claim, not who in the world has the best claim’ (Chambers 2008, 61). Holding property rights means that there must be a correlating obligation, so if one is the owner of, or has superior title to, one’s shoes then the rest of the world has an obligation not to interfere with one’s entitlement to possess those shoes (*ibid.*). The question examined here is whether landowners are entitled to regain possession of archaeologically-recovered objects after all the related fieldwork has been completed (see Rostill 2018 for discussion of legal terminology).

- Tort: this term comes from the old French word for wrong. Today it means a civil wrong (a wrongful act which does not, in itself, constitute a criminal offence), implying that someone has unjustly suffered a loss or harm (McBride & Bagshaw 2005, 343). If title to archaeologically-recovered objects remains with the landowner, then when archaeologists deposit collected material at an archaeological archive centre or museum, both entities (the archaeologists and the recipient archive centre/museum) might be committing the tort of conversion by not returning the objects to the landowner and thus interfering with an (assumed) right to possess the recovered material (as per the *nemo dat quod non habet* rule, see Bridge 1998, chapter twelve; and discussed further in chapter one and chapter seven). In this

¹⁴ *The Winkfield* [1902] p.42; [1900-03] All ER Rep 346

scenario, and only if a judge rules it to be so, the tort committed would be under the Tort (Interference with Goods) Act 1977 (see ‘Trespass’ below).

- Trespass: the tort of trespass means a wrongful interference with another person’s (or party’s) property rights (such as the denial to a rightful owner of the right to possess a thing (McBride & Bagshaw 2005, 344). In this paper we are only concerned with trespass to either land or goods, excluding trespass to person. The law defines wrongful interference to goods as resulting from either: (a) conversion of goods; (b) trespass (onto land); (c) negligence resulting in either physical damage or in damage to the interest (property rights) in the goods; (d) intentional damage resulting in loss either in the goods themselves or the interest in them (Tort (Interference with Goods) Act 1977, section 1). If, for example, archaeologists recover 100 kilos of objects from a certain site, and after sorting the material in the lab 80 kilos are discarded, the tort of trespass to goods (conversion) can potentially apply to the material that was discarded because it cannot be returned to the (presumed) owner (but see discussion of bailment above and in chapter seven). Moreover, according to Lawrence, J. in *MacNicol*¹⁵, not knowing this does not exclude archaeologists from liability in conversion to the (presumed) owner (see below in the introduction regarding the *nemo dat* rule). To be clear, this is probably not the case, as discussed in chapter seven below, but it is an issue that has to be addressed and, as this thesis shows, refuted. (For discussion on the legal definition of ‘finding’ and legal rights and obligations arising from the act of taking possession of ‘discovered’ or abandoned chattels, see Hickey 2010; Palmer 1989; and the discussion in *Parker*¹⁶ per Donaldson LJ).

¹⁵ *Lancashire & Yorkshire Rail Co. v. MacNicol* [1918-1919] All ER Rep. 537, per Lawrence J, at p.539

¹⁶ *Parker v. British Airways Board* [1982] 1 All ER 834

List of abbreviations used in the text

AA	Archaeological Archives
AAF	Archaeological Archives Forum
ACE	Arts Council England
ADS	Archaeology Data Service
AER	Archaeological Evaluation Report
AMAA	Ancient Monument and Archaeological Areas Act 1979
ASE	Archaeology South-East
CA	Cotswold Archaeology
CAT	Canterbury Archaeological Trust
CBM	Ceramic Building Material
CC	County Council
CifA	Chartered Institute for Archaeologists
CoE	Code of Ethics
CRM	Cultural Resource Management
DCLG	Department for Communities and Local Government
DCMS	Department for Digital, Culture, Media & Sport
DEFRA	Department for the Environment and Rural Affairs
DoE	Department of the Environment
EC	European Community
EEC	European Economic Community (today the EC)
EIA	Environmental Impact Assessment
EU	European Union
FAME	Federation of Archaeological Managers and Employers
FCF	Fire Cracked Flint
GLAAS	Greater London Archaeology Advisory Services
HE	Historic England (formerly English Heritage)
HER	Historic Environment Records
ICOM	International Council Of Museums
ICOMOS	International Council on Monuments and Sites
IDP	Infrastructure Delivery Plan
LAARC	London Archaeological Archive Resource Centre

LPA	Local Planning Authority
MA	Museums Association
MAP2	Management of Archaeological Projects 2
MLA	Museums Libraries and Archives
MoL	Museum of London
MoLA	Museum of London Archaeology
MoRPHE	Management of Research Projects in the Historic Environment
NPPF	National Planning Policy Framework
NPPG	National Planning Policy Guidance
PPG16	Planning Policy Guidance 16
PPS5	Planning Policy Statement 5
PXA	Post-Excavation Assessment
RCHME	Royal Commission on the Historical Monuments of England
SAA	Society for American Archaeologists
SMA	Society for Museum Archaeology
TCPA	Town and Country Planning Act
WCS	Wiltshire Core Strategy
WSI	Written Scheme of Investigation

Chapter 1: Introduction

This thesis aims to elucidate the legal status of objects recovered during archaeological fieldwork carried out in England. To address this, the research uses case studies to examine and illustrate archaeology practice, and legal research of pertinent literature and precedential court cases to establish applicable property law. Objects recovered by archaeologists have the potential to enhance our understanding of the past and provide invaluable information about cultural activities (Carver 2011). The collection of recovered objects thus forms an essential phase of archaeological research, but issues relating to the ownership of collected material have to be resolved in order to facilitate access for future research. This issue is particularly important for the archaeology and museums services who store the collections. The focus of this thesis is, therefore, archaeological fieldwork taking place within the system of Cultural Resource Management (CRM) in which discovered objects are recovered and analysed as a source of information and a sample retained to facilitate future research.

During archaeological field investigations conducted in accordance with the principles of CRM, archaeologists recover information and objects in order to analyse the obtained data and gain a better understanding of the past (Carver 2011, 11). After the completion of the fieldwork, a selected sample of the recovered objects is stored, primarily in order (a) to facilitate future re-examination of the evidence; (b) to preserve tangible representations of cultural activities; and (c) so it can be used as the scientific evidence to support the narrative archaeologists compose of past cultures (Drewett 2004, 10; Chapman & Wylie 2015, 2). In the past this method of archaeological research and evidence collection was referred to as ‘preservation by record’ (Merriman & Swain 1999, 256) whilst today there is a move towards emphasising information gained through the practice, for which R. Thomas has suggested using the term ‘record and advance understanding’ (Thomas 2019, 338). In this paper the term

‘preservation by record’ is used explicitly to describe the mechanics of the archaeological excavation method entailing the recovery of objects, notwithstanding that the term is not used in the policies (NPPF 2020, para 199) and that the wider understanding of the aim of archaeologists is the collection of discovered objects in order to advance understanding while protecting information and artefacts (per Thomas 2019).

Archaeologists’ practice of extracting objects discovered in someone else’s land has led to a prevailing supposition within the archaeology sector that there are legal problems with respect to the transfer of ownership of material recovered during pre-development fieldwork from the landowner to the archaeology contractor (see for example the Archaeological Archives Forum (AAF), Guide to Best Practice, ref. as Brown 2011, 33, s5.4(1); Cunliffe 2011, 9; or Department for Culture, Media and Sport 2005, 15).

Extraneous factors, such as whether an act was carried out for public safety measures, can determine the lawfulness or otherwise of taking possession of an object (Hickey 2010, 2). Therefore, prior to clarifying property legislation pertaining to objects extracted from land it is necessary to establish the purpose for which the items were assembled. Accordingly, the underlying rationale for the structure of this thesis follows a similar path – beginning, at chapter one, with an introduction of the issue at hand, the research questions, a synopsis of the thesis premise and key issues related to the possession of archaeologically-recovered material.

Chapter two continues by outlining the research design and the framework for the production of data, analytic techniques and mechanisms for presenting the evidence underpinning the interpretations proposed in this thesis within both the legal and archaeological contexts. The chapter describes the research methodology and introduces the dataset which forms the basis of analysis. The legal and archaeological research paths are described as separate segments, however, most of the research work happened concomitantly in the

seemingly parallel disciplines of law and archaeology. So, for example, a visit to a site on which archaeological fieldwork was taking place was followed by a lecture at university on property law. The chapter also includes an assertion regarding the compliance of the data gathering and research method used during the case studies research in adherence to the UCL ethical research procedures (per <https://www.ucl.ac.uk/data-protection/guidance-staff-students-and-researchers/research/how/appropriate-safeguards-researchers-guidance#requirements-relating-safeguards>).

The discussion then takes a step back in time by focusing on the historical background and legal context of the issues discussed here, in chapter three, which is divided into two parts. Part one explores the origins of the dichotomy between archaeological remains considered as ‘ancient monuments’ and those which are regarded as ‘recovered objects’. Part two addresses a particular facet of the story of the establishment of professional archaeology by asking why the legal status of archaeologically-recovered objects was not clearly defined when archaeology became a commercial enterprise within the context of the historical background (why archaeology is conducted in a ‘preservation by record’ method under the CRM system).

This leads to addressing the question of archaeologists’ aim in retrieving and keeping discovered objects and how to define the ‘product’ of archaeology. Chapter four is an examination of the policies, rules and guidelines which apply to the operation of pre-development CRM-based archaeological work. It should be noted here, however, that the policies and legislation currently governing archaeological work in the UK are in the process of being completely redrafted, so this chapter is deliberately brief so as not to elaborate on policies that will likely be redundant when Britain leaves the EU.

Chapter five is a discussion of the impact that the CRM approach has had on archaeology in England and an examination of whether the expectation imbedded in it, that

damage to the historic environment can be offset by imposing planning conditions that lead to enhanced understanding (after Thomas 2019), can realistically be attained. The chapter continues with a discussion of the role that planning authorities play in implementing CRM and the question of whether this is commensurate to a measurable public benefit.

Chapter six presents the case studies that were used in this thesis both as a primary data source and as indicative examples of broader issues, beginning with clarification of the ethical conduct of the research in terms of compliance with UCL ethical research and data protection guidelines. Following Anderson, Schum and Twining's method for 'using known data to generate hypothesis to be tested by further investigation' (2005, 379) the case studies used here have a twofold purpose. Firstly, the case studies are used to illustrate the process by which archaeologists generate and manage obtained property (unearthing, extracting, recovering, collecting, sorting, analysing, discarding and retaining a sample of objects discovered during fieldwork). Secondly, to test the validity of the assumption that perceived uncertainties regarding the ownership of recovered material hinder its use for further research by limiting access. In particular, the question is raised whether there are specific difficulties in accessing archaeological archives held by archaeology contractors due to the contractors' assumption that they might not have title to the material that they are holding. It is important to note that the purpose of the case studies within the research method used here was not to provide a comprehensive account of development-driven archaeology across England. The case studies sampling strategy and data analysis method aimed to be an illustrative cross section of a variety of contracts and curatorial arrangements by delineating the operational relationships of archaeology contractors with their clients, planning authorities, consultants, archive depository centres and museums. The case studies provide an illustrative synoptic example of archaeological practice, from excavation through to storing recovered items, across various counties and planning authorities and for different scales of work. Where permission was given

and in accordance with UCL data protection rules, some of this data is included in appendix C (information and data not included in the appendices is available on request per UCL's procedures. As this version of the thesis is submitted at the end of 2020 in electronic format only, the minutes of two interviews originally intended to be included in appendix B had to be omitted and are only available by specific request. This is in accordance with the UCL data protection procedures as applied in October 2020; <https://www.ucl.ac.uk/data-protection/>). A conclusion of the analysis of the case studies is provided at the end of the chapter.

The research into pertaining legislation is incorporated within the discussion concerning archaeological practices, culminating in chapter seven with clarification of the legal status of archaeologically-recovered material. Chapter seven, which forms the legal research part of this thesis, begins with an examination of the origins of the notion that there are legal issues regarding the ownership of archaeologically-recovered material obtained during CRM-based fieldwork. The chapter continues with a scrutiny of the syllogism that title to recovered objects remains with the landowner, through meticulous analysis of pertinent case law. The objective of this chapter is to elucidate and ascertain the legal status of archaeological material assembled during development-driven CRM-based archaeological fieldwork.

Chapter eight is a discussion of the strategies implemented to date and proposed solutions to some of the issues addressed here, leading to the conclusion of the thesis in the final chapter.

The question regarding the legal status of archaeologically-recovered objects was first presented to me in 2009, by the then manager of the LAARC (London Archaeological Archive Resource Centre). The LAARC manager said that within the archaeology sector there is a widely-held opinion that when archaeologists collect objects during excavation, landowners retain title to all the items extracted from their land, or as Lord Renfrew put it: 'under English

law the original owner of the land is the rightful owner of artefacts found therein' (Renfrew 2000, 87). This syllogism may be interpreted to mean that when museums or archive repositories accept boxes of recovered material, they could be liable in conversion unless the transfer of title to the collected objects was adequately documented (see Deyntes Cottage case study). This legal interpretation has led to statements such as that issued by the Federation of Archaeological Managers and Employers (FAME) that: 'Commercial archaeologists risk potential liability from the owners if the artefacts are damaged or lost' (<https://famearchaeology.co.uk/fame-position-statement-on-archaeological-archives/> (accessed in January 2016)). Such notions are based on the common law principle of *nemo dat quod non habet* (hereafter referred to as *nemo dat*) which means that one cannot give what one does not have (Chambers 2008, 369). The *nemo dat* rule can be interpreted to mean that when archaeologists obtain possession of discovered objects during CRM work, they cannot pass title of the collected items to museums or archive centres because they do not have title themselves (Palmer 2009, 565). Thus, if the *nemo dat* rule is the determining factor then archaeology units and archive repositories could potentially be liable under the tort of conversion and their sincerity would offer no protection: 'Conversion may take place though there may be no intention to commit a wrong' (*MacNicol*¹⁷, per Lawrence J, at p.539). Accordingly, if the collection of discovered objects by archaeologists is considered as trespass, then the 'preservation by record' method would be considered unlawful (see Palmer 1978, 629; Pollock & Wright 1888, 57-60; Bridge 2002, 116; *Parker*¹⁸, per Donaldson LJ). Furthermore, a legal interpretation whereby the *nemo dat* rule is used to determine the conveyancing of title to recovered objects would render the contract between archaeologists and their clients as nullified due to the NPPF requirement that the archive be deposited at a museum or other public

¹⁷ Lancashire & Yorkshire Rail Co. v. MacNicol [1918-1919] All ER Rep. 537

¹⁸ Waverley Borough Council v. Fletcher [1995] 4 All ER 756 at 757

depository (NPPF 2020, footnote 64 to para 199). These contracts can, potentially, be based on committing the tort of conversion (see McKendrick 2016, 5-6; Pey-Woan 2009; decision in *OBG Ltd*¹⁹).

This thesis shows, however, that the syllogism that: (a) everything in land is owned by the landowner; (b) archaeologists extract objects from someone else's land; and therefore, (c) the objects recovered by archaeologists belong to the landowner – is incorrect. Furthermore, if taken at face value, this syllogism could jeopardise the operation of development-driven CRM-based archaeology by potentially nullifying the contract governing the work. The legal inference proposed here, however, is that archaeologists operating within the system of CRM, do obtain lawful title to the objects that they recover and retain – as a contractual term implied into all CRM-based contracts by virtue of the recovery and retention of discovered objects being a well-established practice.

The findings of the legal research conducted for this thesis are that the legal issues highlighted by archaeology sector publications (FAME statement above; Brown 2011, 33, s5.4(1); Cunliffe 2011, 9; Department for Culture, Media and Sport 2005, 15) appear to be based on too narrow a view of the operation of property law. Furthermore, it is proposed here that, in England, the conveyancing of ownership of recovered objects is a process that takes place concomitantly to archaeological work conducted as part of CRM policy. Despite perceived uncertainties regarding the ownership of archaeologically-recovered items, the evidence of this research suggests that when fieldwork is carried out under a valid contract and the terms agreed upon, a transfer of ownership of the recovered objects takes place. This process begins with a contract-based bailment and ends with the complete conveyancing of possessory entitlement from landowners to archaeologists of all recovered, discarded and

¹⁹ *OBJ Ltd v. Allan* [2008] 1 AC 1

retained chattels. Therefore, archaeologists working within the CRM system can safely convey title in the material that they assemble to museums and/or to other archaeological archive repository centres (see also Palmer 1996, 159; Palmer 1998, 66-74; Palmer 2002).

The late Norman Palmer QC referred to the current vagueness in the law concerning the legal status of discovered antiquities as ‘unsatisfactory’ (Palmer 2002, s384) and the legislation itself as ‘pitiable’ (Palmer 1981, 183). It is also worth noting that within the corpus of academic papers relating to the operation and legal aspects of development-driven archaeological work, no current publication addresses and explicitly elucidates the legal status of archaeologically-recovered material. Available literature on the subject focuses primarily on either planning-related legislation (Thurley 2013; Harwood 2012; Addyman 2009; Thomas 2004; Cookson 2000; Pugh-Smith & Samuels 1996; etc.) or on specific aspects of the law as it relates to archaeology (Treasure Act 1996, looting, metal detecting, burials and so on; Addyman 1995; Brodie, Doole & Watson 2000; O’Keefe & Prott 1989, 2011; Pendlebury 2001; Prott & O’Keefe 1992; Renfrew 2000; Palmer 2015; to name but a few (archaeology professional literature is discussed further in the relevant sections below)). Property legislation specifically pertaining to the mundane objects that archaeologists extract from the ground and archive in a box on a shelf has not been sufficiently examined in contemporary literature. It is this scholarly deficit regarding the legal status of archaeologically-recovered objects that this thesis primarily aims to address.

The main argument put forward and considered in this thesis is that, consequent to the landowner not asserting an intention to retain title to recovered objects, and on the condition that the work is carried out according to the principles of CRM, title transfer of recovered material to the archaeology contractor is implied as a condition of the contract, based on long-standing industry practice. Thus, consequent to a CRM-based contract, a transfer of title to all

recovered objects, from the landowner to the archaeology contractor, occurs automatically, and without further act, on completion of the contracted work.

To illustrate this another way, as shown in the graph below, the conveyancing of ownership of recovered objects from landowners to archaeologists is akin to two lines at a dihedral angle of 45° so the one increases as the other decreases. The point at which the two metaphoric lines converge is when the discovered objects are in ‘find bags’ but are still at the site where the work is taking place. At this point, landowners can examine the discovered objects and request that certain items be left at the site or returned once analysis is complete (as per decision in *Tucker*²⁰; see further discussion in chapter seven). Once the collected objects are removed from the site, in accordance with a previously agreed sampling strategy, a bailment situation is created and the balance of ‘entitlement to possess’ transfers in favour of the archaeologists who now have lawfully obtained possession. If, for example, the recovered objects were stolen from the lab (at the point of bailment in the graph below) only the person (or entity) who had actual possession of, or the immediate right to possess, the material at the time of the theft may claim it – in this example the archaeology contractor, not the landowners or developers (Palmer 2015, 11; Palmer 1991, chapter four; Palmer 1998, 66, s3.1; the decision in *The Winkfield*²¹ regarding who can claim for property; and the decision in *Scipion*²² regarding *jus tertii* defence in bailment. See Rostill 2018 for discussion of legal terminology used here regarding ‘entitlement to possess’).

²⁰ *Tucker v. Linger* [1883]. 8 App. Cas. 508

²¹ *The Winkfield* [1902] p.42; [1900-03] All ER Rep 346

²² *Scipion Active Trading Fund v. Vallis Group Ltd.* [2020] EWHC 795 (Comm.)

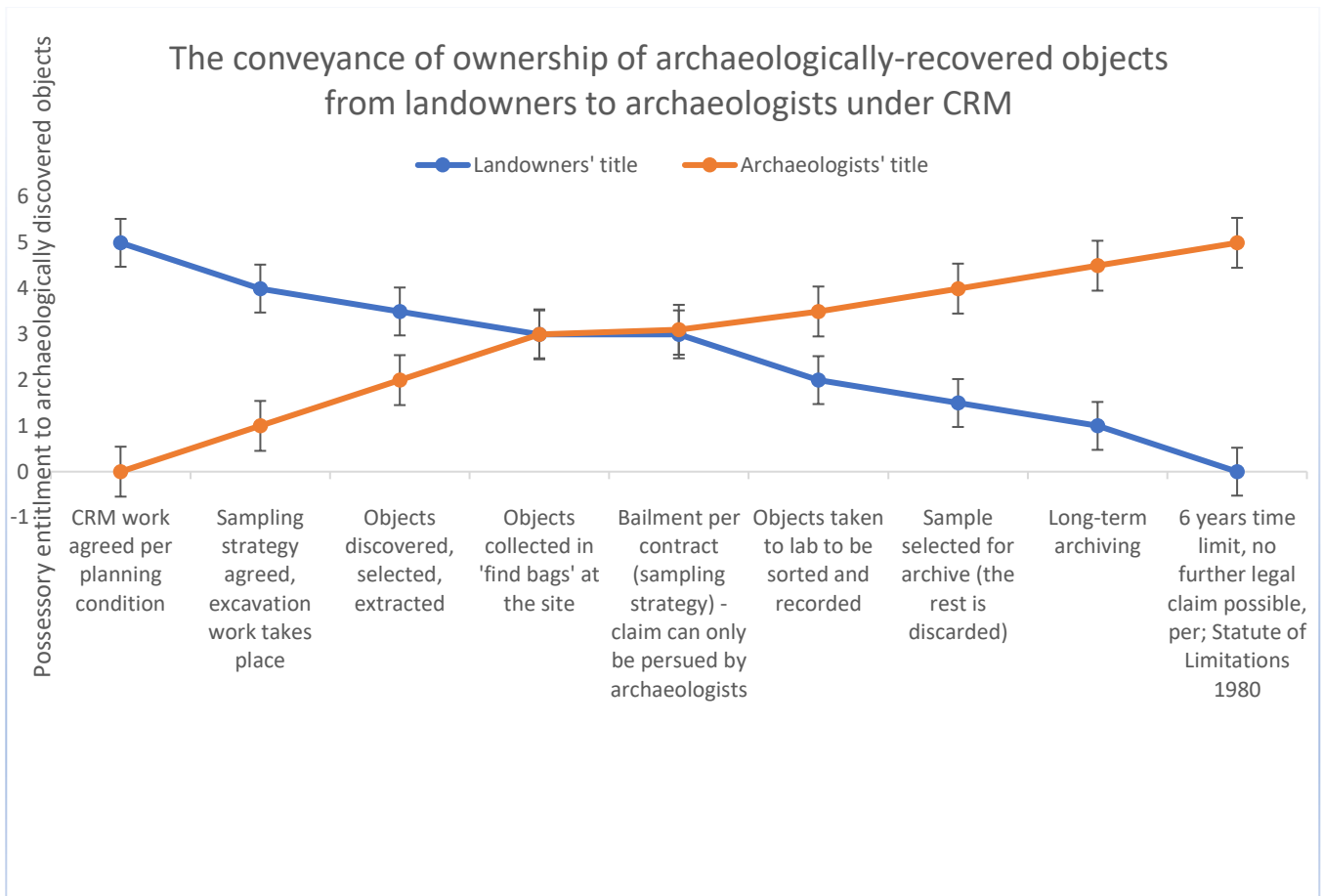


Figure 1: How ownership of archaeologically-discovered objects is transferred from landowners to archaeologists per the stages of pre-development CRM archaeological fieldwork

Source: Author's own

As briefly mentioned above (Hickey 2010, 2), in respect of conducting and presenting the legal research for this thesis, the problem is that only after clarifying archaeologists' purpose in taking possession of discovered objects can the primary research question regarding the legal status of recovered objects, be clarified. Accordingly, the presentation of the thesis must start with what I will refer to as the 'background' research questions, which examine why archaeologists recover and retain objects discovered during fieldwork.

The background research questions addressed in this thesis can therefore be summarised as:

- What is the aim of pre-development CRM-based archaeological field investigations?

- What is the purpose of collecting objects discovered during CRM-based fieldwork?
- What is the purpose of archiving a sub-sample of the recovered objects?

Addressing these background questions then leads to the primary research question addressed in this thesis:

- What is the legal status of archaeologically-recovered material assembled in England during CRM-based fieldwork?

As well as the legal issues discussed here, there are acute problems concerning lack of storage space and shortage of funding for the long-term curation of recovered material in both the archaeology and the museums sectors (see Mendoza 2017). These issues, in addition to perceived uncertainties regarding the ownership of collected material, can hinder the use of recovered data and objects and undermine the argument that archaeology is carried out for public benefit (Merriman & Swain 1999, 565). The underlying aim of this thesis is to strengthen the platform for fulfilling the potential of archaeological archives as a resource providing a public benefit. To achieve this aim, issues of ownership need to be elucidated for the museums and archaeology sectors in order to facilitate access to, and use of, archaeological collections. By clarifying and responding to wider questions relating to the legal and ethical responsibilities for the protection and curation of archaeological archives, the knowledge and understanding gained through this research will directly contribute to enhancing the public benefit that can be obtained through further research on, and better protection of, the archaeological resource.

1.1 The issue at hand

The last three decades have seen an exponential growth in the number of development-driven field projects and, despite the adaptation of better sampling strategies, the amount of archaeological material recovered and archived has quadrupled over that period (Fulford 2011, 34; Brown 2015). The continuous proliferation of archaeological material in combination with perceived uncertainties regarding its ownership render the issues discussed in this research particularly pertinent. Archaeology entails the collection of material using a scientific data-gathering method in which evidence is selected, recovered, recorded and analysed (Perring 2016). The records of this scientific exercise are kept in an archive along with a sample of the objects recovered during the work (Drewett 2004, 143). These records and objects are kept so that they can serve as proof of past cultural activities and as the scientific means for testing the plausibility or fallibility of proposed hypotheses, an idea similar to the principles of presentation of evidence in a criminal court case (after Wigmore 1913; Wigmore 1931; Thomas 2015, 257). This is the ‘preservation by record’ method of conducting archaeological field research as advocated by V.G. Childe a century ago (Rahtz 2001, 603; Merriman & Swain 1999, 252).

The majority of CRM-based field projects take place because a client, usually a land developer, is required by planning authorities to investigate a site prior to the granting of consent for a proposed development application (Brown 2015). Archaeological companies are contracted to do this work and report their findings to the client. This type of archaeological work is referred to as ‘development-driven, or pre-development, CRM-based fieldwork’ (see *Rescue* 2019, Planner, at p7 for a synopsis). Development application approval conditions are imposed by planning authorities because they are required by environmental legislation known as the ‘Precautionary Principle’ to demonstrate a strategy for mitigating environmental damage

during development (EU rules implemented through an EC directive which, at the time of writing, are still ratified and applicable in the UK, but see further discussion of this at chapter four). These archaeological fieldwork projects generate a staggering amount of material that requires expensive curatorship so it can be kept in perpetuity in order to preserve cultural artefacts and for potential future use (Merriman & Swain 1999, 252).

The combined effect of rigorous archaeological sampling methods with the number of pre-development conditions imposed by planning authorities means that the current rate of material accumulation is unsustainable in terms of providing appropriate storage and curatorship of the collections (this point is discussed extensively within the archaeology/museums sector, see CIfA report at <https://www.archaeologists.net/news/archaeologists-museums-running-out-space-staff%E2%80%A6and-time-1499337159> (accessed in June 2018)). Furthermore, because planning conditions are primarily placed as precautionary measures to reduce, mitigate or offset potential environmental damage (Thomas 2019), they do not necessarily correlate with the archaeological value of the site in terms of enhancing understanding through research (Merriman & Swain 1999, 252). This can sometimes lead to a contradiction in defining the expected product of archaeological work and, worse still, it means that museums have little control over the ‘product’ that they are expected to accommodate (Cooper-Reade 2015, 39). As pointed out by Merriman and Swain in 1999:

Decisions to undertake archaeological fieldwork resulting in the generation of archives destined for museums are made as part of the planning process, which does not involve input from museums. Museum archaeologists therefore have no real control over the rate at which archaeological archives are generated and therefore cannot ensure that the rate of collection is kept in balance with the resources available to curate them in the long term. (Merriman & Swain 1999, 252).

A concomitant problem is that perceived uncertainties regarding the legal status of recovered objects mean that museums and archive centres are reluctant to accept material without a documented transfer of title. This perceived legal conundrum adds vexing paperwork and means that archaeology contractors are often obliged to keep the collected material at their own expense when museums refuse to accept undocumented objects. Worse still, because they are uncertain that they own these objects, archaeology contractors are sometimes reluctant to promote the use of the material in case artefacts are damaged or destroyed (see Hoo Road case study at 6.4 (referenced in appendix C) and Southport Report 2011, s3).

Museums' lack of storage capacity and the perceived issues regarding the transfer of title to archaeologically-recovered objects result in an ever-increasing number of boxes on shelves containing material which is rarely accessed or used (Merriman & Swain 1999, 252).

This problem therefore raises the question of the purpose of unearthing, collecting and keeping recovered material, which then can lead to questioning the very purpose of development-driven archaeology itself. The more recovered material is stored without being used, the harder it becomes to justify its perpetual storage in terms of financial expenditure and ethical practices. As Merriman and Swain put it, 'how many boxes of archived material should be kept, for how long and precisely what for?' (Merriman & Swain 1999, 253). Thus, the tenet of 'preservation by record' leads to a paradox wherein the more rigorously it is applied, the less valuable it becomes and the more problems it creates (King 1979, 353 – 'the archaeology problem'). This is also true when referring to the premise of development-driven archaeology as being to 'record and advance understanding' (after Thomas 2019) because avidly amassing too much data and objects creates a backlog of information that hinders the very notion of enhancing understanding (Perring 1996; Merriman & Swain 1999, 253). To this we can add that if the initial recovery of discovered objects is justified by the premise of public benefit then the same justification should apply for archiving the material, i.e. public benefit must be

demonstrated as the legal and ethical justification throughout the process of CRM-based ‘preservation by record’ work including the archiving of the recovered items.

The primary aim of this thesis is to address the legal issues surrounding the acquisition and storage of objects recovered during CRM-based work. As a result of the findings of this research, three solutions are proposed here that can be implemented immediately and without additional public funding:

- That archaeology contractors buy the recovered material from the landowners/developers for a nominal amount (for example, £1). Pursuant to the Sale of Goods Act 1979, property in chattels (or title, to use the term in the Act) transfers to buyer from seller under a contract for sale (Part II, section 2(4)). This will transfer ownership of the recovered material from landowners to archaeology contractors as a bona fide purchase (discussed further below in s8.6).
- That archaeology contractors be considered as regional archive repository facility centres. These contractors would then be required to operate accordingly, particularly in terms of providing standardised curatorship and storage of the material that they collect and keep. This would lessen the pressure on public funding, alleviate the problems of lack of storage space and potentially improve access to the material.
- That the legal status of objects recovered and retained by archaeology contractors be clarified. This would significantly reduce paperwork and enable such companies to promote public access to their collections.

Notwithstanding Duncan Brown’s proposed solutions (Brown 2015) which are outlined in chapter eight, these entail a public cost, whilst the proposals put forward above are based on

archaeology contractors already funding the storage of material that they recover due to lack of storage space in museums (Adams 2017, MA statement, and see further discussion below).

Before discussing possible solutions, however, it is worth examining the causes of the problem. Figure 2 illustrates a distilled synopsis of the issues addressed in this thesis – the four phases demonstrating the *chaîne opératoire* of the life of archaeological archives.

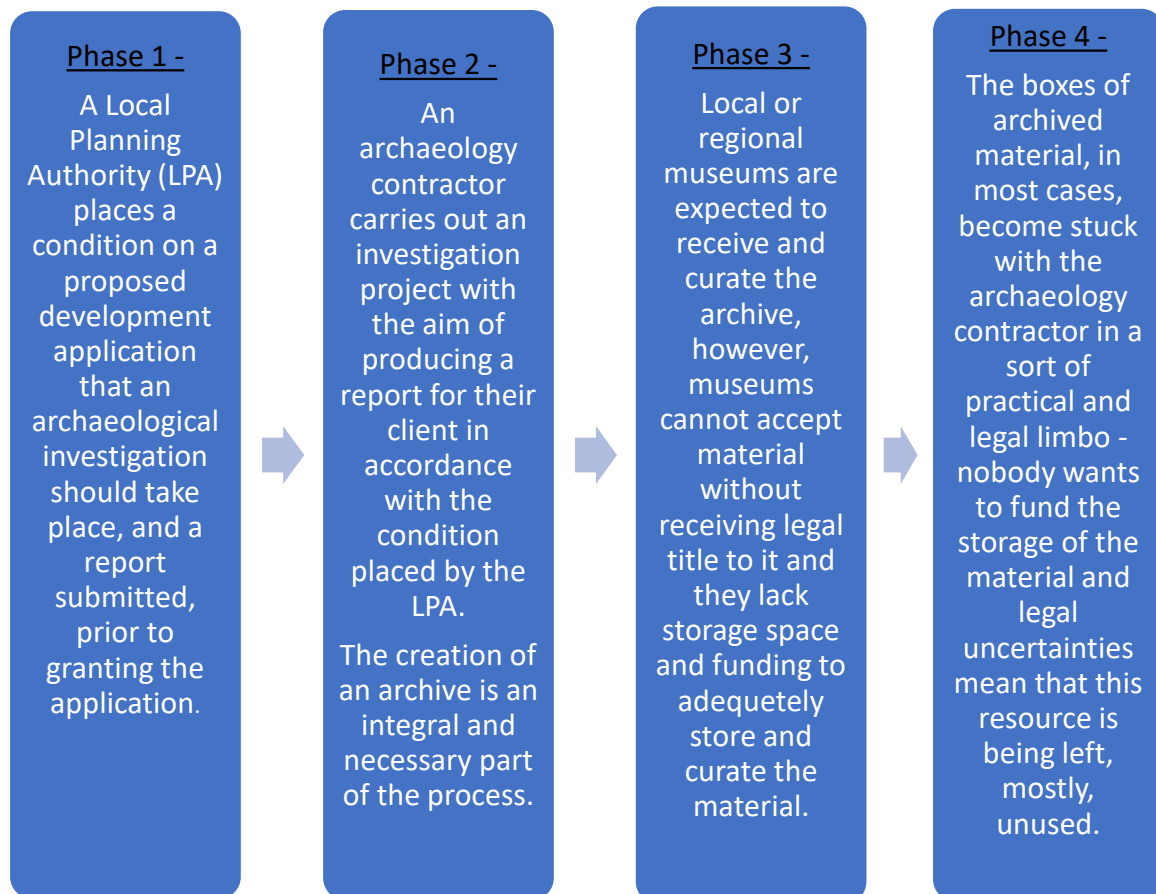


Figure 2: How and why archaeological archives are created and the problems with curating archaeologically-recovered material

Source: Author's own

1.2 Development-driven archaeology and the purpose of archaeological archives

This thesis is focused on development-driven archaeological investigation projects because, after the publication of PPG16 (Planning Policy Guidance 16, Archaeology and Planning) in 1990, this has become the predominant mechanism by which archaeological

material is generated and conserved, accounting for over 90% of all archaeological fieldwork now taking place in the UK (Fulford 2011, 34). Development-led archaeology is now a major industry with an estimated annual revenue which, in England alone, exceeds £293 million (Heritage Counts 2017, 13). PPG16 also cemented what is now a well-established regulatory regime which obliges land developers to fund archaeological field investigation work in order to mitigate (or offset, after Planning Policy Statement 5, Planning for the Historic Environment) any potential adverse impact on the historical or other environment as a result of development (Wainwright 2000, 910).

More than 5,000 archaeological investigation projects now take place in England every year, which is a tremendous increase from the 938 fieldwork projects carried out in 1990 before PPG16 came into force (Darvill 2009, 8). These field investigation projects generate tons of material that requires hundreds of cubic metres of storage space (Thomas 2004, 38; Darvill & Russell 2002, 31). With the exception of London, approximately 75% of archaeological material recovered during development-driven projects in England is kept by the archaeology contractors who carried out the work (Fulford 2011, 34). A recent survey aimed at calculating the total amount of archaeological archives accumulated in England (including in areas where no archive repository exists or where museums refuse to accept additional material) estimated that in 2012 there were 9,000 completed archaeological archives, comprising (on an average per project calculation) a total of 1,116,000 boxes. These archives, which could not be transferred to a museum or archive repository centres, required 1,160 cubic metres of storage space at an annual cost to the archaeology contractors of over £330,000 in order to keep obtained data and recovered objects (based on an average calculation; Edwards 2013; Smith & Tindall 2012).

Current information concerning the number of boxes of archived material indicates that the graph of accumulated material stored by archaeology contractors, where museums refuse

or are unable to accept it, has a clear upwards trajectory and that year-on-year the problem is worsening. Applying the same calculations (as used by Edwards 2013; Smith & Tindall 2012) indicates that in 2017 there were approximately 27,000 archives held by archaeology contractors (although some of these would be in a temporary transitional phase), comprising roughly 11,800,000 boxes requiring 16,214 cubic metres of storage space. The storage cost of such boxes would vary too widely to be accurately calculated, but following the methodology of the Edwards 2013 paper, would suggest that the cost of storing undeposited archaeological archives is now in the region of a million pounds per year.

In addition to the problems caused to the archaeology sector by this continuous accumulation of material, this situation also creates significant difficulties for many museums inundated by the sheer quantities of material that they are expected to curate (see Adams 2017). Regional museums are expected to provide storage facilities for archaeological material, but they are already holding many archive boxes that they accepted in the past and they continue to serve as the probable depository of additional material constantly generated in the course of development-driven archaeological projects (Brown 2015). As Duncan Brown, the Head of Archaeological Archives at Historic England, states:

Following the adoption of PPG 16, museums found themselves having to take archives from many more projects, which often went ahead without their input, simply because archaeological contractors and planners assumed they would. From the point of view of museum curators therefore, the last twenty years may be characterised as a period of uncontrolled collecting on behalf of planning authorities that seem to take the museum archives for granted. (Brown 2015, 248).

These issues draw attention to the question of why archaeological material is assembled in the first place. To expand on the details briefly mentioned in the previous section, the focus

of this thesis is on archaeological object collections that were generated through the mechanism of the CRM system of environmental damage-mitigation. Planning authorities are expected to demonstrate an environmental damage-mitigation strategy (after EEC directive 11/85 and the 'Precautionary Principle' regulations), so the Government has authorised councils to impose conditions prior to approving land-development applications (section 106 of the Town and Country Planning Act 1990 (TCPA 1990)). It is worth noting that after the decision in *Pyx Granite*²³ in 1960, planning authorities were already allowed to impose planning conditions where archaeological remains were thought to exist, but after the EEC directive, the TCPA 1990 and PPG16 came into force and this became an expectation (see Wainwright 2000, for further discussion of this point). The conventional method for achieving this environmental-damage mitigation is through incorporating the principle of 'preservation by record' into the CRM approach (Merriman & Swain 1999, 256). This combined system is based on the tenet that available reports, supported by an archive of finds and records, can serve as an *ex situ* surrogate for the archaeological remains which would be destroyed by the proposed development (Ucko 2000, 353).

Accordingly, the information, data and material gathered during development-led fieldwork can be used to scientifically test a theoretical hypothesis – the plausibility of the narrative (Nicholas & Markey 2015, 288; Jones 2015, 326). Archaeological archives assembled during development-led projects are thus seen as compensating for the loss of the *in situ* remains by creating an *ex situ* resource for the continued examination of the material and of the information extracted from sites (Ucko 2000, 353). The purpose of recovering and collecting the material and records in an archive is therefore to provide a measurable public benefit in the form of 'preservation by record' within the system of CRM to enable the

²³ *Pyx Granite v. Ministry of Housing and Local Government* [1960] A.C. 260

continuous examination and protection of recorded data (Pitt-Rivers 1888, 7; Atkinson 1946, 26; Cunliffe 1982; Merriman & Swain 1999, 257).

Hence, archaeological archives resulting from development-driven projects are regarded as representations of the narrative we call ‘heritage’, and as the scientific means for testing the plausibility of interpretations of past cultures (Perring 2016). Archaeologists can thus justify their practice of extracting objects from someone else’s land by saying that the objects that they select and collect have an intrinsic and innate cultural value (Drewett 2004, 12). Consequently, these objects metamorphose from being part of the land, governed by planning and environmental legislation, to becoming chattels with an acknowledged and permanent cultural value governed by property legislation (Prot & O’Keefe 1992). Despite this, the sheer amount of data and objects being assembled and stored defeats the object of providing evidence for any meaningful observations – because the amount of gathered information, recorded data and recovered objects is simply overwhelming (Merriman & Swain 1999, 258). Archaeology is thus advancing towards a self-induced data overdose.

This situation also leads to the information and objects gathered during archaeological work being viewed as a resource that is the primary expected product of CRM-based fieldwork (Welsh 2018; Tilley 1989; Thompson 1975). Yet, despite the work that goes into its assembly and the cost involved in storage, the object collections kept by archaeology contractors are rarely exploited as a resource for academic research or for any other social function (Fulford & Holbrook 2011, 324; Holtorf 2015; (Merriman & Swain 1999, 253)). Moreover, the exponential increase in the number of archaeological objects collected and stored over the past thirty years means that the proportion of material being used is constantly falling (Brown 2015, 3; Fulford 2011, 33). If measured by function, therefore, the social value of archaeological archives is decreasing since they are proportionately less and less used (Merriman & Swain

1999, 260). At some point, this continuum will jeopardise the public's willingness to fund the conservation of this rarely-used resource. As Cooper-Reade has pointed out:

Commercial exchange requires the goods or services being exchanged to have value. The value of the product of archaeology can be assigned at several points in the chain; it might even be the case that the person who pays for the goods or services gets less value out of them than the user of the product. Commercial archaeology sits somewhere in the spectrum between those that benefit through the academic and publicly accessible product, and those who pay and have a vested interest in carrying out the work as cheaply, and with as little requirements, as possible. Maybe in our desire to be business-led we failed to retain those aspects of public-service delivery most helpful in offering a product to an end-user who has no commercial relationship with those paying for and delivering that product. (Cooper-Reade 2015, 39).

The problem is intensifying because the vague definition of the 'product' of archaeology and questions as to who should fund which aspects of this 'product' and for how long, result in apparent uncertainty as to who owns archaeologically-recovered material. Unlike documents, photos or digital parts of an archive, access to and research on the collection of objects within the archive requires specific consent from the owner because: (i) research may damage or destroy the objects; and (ii) the possession and transfer of archaeological and cultural objects requires adherence to international regulations and national legislation that might contradict each other (Brodie 2014; Palmer 2015; further discussion in chapter seven). As briefly mentioned in the previous section, in order to ascertain and elucidate the legal status of recovered archaeological items, it is necessary to define precisely what is the expected 'product' of archaeological work. This means that we must establish the purpose for collecting the objects in the first place so as to ascertain whether the recovered objects are to be regarded

as part of the product. Is the recovery of discovered items done as part of the expected work under the contract, is it for public benefit reasons, or is it just by force of inertia? (Tilley 1989, 276).

As Figure 3 below illustrates, in terms of establishing the legal status of archaeologically-recovered objects there is an apparent peculiar ‘vicious circle’ because it could depend on the reason the material was assembled in the first place and on who defines the product (the contractor, the client, academic archaeologists or museums etc.). As shown by the discussion in the following chapters, an opaque definition of the function and purpose of archaeological object collections leads to difficulties in realising the potential public benefit that can be derived from keeping the material (i.e. if we are not allowed to use it then why are we keeping it? (Perring 2016)). This can then lead to uncertainties regarding the legal status of material which are kept perpetually without a clearly defined purpose (Merriman & Swain 1999, 260) and contribute to exacerbating the problem due to the continuous recovery of items discovered during CRM-based fieldwork.

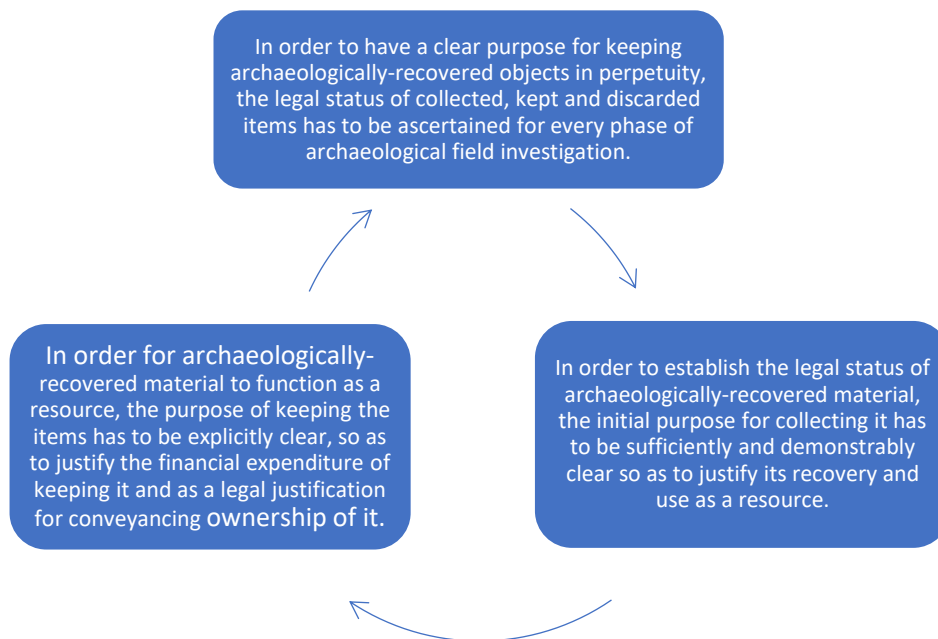


Figure 3: The ‘vicious circle’ of ascertaining the legal status of archaeologically-recovered objects by establishing the purpose for which the material was assembled

Source: Author’s own

1.3 Thesis premise

The value of archaeological archives is based on and derived from the information they contain (Chapman & Wylie 2015, 10). Accordingly, preserving the integrity of the archaeological context in which the data and the material were collected is of paramount importance – without context the obtained data and collected objects lose their archaeological value (Barker 1977, 12). Underpinning this thesis, therefore, is the notion that no matter whether archaeological archived material is kept by a contractor, a regional museum or a county council facility, archaeological archives contain information which belong to society and must therefore be protected (Brown 2011).

At some point, however, archaeologists need to justify why taxpayers' money, or funds provided by developers, should be allocated towards the preservation of material even though archaeologists themselves find it to be of little use (Holtorf 2013, 13; Holtorf 2015, 406). As Merriman and Swain suggest, the question then becomes what criteria should be used in order to assess this theoretical value; is it only a question of how much and in what way the material is being used, or do archaeological archives have an intrinsic and innate value derived from the cultural information they contain? (Merriman & Swain 1999). Nonetheless, caution must be taken here as Petrie warned us more than a century ago against defining archaeology as a commoditised industry producing value purely for financial interest:

We are driven, then, to the conclusion that the progress of archaeology and the preservation of the past, as it comes in to our hands year by year is essentially a question of free space. To refuse to preserve anything that is not worth some pounds per square foot, is the death of archaeology; and yet such are the necessary conditions in our present museums. (Petrie 1904, 133).

The following chapter introduces the data set used in this research, the thesis structure, the research method and explanation as to the rationale behind the choice of this particular data and research method. The determining factors for the thesis structure were based on chronology and relevance, i.e. planning condition (environmental legislation) → archaeologists' actions (contract law) → boxes on shelves (property law), the levels of impact on the preservation and use of the recovered material, and the flow of presentation.

Chapter 2: Thesis presentation, research method, data collection and analysis, the product of archaeology – why collect things

2.1 Thesis presentation

The previous chapter – setting out the rationale behind this research – also illuminates the reason for conducting the data gathering and research methods in reverse chronology, i.e. starting with boxes of archived material on a shelf and tracing back through who deposited them and why they are being kept. In presenting this thesis, I was faced with the particular problem that archaeologists and lawyers communicate in very different languages (Thomas 2015). This necessitated the elucidation of particular legal concepts such as ‘bailment’, ‘title’ and ‘possession’ in the ‘Annotation of Terminology’ section at the beginning of the thesis. In this respect, the most challenging aspect of presenting this research has been discussing the legal status of material held by archaeology contractors. This is because the idea that title to objects can be conveyed without being explicitly mentioned in a contract or in any other related document requires an understanding of legal terminology. An example of this issue is that there are many occasions during everyday life when title to property is conveyed without being explicitly mentioned and without requiring specific paperwork, such as during refuse collection by employees working for a contractor (discard (rubbish in the bin) as an implied abandonment of property; Hudson 1998, chapter 23; *Ellerman*²⁴, per Goddard L. CJ).

The solution adopted here is to use the correct legal terminology throughout, whilst postponing the explication of legal concepts until the legal research at chapter seven. Readers unfamiliar with legal terms should refer to the ‘Annotation of Terminology’ at the beginning of the thesis.

²⁴ *Ellerman Willison Line v. Webster* [1952] 1 Lloyd’s LL Rep 179

In terms of examining the hypothesis proposed here, by way of conducting and presenting this research, two main obstacles had to be overcome: (a) data collection had to be flexible and adaptive so as to fit with the schedules of the projects presented here as case studies; and (b) in respect of the principal legal question addressed in this thesis, the main problem with which I had to contend is that it is much harder to prove a negative than a positive. Explicitly, if the assumption that landowners are the rightful owners of objects discovered by archaeologists is correct, as per the quote from Lord Renfrew above (Renfrew 2000, 87), then it should be relatively easy to prove. On the other hand, if this syllogism is incorrect, yet perpetuated by many people, then it is difficult to prove this ‘negative’. This is because the absence of circumstantial proof should not be taken as evidence of the validity of proposed suppositions (or syllogism), and should not, therefore, be taken at face value (Wigmore 1931, 635-636; the fact that the knife was never found does not prove that it was not used). More pertinently, not knowing about a precedent court case relating to the matter at hand is not a proof that the case does not exist, only that further research is required. The precedent case of *Tucker v. Linger* (int 1883, app 1886)²⁵, presented here in chapter seven, is the culmination of over a decade of legal research. It explicitly concerns the conveyancing of title to objects discovered in someone else’s land by virtue of a known practice becoming an implied contractual term. As such, it is proposed here that the *Tucker* case holds precedence in relation to the legal status of objects recovered during CRM-based archaeological fieldwork.

The type of data and the method of analysis used in this thesis required a multidisciplinary approach in order to examine and combine data from the seemingly remote spheres of law and archaeology (see Thomas 2015 for an excellent discussion of this point). The research method used here to carry out this multidisciplinary research is based on J. H. Wigmore’s proposed investigative method of extracting information from the evidence

²⁵ *Tucker v. Linger* [1883] 8 App. Cas. 508

(selecting data to be used as proof) (Wigmore 1913, 77; Wigmore 1931, 65; see also the discussion of Lord Bacon's methodology, below). More specifically, the research for this thesis included an examination of archaeological practice by use of on-site observations, interviews with archaeologists and collaboration of the data obtained through email correspondence. The legal research, which was carried out simultaneously with the archaeological research, entailed legal literature reviews and case law analysis combined with law studies at university. The case studies, presented here in chapter six, provided the foundation for examining archaeological practice through the prism of applicable policies and pertinent law.

The structure of this thesis and the methodology of the research follow the idea that both archaeology and property law use similar investigative methods in order to 'understand a past that actually happened' (Thomas 2015, 256). Note that although the scholars referenced here refer to criminal law not property law, the investigative method principles are the same as they aim to provide proof in order to ascertain the chronology of past events and accuracy of a proposed narrative (Bayliss & Whittle 2015, 214-218; Anderson & Twining 2015, 379; Wigmore 1913, 77; Wigmore 1931, 66-68). Field archaeologists, and lawyers ascertaining the chronology of a criminal act or the legal status of property, utilise the same combination of strategies, known as 'hypothesis-testing' or 'inductive' empiricist methods, to 'dig' through stratigraphic layers of the past in order to discover the processes that resulted (Johnson 2000, 23; Thomas 2015, 258; Bayliss & Whittle 2015, 214; Bogaard 2015, 244; Anderson & Twining 2015, 272). This is exemplified by Thomas' (2015) comparison of Harris's *Matrix of Archaeological Stratigraphy* with Wigmore's *Chart of Evidential Proof* (Thomas 2015, 264-266; Wigmore 1931, 66; Harris 1989, 13). This thesis follows the same principle; establishing the legal status of archaeologically-recovered objects through the examination of the process that resulted in collection of objects on shelves, and the inference that gave rise to the notion that landowners retain title to discovered items. Thus, this research is a 'dig' through various

facets of the ‘product’ of archaeology in order to determine the origins of the legal misunderstanding prior to ascertaining the actual legal status of material collected during CRM-based fieldwork.

2.2 Research method

The specific research methods used here are discussed below in dedicated sub-sections, starting with the rationale and methodology of using case studies to generate data and address the research questions through a systematic programme of research. Key points of the research journey for examining archaeological practice and applicable law are presented in the second and third sub-sections through a series of questions raised consequent to the analysis of the data which necessitated adaptations in the research design. Prior to that, it is important to explain why this thesis could not follow conventional methods of establishing ownership of property (see *Parker*²⁶ and *Waverley*²⁷ for pertinent examples).

When a claim concerning property is brought to court, the decision will be who, between the disputing parties, has a better claim, not whether a third party might have a claim which is superior to the disputing parties (Chambers 2008, 61). In order to examine the claim and reach its decision, the court will aim to establish the chronology of events and ascertain the creation of rights as opposed to priority of rights, so older or prior rights are considered stronger than newer ones (see *Northern Counties*²⁸). Despite seeming to be an ostensible dispute between landowners and archaeology contractors as to who has title to recovered material, the issue addressed in this thesis concerns neither a claim nor a dispute concerning

²⁶ *Parker v. British Airways Board* [1982] 1 All ER 834

²⁷ *Waverley Borough Council v. Fletcher* [1995] 4 All ER 756 at 757

²⁸ *Northern Counties of England Fire Insurance Co v. Whipp* [1884] 26 Ch D 284

title to property. The subject examined here, unusually, involves the party with possession claiming not to have title (per Brown 2011; as discussed above in the Introduction, and see also Deyntes Cottage, Moorfield School and Hoo Road case studies and relevant references in appendix C). For this reason, the conventional legal research method of establishing rights to property through ascertaining the chronology of control over the object could not be followed in this thesis.

Following the notions discussed above of ‘hypothesis testing through the examination of known data’ (per Anderson & Twining 2015, 272; see also Wigmore 1913, 77; Wigmore 1931, 65) the method used here in order to ascertain the legal status of archaeological material collections was an interdisciplinary hybrid that entailed conducting research in parallel lines of data collection and analysis: (i) the archaeologists’ practice of extracting, collecting and keeping objects; and (ii) the legal framework in which archaeologists operate. This was analogous to an archaeological excavation of a Tell site composed of many overlaying strata of consecutive occupational periods (per Bogaard 2015). Two trenches in two academic disciplines were metaphorically excavated in order to carry out the investigation of the site; one trench aiming to ascertain the legal status of recovered objects, while the other targeted at scrutinising aspects of archaeology policies and practice. The lines of inquiry converge at points when archaeologists’ actions, governed by contract and conducted by custom, impact the conveyance of property rights to discovered objects, e.g. when items are unearthed, extracted, collected, retained or discarded. Following Wigmore’s (1931) chart and Harris’s matrix (1989), every point in the process, both the legal aspects and archaeologists’ practice, is either derived from or leading to another point. Accordingly, two sets of primary data were used in this thesis, namely:

- (a) the policies applied by planning authorities and the practice and operation of CRM-based development-driven archaeology. This part of the research incorporates the examination of the case studies as a data source that also illustrates the issues.
- (b) pertinent common law, Acts of Parliament, national and international policies and regulations that create the legal kaleidoscope for examining the ownership of recovered archaeological material (ultimately, as neither the legislation, nor policies or regulations explicitly refer to the issue examined here, the solution is to be found in the common law as per courts' rulings e.g. Palmer 2002; and see particularly discussion of *Tucker*²⁹ in chapter seven).

The following sub-sections present the data set and analysis method used in this thesis and key points in the research journey that impacted its structure, starting with the rationale for using case studies and the methodology employed for gathering and analysing the data. Further aspects of the research into archaeological practices is provided in section 2.2.2 and the research journey and dataset of the legal research is presented in section 2.2.3 below.

2.2.1 Case Studies Rationale, Research Method and Data Gathering Technique

As the case studies provided a substantial part of the primary data used in this research, it is worth explaining at this stage the rationale and research method explicitly relevant to the case studies. The legal strand of the research indicated that the legal status of archaeologically-recovered objects is determined by the initial purpose for collecting the items and the intended aim of archiving a sample of the recovered material. This provided the rationale for using case

²⁹ *Tucker v. Linger* [1883] 8 App. Cas. 508

studies based on published or ‘grey’ literature, publicly available information, and where necessary incorporating on-site visits and further correspondences to corroborate observations made during the research. The aim of this case studies research method was to test the validity of the assumption that the impetus for collecting discovered items is the archaeologists’ aim of recording and studying their findings in order to advance understanding of the past, vis-à-vis the practice referred to as ‘preservation by record’ discussed above in chapter one. In this respect, the case studies presented in chapter six provide the platform for demonstrating and examining CRM-based archaeological practices of recording findings, advancing understandings and archiving a sample of the recovered material.

In addition to the publicly available information referenced, the dataset itself consists of emails and notes of observations taken during on-site visits. The entire dataset obtained during the course of the research for this thesis is currently kept in digital format in strict compliance with UCL data protection regulations (see below concerning the availability of certain types of data obtained, for the regulations see https://www.ucl.ac.uk/drupal/site_data-protection/node/251). The sampling parameters for choosing case studies aimed to illustrate the practical and legal issues addressed here, with the stipulation that they would differ in terms of the approach taken for the management of the collected material. The rationale for the choice of the specific projects presented here as case studies aimed to provide an illustrative cross-section synoptic example of CRM-based archaeological practices, rather than a comprehensive review of development-driven archaeological work in England.

After deciding that case studies were the most suitable research tool for examining and illustrating archaeologists’ practice of recovering discovered items, strict criteria had to be used to select appropriate archaeological projects that fitted within the sampling parameters and reflected the research aim of examining archaeological practice. The criteria for selecting projects to be included as case studies was that (a) the work would be undertaken in different

locations and (b) that it would be undertaken by different archaeological contractors. Additional parameters included the requirement that the fieldwork phase of the project was completed, or very close to completion, that there would be an accessible ‘paper-trail’ relating to the work (the planning conditions, the watching brief, the WSI, etc.) and, most importantly, that such information would be readily available. Admittedly, where information relating to archaeological work is unavailable or denied, this could also present an interesting research topic, however, this was not relevant to the aim or purpose of the current research. The project selection criteria and availability of information honed the research design of this thesis (discussed further below in the following sub-sections).

Case studies within the counties of Kent, Wiltshire, Sussex and Northamptonshire were selected using the same criteria with the aim of expanding the scope of research so as to demonstrate issues relating to proliferation of archaeologically-recovered objects and the archiving of material by different planning authorities. Except for the case of Wiltshire, all the information used here regarding county-level case studies is publicly available and is either included in appendix C (relevant emails) or referenced appropriately. The Wiltshire case study included a visit to the Wiltshire Museums, Devizes, for an on-site meeting with the museum’s director. The aim of this site visit was to discuss issues relating to the transfer of ownership of objects recovered during pre-development archaeological work in Wiltshire, and to observe the reasons why the museum is refusing to accept additional material generated during CRM-based work (see Wiltshire case study at 6.6). In accordance with UCL’s interview procedures, minutes of this meeting are available only by specific request, per <https://www.ucl.ac.uk/culture/sites/culture/files/interviews.pdf>.

The first phase of the case studies research entailed an online search for suitable projects with an emphasis on the availability of the information (i.e. that the fieldwork had been completed or nearly completed), and that the work took place in different counties and

therefore, that the archive could be presumed to have been deposited in different locations, as well as the variety of locations of the fieldwork and different archaeology contractors. This phase was absolutely crucial as it directly correlates to the premise of CRM-based archaeology as taking place for the benefit of society, however, it also led to a strong research bias in favour of projects that have been published online (discussed further below). No issues of data protection were pertinent at this stage as the entire body of information is publicly available.

Once a sufficient number of suitable projects had been identified (see table below), the second phase included introductory email correspondence (what the research is about and the aims of the questions) with the organisations involved with the work. These included the contractors who carried out the work, the client (developer and/or consultant), regional archaeology advisory bodies (EH or GLAAS), county archaeologists and the archive centre or museum with which the archive was deposited (or expected to be deposited).

Following the initial correspondence, where permission was given, on-site observations were conducted in order to provide a more precise analysis of how CRM-based archaeological work is applied during fieldwork and in terms of the selection of a sample of the collected objects to be archived. This phase of the research included correspondence with archaeologists working in the field and in the lab in recording and sorting the recovered material, as well as meetings with archivists and museum curators where archaeological material had been deposited. This phase of the research provided the data regarding the sampling strategies employed during fieldwork and the strategies used to select material to be archived, as well as evidence that the rate of material accumulation during CRM-based work exceeds the capacity of museums and archive centres to adequately curate it (see Wiltshire case study for example). Particularly in respect of this phase of the research, it must be mentioned that as this thesis is submitted at the end of 2020 in an electronic format only (no printing services are currently available at UCL), certain email correspondence with employees (primarily archaeologists and

archivists) had to be withheld from this electronic submission and are only available by specific request. This is in accordance with UCL data protection regulations (digitally-kept personal information data, see https://www.ucl.ac.uk/drupal/site_data-protection/node/251).

Prior to the inclusion of the data obtained through the case studies into the thesis body, further steps were taken in order to ensure the validity of the observations and inferences made. These primarily included sending a draft of the notes taken to the people concerned for review and comments (these email correspondences are included here in appendix C). In most cases, additional meetings were also required because different employees deal with the various stages of collecting, sorting and archiving the obtained material.

The final stage of the case studies research included analysing the obtained information, corroborating and sorting the data with the relevant people to ensure its accuracy and reducing tautological details. This phase of the research provided clear elucidation of the process of CRM-based archaeology from the planning consent condition through assessment, evaluation, fieldwork ('watching brief', mitigation or offset), and into post-excavation, archiving and publication phases. This demonstrable information presented justification for the use of case studies in advancing and supporting a hypothesis in a thesis that primarily concerns legislative issues. The use of case studies for data gathering and as a research method provided the known data from which to extract information (per Anderson & Twining 2015, 272; Wigmore 1913, 77; Wigmore 1931, 65) and the necessary illustration of archaeological practices which in turn determine the legal status of archaeologically-recovered object collections.

Initially, this method of selection meant that only archaeological work that resulted in an archive containing recovered objects could be included in this research (the initial working assumption being that where no items were collected there should be no issue regarding the legal status of the archive). However, this method conflicted with the discussion regarding

public benefit being the justification for archaeologists' practice of recovering discovered items (as mentioned above; discussed further in the next section). The main problem here was that focusing only on projects where the archive includes recovered items led to a strong research bias in terms of defining the expected 'product' of archaeology (i.e. if no objects were discovered, does that negate the planning condition being in the public interest?). Furthermore, this method also raised an ethical question regarding whether the legal status of objects collected consequent to a planning condition would be different than that of material that was not collected during CRM-based fieldwork (i.e. objects collected during academic study, or by archaeologists not working under a contract (amateur or members of the public) or before PPG16 publication).

Consequently, the research method used here for examining archaeological policies and practices had to be recalibrated. Instead of focusing only on the material part of the archive, the design of the research method was extended to include scenarios on which no planning condition was imposed and yet objects were collected, or where the planning authority knew that the archive, including recovered items, would remain with the contractor. In order to incorporate both research methods, this research focused on assessing and comparing the availability of the information obtained during the fieldwork and the accessibility of material archive kept by museums, archive centres and/or archaeology contractors. The rationale for this method is that the one thing that all archaeological projects have in common is that some information was generated during fieldwork. Therefore, assessing the availability of the obtained information is an effective tool for examining the implied public benefit gained from the work, and ascertaining that the work was undertaken in the public interest can help clarify the legal status of recovered items (this point is examined further in chapters four, five and seven below).

Case Study	Location / Planning Authority	Expected Archive deposition / Status	Research Comments
Deyntes Cottage, Northolt {used as case study}	Northolt, London	Archive was kept by MoLA for 12 years until it was transferred to LAARC	Research included on-site visits, correspondence and meetings with MoLA and LAARC archivist
Honeywood Parkway, Whitfield {not used as case study – information refused}	Whitfield, Kent	Evaluation project carried out by Canterbury Archaeology (assumed but not verified that they still hold the archive)	Very problematic case study. The Dover LPA granted the planning application in an, apparent, disregard to the significant remains found at the site (Parfitt 2010). However, further information could not be obtained as correspondence with CA had a negative result
Hoo Road, Rochester {used as case study – initially information was refused but further correspondence was positive}	Wainscott, Kent	Archive kept by Wessex Archaeology; the regional museum in Medway cannot accept AA. This was known to the Medway LPA when the development condition was imposed	Research included correspondence with Wessex Archaeology field archaeologists (the project manager) and the head of archives. Further research was carried out online and by correspondence with relevant people at the county council and the Medway museum (not all of whom consented to the correspondence being presented)
Kent CC {used as case study}	Kent	No county AA deposition centre	LPAs impose planning conditions knowing that the contractor would have to keep the archive
Leicestershire CC	Leicestershire	Museum still accepting AA but is running out of space	Correspondence with museum curator. Procedures under review, currently a

{ not used because too similar to other cases }			'donation' of the material is required
London Mithraeum { used as example of specific issues }	City of London	Archive held at MoL until reconstruction in 2016	Information obtained through literature and online research
Moorfield School, London { used as case study }	Bunhill Row London EC1	Archive still kept by ASE, expected to be deposited at LAARC	Research included on-site visits, discussions with the archaeologists in the field and at the lab, and meetings and further correspondence with ASE archivists and finds processing archaeologists
Northamptonshire CC { used as case study }	Northamptonshire	County AA centre in the process of being commissioned	Online information outdated. Correspondence with (newly appointed) NARC curator. Procedures require 'donation' of the material
Rutland CC { not used because too similar to other cases }	Rutland	Overflow material goes to Leicestershire	Correspondence with Rutland county archaeologist and museum curator, situation rather similar to Leicestershire
Seaford Head, Seaford { used as case study within Sussex case study }	Seaford, East Sussex	Full excavation projects prior to construction. Significant amount of worked flint. Archive currently kept by ASE as the local museum is very small and can only take a representative sample	Research included participating in the excavation and on-site observations. Further information obtained and verified through correspondence with ASE archaeologists and archivists

Six Hills, Stevenage { used as an example of specific issues }	Stevenage, Hertfordshire	No AA deposition centre. Museum not accepting AA. Council CRM approach seems inadequate	Data collected by an on- site research at the museum and the monument, and correspondence with Dr. Lockyear (Welwyn Archaeological Society)
Stonehenge, Wiltshire { not used as case study – too many publications }	Wiltshire	A well-known example of ostensible conflict between land development and protection of a famous Ancient Monument	The research identified important discussion points concerning the value of pre- development archaeology as supporting and enhancing academic research (see Pitts 2018)
Sussex CC { used as case study }	Sussex	Regional museums accept archive per prior arrangement	Information available online. Procedures require ‘donation’ of the material
Sutton Hoo Ship, Suffolk { not used as case study – too many publications }	Suffolk	A well-known listed Ancient Monument. Many available publications on the legal issues surrounding the discovery and ownership of the Ship	Too well-known to be used as a case study. Research identified potential discrepancies in the application of the Ancient Monuments Protection Act 1882 (it is unclear why the Act was not applied in order to transfer ownership of the land to the Crown)
Wiltshire Museum, Devizes { used as case study }	Devizes, Wiltshire	Museum full to capacity. Research also included the Cotswold Archaeology project at Melksham (Howard 2014)	Current situation expected to be resolved in mid-2021 (on-site meeting with museum director). Additional case study of Melksham evaluation projects by Cotswold Archaeology (Howard 2014)

Table 1: Data obtained for use as case studies

Source: Author's own. NB: The list contains some data that was ultimately not selected to be presented.

2.2.2 Analysis of Data Concerning Archaeology Practices and Designing the Research Methodology

The raw data gathered in the course of this research consisted of a large amount of written information obtained from different sources in various formats. It included email correspondences, notes taken during site visits, minutes of meetings and discussions with professional and academic archaeologists, correspondence with archivists working for museums and archaeology contractors and communications with county archaeologists. This necessitated the use of qualitative analysis for identifying recurring themes from which inferences can be drawn that demonstrate archaeological practices. The research method used in this part of the thesis follows the ‘qualitative case study research methodology’ guidelines recommended by J. Gerring, namely the method of conducting ‘un-interfering observations’ (Gerring 2007, 26). The underlying aim of this method was to address the questions of (i) why is the work taking place? (ii) why are objects collected during the work? and (iii) why is a sample of the recovered objects retained in the archive? As discussed in the following subsection, addressing these questions directly correlates to the legal issues examined in this thesis, therefore, qualitative analysis was essential in order to extrapolate information from the data. Despite the apparent similarities of the method used here with archaeological quantitative statistical analysis methodologies (see VanPool & Leonard 2011), the focus of this research was on identifying patterns of practices, not on extrapolating patterns through a statistical analysis. The data analysis method used here aimed at ascertaining whether discovered objects are collected as a matter of practice pertaining to all CRM-based archaeological work, not on the quantities or nature of the recovered objects. That said, as mentioned in the previous subsection, the data analysis method used here entailed extrapolating meaningful information

through the examination of a small synodic sample to achieve general observations that indicate common practices in a large number of CRM-based archaeological projects (over 5,000 per year as mentioned in chapter one). The analysis of the data obtained through the case studies precisely correlated to the legal research in terms of examining whether archaeologists' practice of collecting discovered objects meets the legal test to imply terms into a contract, known as 'The Officious Bystander' (per *Shirlaw*³⁰; see further discussion at s7.6).

The analysis of the data resulted in a comparative study of a set of completed archaeological projects (the case studies) from different counties across England and where the archive is stored by different types of organisations (museum, archive centre, archaeology contractor). This was designed to compare and contrast the practical and legal issues arising from the different approaches taken for the management of archaeological material at these different bodies, while simultaneously identifying recurring themes of customary practices that can imply terms into a contract (as per The Officious Bystander' test, *Shirlaw*³¹, and discussed further in s7.6). Returning to Wigmore's *Apparatus for Charting and Listing Evidence* (Wigmore 1931, 48-71), at this point in the research three flow charts were used to analyse the data – law, policies and practice – by placing different coloured strings connecting the charts at relevant points highlighting patterns that are indicative of practices and issues prevalent in CRM-based archaeological work. Every action by archaeologists (entering the site, excavating, selecting discovered objects, extracting and collecting the objects, removing the collected material from the site, sorting and recording, and finally discarding superfluous objects and archiving a selected sample) must correlate with (a) policies and regulations and (b) pertinent law. This research and data analysis method facilitated the review of how different organisations address the issues arising from the possession of material that they might not

³⁰ *Shirlaw v. Southern Foundries [1926] Ltd [1939] 2 KB*, per MacKinnon LJ, at p.227

³¹ *Shirlaw v. Southern Foundries [1926] Ltd [1939] 2 KB*, per MacKinnon LJ, at p.227

have title to at each phase of CRM-based fieldwork (i.e. do they, how do they, and why do they keep recovered items if they are not certain that they own the collection?).

An additional important aspect of the research parameters was the aim of highlighting the inherent differences between the theoretical realm of ‘ideal’ archaeology and the practical issues of applied archaeological work ‘on the ground’ (per Banakar & Travers 2005, 8). The policies within this arena can be regarded as ‘the ideal’ and the practice as ‘on the ground’. The research and data analysis methods used here aimed at examining both these characteristics of archaeology. The examination of archaeological practice ‘on the ground’ entailed communications with archaeology contractors that both generate and keep the product of CRM-based archaeological work. The organisations focused on in this research are publicly-funded (such as museums, national archive repositories and county archaeologists) as well as privately-financed (archaeology contractor companies, notwithstanding their charitable listing), so as to ascertain whether the identified patterns of material acquisition and retention are practised in organisations with a different funding structure.

An identified issue that resulted from the research method and data analysis discussed above (the use of a sample of case studies to identify general patterns) is that every archaeological field project is unique in terms of the particularities of the work agreed upon in the contract. Sampling strategies, for example, have to be agreed on at the site and again after the completion of fieldwork (discussed in the case studies and referenced in appendix C). Restricting the research method to focusing only on the availability of information gained and accessibility of recovered objects, therefore, severely limits the research so examination would only pertain to the specific contract under scrutiny. Furthermore, archaeologically speaking, you cannot re-excavate the same site twice (Curwen 1937, 6; Bradley 2015, 24), thus a new contract is required for each project. In addition, there is also the question of whether the expected product of work that takes place under a contract includes the recovery of items, or

whether performance of the contract can be completed by gathering and publishing information without any item being collected. Extending the question, can the legal status of items recovered during contract-based CRM work be ascertained through the examination of a contract that does not include collecting discovered items as part of the work remit? The result of the research conducted here indicates that the answer to these questions would rely on practice as superseding the wording of the contract (these questions are addressed in chapters three, four and in particular in chapter seven concerning the contract).

A further problem identified in respect of the research and data analysis methodologies used here has been the reliance on the cooperation of the organisations contacted. During the research for the Honeywood Parkway, Kent case study, for example, in spite of corresponding with Canterbury Archaeology on numerous occasions, by email and by phone conversations (emails referenced included here in appendix C), it was not possible to gain access to any part of the archive generated during the work (neither the information obtained nor the objects collected). Current available information about the work at Honeywood Parkway is limited to Canterbury Archaeology and Whitfield council's websites (see ref. at s6.5.1). Archaeology contractors are under no obligation to allow access to the archives that they hold (note the distinction here between publishing the result of the investigation and allowing access to the raw data). In terms of the research method used here, it is difficult to assess the legal status of objects without knowing precisely the sample that was kept from the recovered material (and, indeed, without verifying that the recovered objects are, in fact, being kept and not discarded). Hence the difficulty of assessing the public benefit of CRM-based work only through examining the material archive or the availability of information gained. Nonetheless, CRM-based contracts for archaeological investigations are expected to result in a 'product' (information, understanding, publication, recovered items and a complete archive, per the *Guide to Best Practice*, Brown 2011). This is one of the key problems faced by the archaeology

sector – how to define the product of its work (Merriman a& Swain 1999, 262). Archaeologists are working within a commercially-motivated system, meaning that the product of their work has to have sufficient value for someone to be willing to pay for it (Cooper-Reade 2015, 39). Thus, it should be possible to examine the legal status of objects recovered during contract-based work through the prism of the ‘product’ compliance with the requirements of the contract (the product, however, is governed primarily by the practice (not the wording) as implied terms of the contract; see McKendrick 2016, 348; also discussed further at s7.6 below).

To address the inherent issues with the research into the practice of archaeology, the sector’s policies and guidelines, or the ‘theoretical ideal product of archaeology’ (D. Perring, in comments referenced in appendix B), are used here as a baseline for assessing the ‘expected product’ of CRM-fieldwork (per the *Guide to Best Practice*, Brown 2011; Banakar & Travers 2005, 8). However, it is important to note that there cannot be property relations to a theoretical object, there has to be a ‘thing’ to which property can be applied or a ‘promise’ – an expectation that at the end of the work there will be a clearly defined product or a specific performance (so there cannot be trespass to non-existent goods, but there can be a breach of contract for failure to comply with an expected product as a specific performance of the contract; McKendrick 2016, at chapter four; Hudson 1998, 809; see also Pollock 1892; this distinction is a vast and convoluted branch of the discipline of law and is beyond the remit of this thesis; for further analysis see Bridge 2002, 116; Clarke & Kohler 2005, 444; Rahmatian 2015, 66).

The impact of archaeology sector policies on the contract for archaeological work is discussed further in chapter seven, but here it is important to discuss this in terms of the effect that these policies have had on the research conducted for this thesis. The problem, ascertaining the legal status of recovered objects, is an apparent contradiction between what the policies say – that landowners retain title to discovered objects (Brown 2011, s5.3.1) – and archaeologists’ accepted practice of removing such items during excavation (‘selection of discrete criteria to

enable further analysis' (Drewett 2004, 182)). The understanding that, notwithstanding the importance of contract in giving rise to property relations, there are legal principles that take precedent over the wording of the contract is critical (for example, terms that are implied onto the contract by statute, custom or time limits, see Redmond-Cooper 1998, 953; Tettenborn 1998, 811; McKendrick 2016, parts 2 and 3; Bridge 2002, 116; Clarke & Kohler 2005, 444; this point is discussed further at s7.6). The study of public, contract and property law is a prerequisite for understanding that archaeologists' practice takes precedent over archaeology sector policies (see McKendrick 2016, part 2, 297-373; Barber 1998, 359; and discussed further in s7.6 below), and case studies describing the collection and archiving of discovered objects provide the best illustration and data for demonstrating and analysing those practices.

The research method used in this thesis involved reconsidering CRM-based work through the prism of pertaining property law, which has emphasised the contract between archaeology contractors and their clients as the governing legislative mechanism for ascertaining the legal status of recovered items (Barber 1998, 359). However, as mentioned above, there were a number of problems with this research method: (a) every archaeological excavation is unique so a new contract is required for every project that includes fieldwork; (b) the contract is silent on the practice of selecting precisely which of the recovered objects should be retained; and (c) the contract does not specifically refer to public interest as the impetus for the practice of collecting and retaining discovered objects – this is usually implicitly assumed.

To compensate for these difficulties, the research method was recalibrated, again, to include the point of view of museums who have, potentially, become involuntary third parties to the contract. The rationale here aimed to examine the legal status of objects kept by a museum, explicitly where the museum had no part in the contract that resulted in the recovery of the items. Many museums have different policies and procedures for accessioning material that originated from CRM-based work. These differences can include charging a fee for the

deposition of archive boxes, for example, or refusing to accept additional boxes when their storage capacity is full (see discussion of Sussex and Wiltshire case studies, and at chapter eight). This reinforces the point made above regarding the fact that CRM-based archaeological investigation contracts are unique in the particular details of the fieldwork and in the phase at which the contract is considered complete (i.e. if no museum or archive centre is willing to accept the archive then the contract can be considered as complete while the contractor is still holding the recovered objects. The same issue applies to the publication of results: is the contract satisfied before publication, or only after? See McKendrick 2016 regarding breach of contract for failing to comply with a specific performance set in the contract, at p.931. Also, see Hoo Road and Moorfield School case studies for further examples).

In respect of researching the effect that museums' procedural differences have on CRM-based contracts, an additional problem is that policies and procedures differ between counties, and even museums within the same county might operate differently (depending on their funding and storage capacity; see Museums Association 2017 Report; Mendoza 2017). The inherent differences found in every aspect of CRM-based archaeological contracts meant that the discussion here, and the research method used, had to be focused on the idea of an 'expected product' because, ultimately, all CRM-based contracts are agreed under the premise that at the end of the work there will be a 'product'. Viewing archaeological work through the different lenses of county and small-scale project levels clarifies the reason for the hiatus in expectations regarding what the 'product' of archaeological work should be.

2.2.3 Legal research method and data analysis

The legal research for this thesis entailed a review of court cases, Acts of Parliament, Government-issued regulations, international conventions, EEC directives and other such documents to ascertain applicable law. For this reason, the analysis of this information is referred to here as primary data analysis. As the Research Program chart below illustrates, the understanding that in contracts relating to CRM-based archaeological work customary practices may imply terms which supersede the wording of the contract required a foundation study of public, contract and property law. The scope of the issues addressed in the legal research required extensive consultation of legal literature and case law in addition to academic legal studies at the UCL Law Faculty in order to provide meaningful analysis of applicable legislation. This followed the advice of the legal research supervisor Prof. Robert Chambers, who said that: ‘in order to be asking the right questions you need to use the correct terminology so you need to understand precisely what is meant by ‘possession’, ‘title’ and ‘ownership’. Only then you can examine the validity and implications of the contract that resulted in the conveyancing of property rights to chattels.’ The analysis of pertinent law pinpointed the importance of the research question focusing on the point at which a discovered object ceases to be a part of the land and becomes a separate entity. And it was this question that distilled the legal research addressed in this thesis – in order to establish the legal status of recovered objects, we must first ascertain precisely the point when they are no longer considered part of the land and the circumstance of their discovery. With this understanding, Pollock’s *What is a Thing?* (1894) and the decisions in *Elwes*³², *Tucker*³³, *Parker*³⁴ and particularly in *Waverley*³⁵ become more coherent and can be used to address and clarify the legal status of

³² *Elwes v. Briggs Gas Co.* [1886] 33 Ch D 562

³³ *Tucker v. Linger* [1883] 8 App. Cas. 508

³⁴ *Parker v. British Airways Board* [1982] 1 All ER 834

³⁵ *Waverley Borough Council v. Fletcher* [1995] 4 All ER 756 at 757

archaeologically-recovered objects. Addressing these questions advanced the research, established the scaffolding for the parameters of the thesis and defined the data collection and analysis methods. The initial research question of ascertaining the legal status of archaeologically-recovered items led to an examination of the definition of land on the one hand, and of the pertaining contract on the other. Addressing these questions focused the research on an examination of how archaeologists generate new legal entities (i.e. the discovered and collected objects) by excavating someone else’s land under a contract. The system of methodological collection and analysis of data adopted here, with case studies as a synoptic example, aimed to illustrate the practice of archaeology in order to test the validity of the argument that this practice implies contractual terms that convey ownership of recovered items from landowners to archaeologists. Thus, as the chart below shows, the two strands of data gathering and analytic methods used here were intertwined to form a singular informative corpus of data for testing the research hypothesis and from which meaningful conclusions could be drawn based on established precedents and legal inferences.

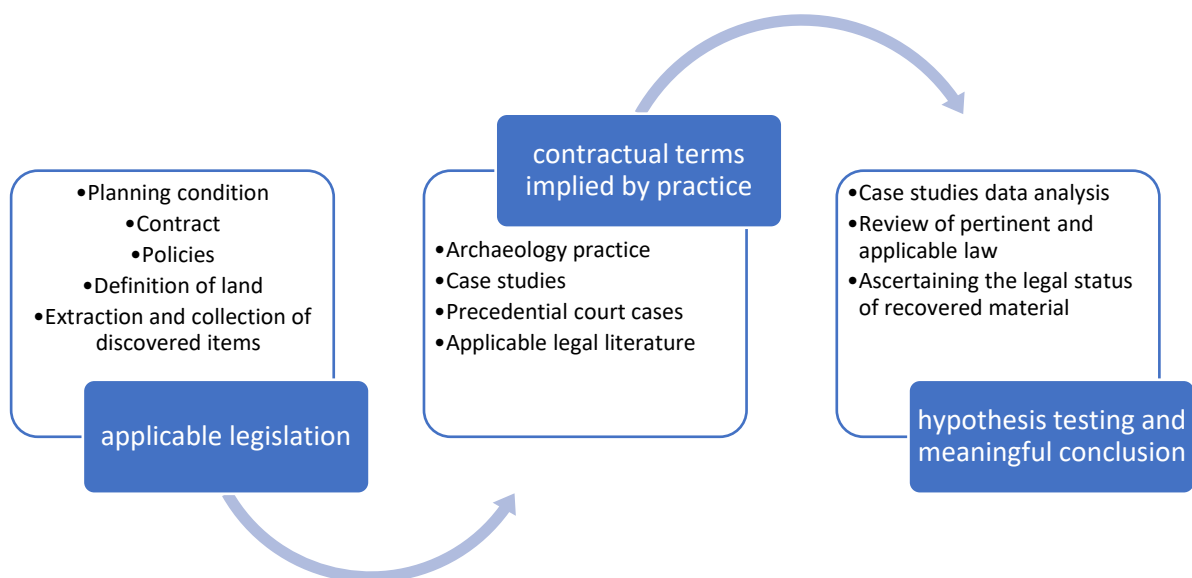


Figure 4: Research Program chart illustrating the advancement of the legal research through the initial question, data gathering, analysis of results and systemic hypothesis testing through the examination of the collected data

Source: Author’s own

As noted above, the first problem in conducting this research was that lawyers and archaeologists use similar words with different meanings and many concepts and terms which appear trivial in the discipline of law represent something completely different in archaeology. For example, in legal terms ‘a thing’ can be defined by ‘the entirety of legal relations to it’ (Pollock 1894, 319), whereas in archaeology ‘a thing’ is defined as ‘a discrete entity’ (Drewett 2004, 182) that can be studied separately from its context. In legal terms archaeologists ‘sever chattels from the land’ (thus ‘creating’ new legal entities, after; *Waverley*³⁶, per Auld LJ, at p.764; see also *Tucker*³⁷; Pollock 1894; Bridge 2002) whereas archaeologists refer to ‘finds’ discovered during fieldwork (this point is discussed further at s7.1.1). Clearly, these terminology conundrums had to be overcome and abridged before addressing the research question examined in this thesis. As mentioned in the previous section, the approach taken here for conducting the legal research is based on Wigmore’s *Apparatus for Charting and Listing Evidence* whereby ‘all presented evidence must be in probative relation to each and all others’ (Wigmore 1931, 48-71). Today this method is often referred to as a ‘Flow Chart’ in which the presented boxes are connected to show their relation to each other (see Ulph 2015 for an example of this regarding museums’ disposal policies). Nevertheless, the problem that had to be overcome in the research presented here was that the evidence suggesting a legal uncertainty regarding the ownership of recovered material is entirely based on archaeology sector publications, not on legislation or court rulings (the significance of *Elwes*³⁸ here is most likely a misunderstanding; see s7.1). The issue was, therefore, to establish whether there are in fact legal uncertainties concerning the conveyancing of title to archaeologically-recovered objects before ascertaining the legal status of the archived material. For this reason, it was not

³⁶ *Waverley Borough Council v. Fletcher* [1995] 4 All ER 756 at 757

³⁷ *Tucker v. Linger* [1883] 8 App. Cas. 508

³⁸ *Elwes v. Briggs Gas Co.* [1886] 33 Ch D 562

practicable to include an illustration of ‘legal research flowchart’ here, because the question became examining whether there was a problem to begin with and not how to illustrate the phases of research (per Wigmore 1931, 170; first establish that a criminal act has, in fact, taken place, before using the evidence to identify the culprit and ascertain the chronology of events). Without establishing that there is a problem that can be scrutinised, the research would not have parameters and would meander without a beginning or an end (note, for example, the discussion regarding the Dealing in Cultural Objects Act 2003 at s7.2; concerning the possibility that museums and archive centres may be in a potential legal conflict with the Act – *if* there are issues with the conveyancing of title to recovered material; *cf.* Ulph 2015).

In order to determine whether or not there are legal problems regarding the ownership of objects recovered during CRM-based fieldwork, a research methodology was developed that involved the use of case studies as an illustrative example for examining archaeology practices (see Figure 4 above). This followed Wigmore’s idea for establishing evidence to be used as proof without relying on other people’s assertions (see Wigmore 1913, regarding ‘proof’; and Wigmore 1931, regarding witnesses as ‘evidence’). The goal of this research method has been to explicate precisely what gave rise to the assumption/syllogism that archaeology contractors do not own the material that they collect and keep, to scrutinise this supposition and, ultimately, to ascertain the legal status of archaeological material collected during development-driven fieldwork. In legal research the information obtained is referred to as a review of pertinent law, which requires (a) a concise understanding of relevant terminology and (b) specific references to the legislation itself (Court Cases, Act of Parliament or policy in common law systems). Thus, the raw data collected for this part of the research consisted of what in other academic disciplines would be referred to as a literature review and involved a significant number of relevant volumes concerning a wide range of legal aspects such as property, public, contract, international and historic environment law, through to legal definitions, philosophy and

jurisprudence. Each stage of the legal research, and correspondingly each phase of CRM-based archaeological work, required consultation of additional legal volumes, review of pertinent Court Cases and applicable policies to accurately identify the legislation relevant to the actions taken by archaeologists at that particular phase of the fieldwork (see Figure 1, at p38 above; each of the points in the chart necessitated consultation and review of relevant legal literature). In addition to the knowledge gained by attending law courses at the UCL Law Faculty and the review of case law, certain key law volumes provided the foundation underpinning the inferences made in this thesis. Of these it is important to note Pollock & Wright's *Essay on Possession* (1888), the numerous publications of Norman Palmer QC CBE, Hickey's *Property and the Law of Finders* (2010), Bridge's *Personal Property Law* (2002) and O'Keefe & Prott's *Law and Cultural Heritage* (1989), as important to the initial review of specific property-related law. Clarke & Kohler's *Property Law* (2005), McKendrick's *Contract Law* (2016), McBride & Bagshaw's *Tort Law* (2005), Palmer & McKendrick's (eds) *Interests in Goods* (1989), Turpin & Tomkins's *British Government and the Constitution* (2007) and Harwood's *Historic Environment Law* (2012) provided a wider scope for ascertaining which branches of the law apply at which stage of archaeological work. Additionally, Macpherson's (ed.) *Property* (1978), Guest's (ed.) *Essays in Jurisprudence* (1961), Smith's (ed.) *Introduction to Legal Philosophy* (1993) and Pound's *Introduction to the Philosophy of Law* (1922) were essential for engaging in jurisprudence and legal philosophy and enabled expansion of the research questions to encompass not only the applicable legislation but also to address the question of why these laws were put into place to begin with (discussed further as a crucial element of chapters three, four and five).

The initial research hypothesis was that the statement in the *Guide to Best Practice* that: 'landowners retain all rights of ownership to archaeological materials found on their land' (Brown 2011, 33, s5.4.1) – was deliberate and based on an agenda aimed at protecting the

recovered material, e.g. to ensure, as much as possible, that no recovered items were discarded without due consideration. The research assumption was that this assertion imposed perceived duties of care on whomever had possession of archaeologically-recovered material, be it museums, contractors or amateur archaeologists keeping boxes in their garage, by giving the impression that since they do not own the material, they may not discard it without the consent of the owner (thus protecting the objects by creating a legal misconception). During the research into this particular point by way of corroborating this observation with Mr D. Brown, the analysis of the obtained evidence suggested that this hypothesis was incorrect (correspondence emails in appendix C). In respect of the prevailing syllogism that discovered objects belong to the owner of the land where they were found, there was never a deliberate agenda, it is: ‘simply stating what everyone was saying, I just put it down on paper’ (D. Brown, email correspondence ref. in appendix C; see also the quote from Renfrew 2000, above). This suggested that further research was needed into the primary data (the court rulings) in order to examine what give rise to the notion that landowners *retain* ownership of discovered objects after the completion of fieldwork and the archiving of the material.

The evidence analysis method used here was to ascertain the earliest, or precedential, court case involving a dispute concerning an entitlement to possess an archaeological item discovered imbedded in land. Although there were, of course, other court cases concerning a claim to discovered objects, *Elwes v. Briggs Gas Co.* ((1886) 33 Ch D 562 (included here in appendix A) is the precedent case involving a claim for an ancient object (so no ‘true owner’ could be identified) that constituted a part of the land when it was discovered (i.e. it was embedded therein). This led to a re-examination of the *Elwes*³⁹ case, and on this re-assessment it became apparent that Justice Chitty’s ruling regarding landowners’ rights to objects discovered in their land set the precedent that has now been followed for more than a century

³⁹ *Elwes v. Briggs Gas Co.* ((1886) 33 Ch D 562

(reaffirmed in *Waverley*⁴⁰). Nonetheless, the ruling in *Elwes* was specifically about ‘possession’ not about ‘title’ or ‘ownership’, which are property rights that may be derived from, but do not necessarily correlate to, possession (see Pollock & Wright 1888; Goodhart 1928; Honoré 1961; Goode 1997; Palmer 2015, 11; Palmer 1991, chapter 4; Palmer 1998, 66, s3.1; and the decision in *The Winkfield*⁴¹, regarding who can claim for property; and the decision in; *Scipion*⁴², regarding *jus tertii* defence in bailment. This is discussed further in chapter seven).

This is the point where the analogous lines of research conducted for this thesis come together; research into the origins of the policies adopted in the archaeology sector draws attention to the importance of the ruling in *Elwes* on the legal status of archaeologically-recovered objects. In *Elwes*, Briggs Gas Co. were not employed to carry out environmental damage mitigation work, and the ruling was pertinent expressly to the *possession* of a discovered object *before* it was extracted from the ground (thus Mr Elwes’s possession of the land entailed possession of items discovered in it; see further discussion in chapter seven, at s7.1). The examination of contractual obligations as the mechanism for ascertaining the ownership of discovered items and whether customary practices can imply terms into the contract raised the question of whether Briggs Gas Co. were contractually required to report the discovery of the boat, or whether they could have legally dug right through it without notifying the landowner. This led to an examination of the question of whether archaeologists employed under a CRM-based contract are legally obligated to report precisely which objects they discover, collect, discard or retain. The evidence analysed for this thesis suggests that the answer is yes, because the reporting and studying of recovered items is part of the remits and requirements of CRM-based work. Hence, as discussed in chapter seven, the wording of the

⁴⁰ *Waverley Borough Council v. Fletcher* [1995] 4 All ER 756 at 757

⁴¹ *The Winkfield* [1902] p.42; [1900-03] All ER Rep 346

⁴² *Scipion Active Trading Fund v. Vallis Group Ltd.* [2020] EWHC 795 (Comm.)

contract, CRM-based WSI, sets the parameters and scope of the work to be undertaken, and the practice introduces implied contractual terms which define its remit of collecting discovered objects to enhance and record understanding of the past.

A further point demonstrating the importance of applying an interdisciplinary research method for examining the issues addressed in this thesis is the crucial part that sampling strategies have in forming the terms of the contract between archaeology contractors and their clients (separate sampling strategies agreed for the excavation work phase (discovery, extraction, collection) and the ‘finds processing’ phase in the lab when a sample is selected to be archived (analysis, recording, discard, retention). See email correspondence with archaeology contractor employees regarding the work phase when sampling strategies are agreed upon, ref. here in appendix C; also, in Moorfield School case study in chapter six). As Palmer & McKendrick 1998; McKendrick 2016; Clarke & Kohler 2005; and Palmer 2009 make clear, sampling strategies set the agreed terms for stipulating contract performance, therefore they are integral to the contract by virtue of being a known practice, thus forming contractual terms that entirely rely on the professionalism of archaeologists. At the time the contract is agreed, it cannot be known what will be discovered, hence the parties to the contract have to rely on the decision of archaeologists in the trench or the lab as to which objects should be collected, kept or discarded, i.e. the archaeologist defines the precise nature of the ‘product’ of the work and the performance of the contract. This facet of the legal research was crucially important to achieve the understanding, reached as a direct consequence of the review and analysis of pertinent legislation, that the precedent set by the *Tucker v. Linger* (1883-6) case (included here in appendix A), establishes a stronger and more relevant precedent for ascertaining the legal status of recovered material than the *Elwes* case (see further discussion in chapter seven and the conclusion). Without understanding that terms can be implied into a contract through custom and that, within certain stipulations, such terms can hold precedent

over the wording of the contract, it would have been difficult to draw these distinctions and formulate the correlation between archaeologists' practice and the legal concept of implied contractual terms. Thus, this understanding was elemental to the design of the research programme and the methodology of obtaining and analysing data by using case studies as a synoptic example of archaeological practices.

The examination of the junctures where property and contract law interrelate with archaeological practice had to rely on a foundation understanding of jurisprudence, hence the hybrid and interdisciplinary nature of this research. Every question addressed in the legal part of the research identified further issues and legal questions that needed to be addressed, examined and clarified before any meaningful observation could be made on the issue at hand. Is it feasible, for example, that the English public can own, or have equity interests in, archaeological archives; is the public considered a legal entity that can have assigned property rights separated from the Crown or the State? (see Turpin & Tomkins 2007, 142; Bingham 2011; Palmer 1998, 66, s3.1). Or, as a further example, can councils or museums be committing the tort of conversion by following Government policy and acting in the public's interest? (see *Scipion*⁴³ regarding whether archive centres can be considered as a third party to the contract). Extending this question, how can an act (recovery of objects) be considered lawful by virtue of being carried out for public benefit reasons, if the 'public' is not defined as a legal entity that can have property rights assigned to it? (see McBride & Bagshaw 2005; Thomas 2010; Macpherson 1978; Bridge 2002; Hickey 2010; for discussion of this point).

The issue of public benefit as a justification for archaeologists' practice of removing items from someone else's land has been one of the most challenging aspects in conducting the research for this thesis, because the term 'public benefit' is not precisely defined under English

⁴³ *Scipion Active Trading Fund v. Vallis Group Ltd.* [2020] EWHC 795 (Comm.)

law (see *The Poverty Reference*⁴⁴; Turpin & Tomkins 2007, 12; and discussed further at s5.2.1). In strictly legal terms, an act carried out for a demonstrable and viable public benefit (removing a suspected bomb, for example) would be considered to supersede a person's property rights (per decision in *Sorrell*⁴⁵; public benefit as it legally applies to the discussion here is examined further at chapter five).

The examination of the applicability of 'public benefit' as a legal justification for the recovery and retention of objects during CRM-based fieldwork required close attention and necessitated expanding the parameters of the legal research. The problem is that the more rigorously the CRM principle of 'preservation by record' is adhered to, the harder it becomes to justify its public benefit because too many recovered objects are being kept without a clear and demonstrable purpose (Merriman & Swain 1999, 252; King 1979, 352; Perring 1996; and as mentioned above in s1.1). A further problem in considering the applicability of 'public benefit' was that it needs to be separately examined for each phase of CRM-based archaeology. If, for example, the initial planning condition is not imposed in the clear public interest (see Wiltshire case study at s6.6 and the Six Hills, Stevenage example at s3.2.2 below), would that negate the argument that the recovery and retention of discovered objects is undertaken for reasons of public benefit? And vice versa – does the lack of storage space for keeping recovered items (see Hoo Road and Kent case studies below) mean that the planning authority is acting in contradiction to the interests of its constituents? Furthermore, addressing this issue entailed trying to reconcile the fact that the majority of archaeological work is carried out for a fee under a private contract (where no Government office is party to the contract), notwithstanding the premise of CRM-based archaeology that it takes place for 'the greater good' (D. Perring, comments; see also Wainwright 2000; Rahtz 1974; Rahtz 2001; regarding the initial public

⁴⁴ Attorney General v. the Charity Commission (The Poverty Reference) [2012] WTLR. 977, 34

⁴⁵ Sorrell v. Paget [1950] 1 KB 252, [1949] 2 All ER 609, 93 Sol Jo 631, 65 TLR 595

benefit purpose of archaeology *vs* what it is now). The obtained and analysed data for this part of the research focused on examining how the concept of ‘public benefit’ is defined in law and on whether it is mentioned or applied in the development consent condition imposed by LPAs (see discussion of this in s5.2 and the case studies at chapter six).

In terms of the research presented here, the problem is the supremacy of public benefit. As a legal tool, this can be used to protect the lives and interests of the public – for example by the imposition of restrictive social rules to protect people from a plague. For CRM-based archaeology to supersede property law, it would have to demonstrate a viable protection of public interests for every phase of its operation – with each phase of protection being on a par with the steps necessary in our plague scenario (see Holtorf 2013 for discussion of archaeology’s limitations in this regard). Hence, the inclusion of the London Mithraeum and the Six Hills, Stevenage examples in this paper to illustrate potential scenarios where an argument could be made for archaeologically-related public interest to (potentially) supersede personal property rights. These issues are discussed further in chapters three, five and six – here it would suffice to say that no clear answer to the question of whether public benefit can be used as a legal justification for archaeological practice could be ascertained in the course of conducting this research (it is most likely that the answer is that it would depend on the particular circumstance of a claim examined in court). In comparison to protecting people from a plague, archaeology does not seem to be on a par in terms of demonstrating a clear and viable public interest. Nevertheless, the examples of the Six Hills monument and the London Mithraeum, discussed in chapter three, illustrate that the relationship between archaeology and public interest is complex and should not be taken for granted. Particularly regarding planning regulations, there is precedential case law where it was held that, within certain stipulations, archaeological remains can supersede even direct legislation by Parliament as was the Court’s

decision in *Pyx Granite*⁴⁶ regarding the Malvern Hills Act 1884 (amended 1909, 1924, 1930) (see discussion in Turpin & Tomkins 2007, 148).

The analysis of these legal questions led to the examination of more practical and ethical ones, such as whether a museum can be expected to fund the storage of an object without having absolute ownership of it. And, furthermore, is ‘ownership’ the correct term here, in respect of public interest, would it not suffice to say that museums and archive centres are holding recovered material in stewardship for future generations? (Cowell 2008; Cunliffe 2011; Flexner 1939; Holtorf 2015; Honoré 1961; Pound 1922; Prott & O’Keefe 1992).

The nebulous nature of the relationship between archaeology and law is a further complex issue that had to be addressed and overcome in designing the data collection and research methodology used here (see Anderson & Twining 2015; Thomas 2015). An important example is the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict that introduced the idea that culture and heritage can be owned like an object by the use of the term ‘Cultural Property’ (Prott & O’Keefe 1992, 312). This was reaffirmed in the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property 1970 (Paris), article 1(c), defining cultural property as: ‘products of archaeological excavations and discoveries.’ The 1954 Hague and 1970 Paris conventions designate archaeologically-recovered objects collected in England, as the cultural property of the English people (Prott & O’Keefe 1992, 312). Furthermore, notwithstanding that both the Hague 1954 and the Paris 1970 conventions have been ratified in the UK, the term ‘cultural property’ has been defined neither in court, nor by parliament, nor in any official policy paper, thus it is not currently part of the applicable legislation in England. This creates an apparent legal paradox whereby, in England, the transfer of title to archaeological material is governed

⁴⁶ *Pyx Granite v. Ministry of Housing and Local Government* [1960] A.C. 260

both by property legislation and also by a system of law relating to environmental protection incorporating intangible concepts such as culture and heritage (Thurley 2013, 95). Such issues were identified and addressed here by setting the research parameters and data collection method to focus on applicable legislation and archaeological practice that implies contractual terms (as discussed above).

An archaeologically-recovered object can metaphorically be considered as a proverbial quantum particle being at two places, and governed by two legislative branches, at the same time. This analogy also explains the rationale for conducting an interdisciplinary form of research utilising a hybrid method of data analysis and following parallel lines of inquiry in order to address the issues scrutinised here. There is substantial literature concerning the impacts of the 1954 Hague and 1970 Paris and other applicable international conventions on modern day CRM-based archaeology. International agreements, policies, regulations, statutes and courts' decisions and deliberations are potentially relevant to the idea of 'cultural property' as the legislative mechanism for ascertaining the conveyancing of title to collections of archaeologically-recovered items (see O'Keefe & Prott 2011; Palmer 2015). Explicitly regarding environmental protection as the impetus for planning legislation and policies, however, the process of the UK leaving the EU can potentially have a detrimental effect on the applicability of any international conventions on the issues addressed here (see discussion in chapter four regarding amendments to current legislation).

The discussion above leads to another important aspect of the research and data analysis methodology used here, which is that strict parameters on the scope and depth of certain discussion points had to be imposed so as not to lose the path of concisely addressing the research question. An important example of this, that directly follows the discussion in the previous paragraph, is that while researching the relationship between international conventions such as the 1954 Hague convention, national legislation such as the Human Rights

Act 1998 and CRM as an administrative policy, an apparent problem became clear – amalgamating these statutes and policies conveys the idea that culture can be managed (Turpin & Tomkins 2007, 142; O’Keefe & Prott 2011). For something to be managed, someone must have property rights and obligations to it (Chambers 2008, 22). Notwithstanding the fact that CRM is an effective framework for development-driven archaeology, not everything has to be owned (Pound 1922, 42). Thus, perhaps the biggest drawback of CRM is that it juxtaposes property legislation with the product of archaeological research, hence the problem of defining the expected product of a contract for conducting CRM-based archaeological work.

Despite the valid question of who should own the information and objects assembled during CRM-based archaeological investigations, there is also scope for arguing that heritage and culture cannot be owned *per cé*, and therefore that archaeological archives should belong to the public, in equity if not property (see particularly Clarke & Kohler 2005, 403-5; Nicholas & Bannister 2004; also; Phillips 1998, 975; Turpin & Tomkins 2007; Merriman & Swain 1999). This understanding was a direct result of the research method and parameters implemented here of examining the jurisprudence of applicable legislation (environmental, public, contract and property law), by asking what is the precise purpose of the legislation, policies, regulations or guidelines pertinent to the issue addressed here (i.e. by asking why these policies are put in place to begin with). The data presented in the following chapters adhere to these research parameters, although undoubtedly there is scope for further debate on many of the points highlighted in the course of this research. The following chapter is a synopsis discussion of the history of the establishment of professional archaeology. It aims to fit within the research concerning the jurisprudence and legal mechanisms for testing the hypothesis that archaeologists’ practice of recovering discovered objects is sufficiently established so as to imply terms into CRM-based contracts.

Chapter 3: The theory – historical background and current practices

As the legal research method indicates, attention must be given to examining why certain types of archaeological ‘product’ are not protected under a clear legislative system. The sections of this chapter highlight some of the ethical and practical issues surrounding the recovery and collection of archaeological material. The aim of the first section is to explore the jurisprudence of archaeology-related rules by asking why policies, regulations and legislation were needed for managing and protecting the archaeological record. As mentioned above, it is necessary to examine when, how and why property and contract laws are applied to the management of archaeological material prior to establishing the legal status of recovered objects. To address this question, the discussion here concerns the enactment of laws for the protection of ‘heritage’ as it relates to non-movable monuments while they remain part of the land. The second part of this chapter (s3.2) concerns portable and non-scheduled aspects of tangible heritage within the framework of professional archaeology.

The distinction between ‘monuments’ and ‘objects’ illustrates a peculiar evolution of cultural circumstances that gave rise to different, yet very much interrelated, branches of scientific doctrines and social awareness that led to the protection of antiquities. For archaeologists, this distinction seems artificial – when does something stop being part of the monument/site and become a portable antiquity? The answer is a legal one – while objects are in the ground or attached to the ground, they constitute part of the land (see Bennet 1989; *Waverley*⁴⁷; *Parker*⁴⁸). Therefore, the legislation for protecting sites and monuments is rooted in land law (see Brown 1905), whilst archaeologists’ practice of collecting objects in effect creates ‘new’ legal entities (Pollock 1894, 319). This chapter also examines the importance of

⁴⁷ *Waverley Borough Council v. Fletcher* [1995] 4 All ER 756 at 757

⁴⁸ *Parker v. British Airways Board* [1982] 1 All ER 834

public opinion as the impetus for legislation to protect monuments (first section) and in shaping the aims and practice of what became known as rescue archaeology (second section). The research method used here was primarily based on extracting relevant information from available literature. The first section of this chapter is dedicated to examining the circumstances leading to the enactment of legislation for protecting sites and monuments regarded as nationally important, and the rather bizarre objections to this process. The discussion continues by looking at the concepts of empiricist and inductivist scientific methodology and the tenet that archaeologists' actions are aimed at providing measurable social gain as part of the modern 'preservation by record' approach. Underlying the discussion in this chapter stands the question of why there is such a clear dichotomy in perception, practice and law between objects regarded as 'monuments' and those regarded as 'collected objects' since both are archaeologically defined products. In other words, why is the archaeological product so obscurely defined?

One answer to the question above is that monuments 'exist' in public awareness while archaeologically-recovered object collections need to be generated through the actions of extraction and collection, or 'created' in legal terms (per Pollock 1894). Thus, in the public perception, and concomitantly in law, ancient monuments are regarded as more important and receive a higher level of protection than collections of objects (see Thomas 2004, 93; Thurley 2013, 34). This process has been taking place for over a century despite the fact that monuments also have to be recognised and are therefore just as much a 'product' of archaeological designation (Wainwright 2000, 910).

The origins of the practice of collecting, studying and keeping a sample of discovered objects can be traced back to Sir Francis Bacon and the 16th century Scientific Renaissance. At its simplest, the Baconian scientific approach can be described as 'gather the facts first, and then induce ideas from those facts' (Bell 1994, 148) – a scientific method directly analogous to modern 'rescue' or development-driven archaeological work (Perring 2016). Four centuries

later, Bacon's ideas can be identified in the modern system of CRM-based archaeology established under the 20th century premise that the entirety of information from an archaeological site can be saved through meticulous recording, thus providing public benefit through the information obtained and research potential (Pitt-Rivers 1888, 7; Atkinson 1946, 26; Cunliffe 1982; Merriman & Swain 1999, 257). This notion, avidly advocated by General Pitt-Rivers more than a century ago (Pitt-Rivers 1888, 3), is today known as 'preservation by record' (the term itself became established after the publication of the Frere et al. (1975) and Cunliffe (1982) reports and post PPG16 (1990) (Bradley 2015, 24)). In this respect, the collection and conservation of archaeological material is undertaken for the purpose of public interest, and it is this aim that separates museums and archaeological archive repository facilities from private collectors and CRM archaeology from metal detectors (Historic England 2018a; Sax 2001).

The sections of this chapter follow a chronological order. Legislation to protect archaeological or heritage monuments came before the establishment of specialised archaeological practices, but nonetheless, the legislative, social and professional changes which took place in England over the past two hundred years happened concurrently and were not necessarily a matter of cause-and-effect. This chapter also includes two anecdotal examples illustrating the issues, namely, the London Mithraeum and the Six Hills Ancient Monument. These examples are used to demonstrate the establishment of provisions for protecting tangible heritage through legislation protecting ancient monuments and the potential for disaster when the existing regulations are not implemented. The London Mithraeum and the Six Hills Ancient Monument illustrate the complexity of using 'public interest' as the justification for archaeologists' practice of removing discovered items, the value of 'preservation by record' as a scientific strategy and the fact that sometimes archaeologists and perhaps even politicians may get things wrong. Additionally, the second part of this chapter addresses the development

of professional archaeology and the social powers which directed its course by setting ethical, legal and practical limitations on its operation. These factors govern the ‘theoretical’ framework of the operations of modern-day archaeology.

3.1 Aristocracy v. Public – establishment of legislation for protecting or ‘nationalising’ monuments

The initial legal protection of monuments is based on land laws, since monuments are first regarded as part of the land and only after a process of investigation become regarded as a ‘thing’ in their own right (Pollock 1894, 319). Although the Ancient Monuments and Archaeological Areas Act 1979 (AMAA) was meant to impact the legal status of archaeological material, it does not affect the conveyance of title to objects collected during development-driven fieldwork because of the use of the word ‘temporarily’ at section 54 of the Act.

For the purpose of this thesis, the Norman conquest of Britain in 1066 is used as the illustrative starting point for discussion. After the Norman conquest, there were many social and legislative changes which occurred in Britain over the years, including the 13th century which saw the start of the process of exchanging feudal tenure with private land ownership, culminating in the notion that ‘one’s home and land are sacred’ (Platt 2004, 79-81) in the late 19th century. Land laws enacted during the 13th to the 19th centuries meant that all archaeological sites and monuments in England were the property of either landowning aristocracy or the Crown as state-owned land (palaces, prisons, forts and suchlike) (Bush 1984, 53). This continued to be the case until the law was replaced by the Scheduled National Monument Act 1882 and later the Law of Property Act 1925, which brought in a series of legislative changes (Murray 1989, 61). Land owned by Government-managed institutions,

Royal palaces and parks, land owned by the military and Church grounds all have specific legislation pertaining to ownership of the land and any related artefacts found in or attached to the land, and therefore the discussion of such land is excluded from this thesis.

The need to provide explicit protection for non-portable archaeological remains (monuments) was acknowledged in England during the late 16th century with the 1572 formation of a society for the preservation of national antiquities in London (O’Keefe & Prott 1989 37). The termination of this society by King James I in 1603 was due, ironically, to the influence of Sir Francis Bacon who was, amongst his many other roles, Lord Chancellor and Attorney General under King James I, and had a lasting influence on establishing the methodology of collecting data as scientific evidence. Thus, the same person to whom we owe archaeologists’ practice of collecting and conserving objects as a scientific data gathering exercise (see Bacon 1625 (reprinted in 1962), 104) was initially responsible for the fact that the archaeological remains and monuments in England were not afforded any legal protection until nearly 300 years after his death. Nevertheless, more pertinent to the topic of this section is the curious notion that what we today regard as ancient monuments were not, in Bacon’s time, considered to be, or to provide, any form of scientific data from which information could be extracted (Brown 1905, 7).

The first legislation explicitly concerning the protection of heritage, excluding Crown, Government or Church-owned land, was established in the Ancient Monuments Protection Act 1882 (see Brown 1905; Murray 1989, 61). The passing of this Act was due to the relentless efforts of MP John Lubbock, who was himself a wealthy banker who later became 1st Lord of Avebury as a result of his political career and his inheritance of the 4th Baronet title as well as immense personal wealth (Schofield, Carman & Belford 2011, 32). Lubbock’s political agendas, parliamentary career and, to an extent, his personal wealth, are relevant when we examine the reasons for the current opacity in the legislation pertaining to the ownership of

ancient monuments and, to a much lesser extent, archaeological material. Lubbock managed to push forward a very controversial piece of legislation that limited landowners' use of objects found on their land (Murray 1989, 61; and see further discussion below). His success in passing the proposed Bill through Parliament was a great achievement; the Bill was first introduced at the Commons on February 7th 1873 as a Private Member's Bill, and then reintroduced nine times, including passing the 'second reading' six times, a Select Committee once, a Committee of the Whole House twice, a 'third reading' once, and first and second readings in the House of Lords (Murray 1989, 61).

The enactment of the Ancient Monuments Protection Act 1882 cemented the distinction between 'monuments' and 'archaeological remains' through different levels of protection and thus the perception of archaeology's 'product' being defined in tangible terms has been fossilised into dogma (Brown 1905, 12). Interpretation of the Act implies that certain things are more worthy of protection, although such a notion requires there to be a 'thing' that the law can protect.

This was to be the first instance in the United Kingdom's legislative history upon which property rights could be changed by an institution not directly part of Parliament, the Crown or the Courts – an Inspector appointed under the Ancient Monuments Protection Act 1882. For the purpose of clarity and academic integrity, it should be mentioned here that John Lubbock's motivation for pursuing the Ancient Monument Protection Bill was heavily influenced by the newly-published writings of his childhood next-door neighbour, Mr Charles Darwin. In particular the interpretation of Darwin's evolutionary ideas as having social-cultural implications, to the extent that Trigger has described Lubbock's social ideology as eugenicist:

Lubbock believed that as a result of natural selection, human groups had become different from each other not only culturally but also in their biological capacities

to utilise culture. He viewed modern Europeans as products of intensive cultural and biological evolution, and believed that technologically less advanced peoples were not only culturally but also intellectually and emotionally more primitive from a biological point of view than were civilised ones. He also maintained that as a result of natural selection, the criminally inclined, the lower classes and women were biologically inferior to the successful middle and upper classes of European men. (Trigger 2006, 169).

The relevance of Lubbock's motives to the subject of this thesis is primarily due to the long-lasting impact that these perceptual and legislative changes have had on the operation of archaeology within English society. His 1865 publication *Pre-historic Times* was republished seven times and is still considered one of the cornerstones of archaeology as a scientific discipline (Mithen 2006, 514). Lubbock's social ideology notwithstanding, when the 1882 Act was passed, it included an addition which devised the idea that landowners were to be paid compensation for the nuisance of having Ancient Monuments found on their land (Brown 1905, 5). This was intended partly to financially motivate landowners to not destroy monuments, but also because it was accepted that these monuments and archaeological sites had been created by 'inferior, primitive people' (Lord Francis; see quote below, and also Murray 1989, 61; Brown 1905, 6).

The financial incentive to landowners to not destroy monuments on their land became one of the longest lasting of the many compromises which had to be negotiated during the Parliamentary debate on the extent that the proposed Bill (1873-1882) would affect the ownership of the monuments themselves (Murray 1989, 62; Brown 1905, 7). Consequently, it was agreed that the, already wealthy, landowners were to be paid by the public for protecting archaeological sites and monuments located on their land – the same monuments which were

to be considered as belonging to the nation by the 1882 Act (Murray 1989, 62). These provisions in the Ancient Monument Protection Bill were described by Lubbock as follows:

The principle of our bill is that if the owner of one of those ancient monuments wishes to destroy it he should be required, before doing so, to give the nation the option of purchase at a fair price. (Lubbock's 1879 essay on the protection of ancient monuments, quoted in Murray 1989, 62).

Lubbock's proposal of the 1873 Bill was, nonetheless, met with resistance by landowning aristocrats who were much wealthier and, to an extent, politically stronger (Brown 1905, 6). During the decade in which the 1873 Bill was debated in Parliament, the landowners, who stood to be directly affected by it, referred to the Bill and the requirement for legislation to protect ancient monuments in the utmost derogatory terms, at times perhaps even surpassing the accepted political vim. Lord Francis Harvey is quoted as saying that:

England was once inhabited by barbarians – he would not call them our ancestors, but our predecessors – who stained themselves blue, ran about naked, and practised absurd, perhaps obscene, rites under the mistletoe. They had no arts, no literature; and when they found time hanging heavily on their hands, they set about piling up great barrows, and rings of stones. (Lord Francis' speech in Parliament on April 14th 1875, quoted in Murray 1989, 63).

Lubbock's social agendas and political achievements notwithstanding, the legal protection afforded to private property rights should not be taken for granted or underestimated since it is the conclusion of centuries of struggle to achieve what is today regarded as a basic human right (as per the Human Rights Act 1998, Part II, Article 1 – Protection of Property).

Pertinent to the issues discussed here is the fact that the mid-18th century witnessed the rise to political power of the 'uncharted masses' (Thompson 1979, 11). From the mid-19th

century, a newly found sense of patriotism, directed at country as well as Crown, was combined with such factors as the publication of historic novels, the construction of new railways and, above all, the rise in middle-class tourism (Thurley 2013, 11). These factors led to a romanticised appreciation of the past as the ‘Olden Days’ (*ibid.*). All these immense social changes meant that people who had not been previously consulted gained a voice, and that the definitions, concept and ownership of heritage had to be recalibrated and adapted to better fit a changing society. In contrast, archaeology in Britain, both as a concept and as a profession, has from its onset been mainly ‘the preserve of the elite’ (Thurley 2013, 6). This perception in the minds of the British public continued well into the 20th century, and arguably remains to this day (*ibid.*). At its core it is a question of whose interests are served by collecting and conserving archaeologically-recovered material and who should pay for its conservation – a centralised Government body or localised communities.

Consider, for example, the intricacies of ownership and management of a Scheduled Ancient Monument such as the Six Hills, Stevenage (discussed here at s3.2.2) which could be simultaneously owned and controlled by Historic England as an official Government body, by a local council as the landowner and by the Crown as the owner of a *bona vacantia* property (Bell 1989, 210-213); which of these can be said to best represent the interests of English society in protecting its tangible heritage? This ethical, legal and pragmatic question has been vigorously debated in Parliament over the past century, as Gerald Brown put it:

In a country like our own, redolent of ancient memories, but at the same time astir with restless movement, the interests at stake in this matter are too great for the British system of ‘laissez-faire’ to be satisfactory. The considerations (I) that these monuments when once destroyed can never by any possibility be replaced, (II) that in the minds of many they are of extreme value, and (III) that their character and history give them in many cases a place in the common and even the national life,

should be quite sufficient to lead anyone interested in public economy to doubt whether we are right to leave them in irresponsible hands. The question at issue is the question whether national possessions should remain in the absolute control of private individuals. (Brown 1905, 5).

Parallel to social and legislative changes, archaeology as a scientific discipline also experienced a renaissance during the 19th century. From the 1840s onwards, England saw a rise in local, county and regional archaeological societies which carried out most of the archaeological fieldwork; this was concomitant to the social and political changes which ‘repatriated’ heritage to the people (Thurley 2013, 15). Two key developments that took place at the end of the 19th century helped to establish archaeology as a profession, the establishment in 1877 of the Society for the Protection of Ancient Monuments, and, after the 1882 Act, the appointment, by Lubbock, of General Pitt-Rivers as the first Inspector of Ancient Monuments (himself a landowner whose name was originally Lane Fox, he became Pitt-Rivers after inheriting land as part of the bequest (Schofield, Carman & Belford 2011, 30)).

These philosophical, social and legislative changes led to a series of arguments among the landowning aristocracy, some of whom owned the monuments and the land on which archaeological sites were found, as to who was better suited to own, and be the custodian of, tangible manifestations of the British people’s heritage; the landowning aristocracy, on the one hand, or experts appointed by the Commons Government on the other (Schofield, Carman & Belford 2011, 32). Prior to discussing the establishment of archaeology as a profession in the following section, it is worth reiterating how the historical events reviewed above fit within the research question addressed here. In order to ascertain the legal status of archaeologically-recovered objects it is necessary to examine (a) the manner in which archaeological work is conducted (practice) and (b) the legislative framework in which the work takes place. To clarify the current legislative structure, it is important to review the evolution of contemporary laws

through a historical lens. This method of legal analysis provides a wider scope of understanding, which can then be used to explicate the reasons why the current legal system, applied in England, emphasises the protection of monuments over and above the level of legal protection conferred to collections of archaeologically-recovered objects. The following section discusses how during the 20th century archaeology became established as a professional practice of enhancing understanding of the past by collecting, recording and protecting material evidence and obtained information, while simultaneously providing contractual services for its clients (see Wainwright 2000, 911).

3.2 Establishment of Professional Archaeology – social discipline for scientific collectors

In this section, I consider the background for the establishment of pre-development professional archaeology while aiming to avoid replicating discussions that have been amply covered in the literature (Rahtz 2001; Thurley 2013; Wainwright 2000; Everill & Irving 2015 to name but a few examples). The aim of this section is to address the question of why, as archaeology became an established profession, the issue of title to archaeologically-recovered material was not properly addressed.

As this section is not intended to be a comprehensive account of the establishment of professional archaeology, a synopsis review of key events that took place from the mid to late 20th century can begin with the creation of what became known as ‘rescue archaeology’, or ‘pre-emptive’ archaeology (Wainwright 2000; for comprehensive review of the development of professional archaeology see Thurley 2013). This type of work was regarded as a rescue operation aimed at saving archaeological remains from destruction consequent to land development, although the remit of the Ancient Monuments Department was wider and

included the recording and protection of known sites and monuments (Thurley 2013, 1). It was mainly reliant on the publicly-funded work of local or regional teams of volunteers and professional archaeologists which were referred to as field units and during the 1950s and 1960s were paid two guineas a day (Rahtz 2001, 604). This was changed in the post-war years by the then Chief Inspector of Ancient Monuments, Bryan O'Neil, who inherited the position from the first Chief Inspector of Ancient Monuments, General Pitt-Rivers, himself appointed by Lubbock after the enactment of the Ancient Monuments Protection Act 1882.

In 1952, O'Neil issued a memorandum to the Office of Works Department stating that between 1939 and 1945, there had been 55 archaeological field investigations that took place in order to 'rescue' archaeological remains prior to the construction of wartime airfields – and thus the idea of state-funded pre-emptive archaeology was born (Wainwright 2000, 909). This gave rise to a *modus operandi* of publicly-funded archaeological field units working in a public service capacity, under the umbrella of environmental protection, carrying out an archaeological investigation and recording the evidence prior to land development (Perring 2016). The notion that archaeological remains which were about to be destroyed by land development can somehow be saved or 'rescued' was ideated by Pitt-Rivers (Carver 2005, 4). Pitt-Rivers is also considered to be the founder of a school of archaeology which aimed to carry out excavation research projects in which meticulous recording methods and detailed descriptions could achieve such a high level of data preservation that the site could, in theory, be reproduced and the archive considered as a form of substitute to the original site (Ucko 2000, 353; Bradley 2015, 24; and see discussion of the London Mithraeum at s3.2.1). The idea of what became known as 'preservation by record' emerged during the mid-20th century with the practice itself being established in Britain by the Government-issued PPG16 in 1990 and the publication of the Management of Archaeological Projects 2 in 1991 (Pitt-Rivers 1888, 7; Atkinson 1946, 26; Cunliffe 1982; Merriman & Swain 1999, 257; Gill 1991).

The work of the ‘rescue’ archaeology teams relied on Government funding and came under the management of the department which was initially named Office of Works (after the similarly named medieval Royal Department of Construction). The name was subsequently changed to the Ministry of Works, followed by the Ministry of Public Buildings and Works, which later became the Department for the Environment and, as a separate entity, English Heritage. In April 2015, English Heritage was separated into two entities, the English Heritage part is a registered charity which looks after archaeological material collections, while Historic England deals with wider aspects of national heritage, administrating the sites and monuments listing system, planning matters and grants (English Heritage website ‘our history’ section <https://www.english-heritage.org.uk/about-us/our-history/> (viewed in June 2018)).

The aim of these departments, whatever their name happened to be, was originally to conserve and protect designated Ancient Monuments. This purpose was altered by O’Neil who decided to divert resources, both funding and archaeologists, towards investigative fieldworks aimed at what became known as ‘rescue’ pre-construction projects (Rahtz 2001, 604). The locations where investigative ‘rescue’ work was to be undertaken were identified by local museums and university departments rather than being centrally managed or directed by the Government. Importantly, at the time, there was no direct link between planning and ‘rescue’ archaeology, neither in practice as a mere three-month period was required before developers could destroy a site, nor in law as the legislation only referred to listed, or at least known, sites (Rahtz 2001, 604).

The conjoining of planning legislation with the preservation of heritage is considered a result of the enthusiasm of the Liberal MP Phillip Morrell who managed to add an amendment to the Housing and Town Planning Act 1909 which gave local authorities the power to protect ‘objects of historical interest or natural beauty’ (Thurley 2013, 89). This was implemented in the Housing and Planning Act 1919 which gave Local Planning Boards the authority to

determine what the houses of the ‘working classes’ should look like (Chapter 35, Part 1, ‘Housing of the Working Classes’ of the 1919 Act). Consequently, the Boards could also instruct what form the environmental investigative work should take, and if it should take place prior to the construction of the houses. Historically, and perhaps more pertinent to archaeological remains, the most significant change in statutory planning was the 1932 Town and Country Planning Act, which implemented a major amendment to earlier versions of the 1919 and 1923 Acts, and a major reorganisation of local government in 1929 by specifying the Government body responsible for different aspects of planning-related matters (Thurley 2013, 89-102).

The Acts which devolved powers to local authorities by the Government originally required local authorities to compensate landowners for any loss suffered due to archaeological remains being identified on their land, as such remains were considered a nuisance (within the 1882, 1900, 1919 and 1932 Acts) (see Brown 1905, 12). We should reiterate here that all of these rules and regulations were only aimed at the preservation of known and listed Ancient Monuments, as per the discussion in the previous section regarding the political agenda and social philosophy advocated by Lord John Lubbock. This continued to be the case until O’Neil directed resources towards ‘rescue’ work at unlisted sites, thus applying some protection to yet un-discovered archaeological remains. This later became the customary practice and was regarded as environmental protection (Wainwright 2000, 909).

Legal and applied protection of unlisted archaeological sites was only gradually introduced in Britain during the 1960s. Parallel to the work of Pitt-Rivers, but some years before the changes instigated by O’Neil, Gerald Brown published *The Care of Ancient Monuments* in 1905, in which he argued that the UK’s ancient monument protection legislation was ineffective as it lacked a detailed list of all the monuments it was meant to be protecting (see Brown 1905, chapter seven). He proposed that a Royal Commission be established to

monitor the situation and advise the Government on the protection of listed monuments and sites (*ibid.*, chapter twelve). Brown's suggestion was successful and led to the establishment of the Royal Commission on the Historical Monuments of England (RCHME) by Royal Warrant dated 27 October 1908 (National Archives website - <http://discovery.nationalarchives.gov.uk/details/r/C5> (obtained in July 2017)). The Royal Commission was very influential in setting agendas and methods for protecting known archaeological remains in England (Scotland, Wales and Ireland had their own Royal Commissions).

Of particular significance to the issues discussed here is a survey report by the RCHME published in 1960 entitled *A Matter of Time, an archaeological survey of the river gravels of England* (Wacher 1961), which is noted for being the first officially published document to state a warning that archaeological remains are a diminishing asset requiring protection (Wainwright 2000, 911). The Royal Commission's 1960 report is also important for identifying a large number of archaeological sites being threatened either by natural erosion or as a result of land works. The initial report was followed in 1963 by a list of 850 monuments identified as being at high risk of imminent destruction (*ibid.*).

The importance of the RCHME reports on the establishment of professional archaeology in England cannot be overstated as they led directly to the Government appointing J. Hamilton to head a department, in effect a sub-department of the Department of Works, whose sole role was to examine and record sites before they were destroyed (Wainwright 2000, 911). A few years later, with the Office of Works now a recognised entity and the principles of protecting archaeological remains from destruction by land development becoming standard practice, the concept of development-driven archaeology as a tool for assessing and recording archaeological remains obtained impetus through the publications of the Frere et al. 1975 and Cunliffe 1982 reports.

The Frere et al. and Cunliffe reports are pivotal to the issues discussed in this thesis as they serve to underpin the notion that the destruction of archaeological remains can be mitigated, as opposed to rescued, through archaeological investigative research and scrupulous recording work. The Frere et al. report argued that archaeologists have an obligation to produce a full record of excavations in order to record the evidence which they destroy, thus mitigating, or offsetting (after Thomas 2019), the destruction of the site through records that further our understanding of the past and can be used for future research (Frere et al. 1975). The Cunliffe report advocated an emphasis on the project archive as a comprehensive record, whilst arguing that a selective research analysis and synthesised publication should be derived from the archived data (Cunliffe 1982, s6, subsection 4.11). This resulted in the notion that the archive can be regarded as a form of an *ex situ* surrogate to *in situ* remains, and that the research potential of the archive can then be regarded as sufficient offset, or as mitigation for the destruction of the site. This notion established the tenet of ‘preservation by record’, which assumes that collected data and material are properly conserved in an archive (Ucko 2000, 353; see Thomas 2019 for further discussion of this point).

The publication of the Cunliffe 1982 report in particular can be identified as the point from which archaeological archives became regarded as the expected product of archaeological field investigative work. Because the Cunliffe report was specifically aimed at ‘rescue’ archaeological work, it emphasised the importance of the archive as the collection of evidence from which data can subsequently be extracted and hypotheses tested. Unless archaeologists produce an archive as a result of their work, no record of past activities at the site would be preserved after the site’s destruction (Pitt-Rivers 1888, 7; Atkinson 1946, 26; Cunliffe 1982; Merriman & Swain 1999, 257; Rahtz 2001, 604).

The Frere et al. and Cunliffe reports crystallised what can be referred to as the ‘ethos of archaeology’, whereby data gathered by archaeologists as part of a scientific method for testing

the plausibility of hypotheses should be kept in perpetuity for posterity as tangible evidence of past cultures (Merriman & Swain 1999, 259). Controversially, although the Frere et al. and Cunliffe reports established the operation of professional pre-emptive ‘rescue’ archaeology, the reports are also largely responsible for the current problems of the unsustainable rate of material accumulation and insufficient funding for the perpetual conservation of this material. Notably, the issue of the potentially overwhelming amount of data generated by developer-funded work, due to the emphasis on the physical archive, was recognised by Cunliffe himself only a few years after the publication of his original report (Cunliffe 1990, 668; Thomas 2004, 93).

As the example of the Temple of Mithras in London (discussed below) illustrates, when archaeological work is carried out to a sufficiently rigorous standard then neither the initial reason for conducting the project nor the surrounding political agendas should matter. The work carried out at the site of the Temple of Mithras was so meticulously executed that the temple has been reconstructed in its original place using accurate alignments and matching building materials some 63 years after the original site was destroyed. This achievement was accomplished even though the initial project only took place as part of land development work (Shepherd 1998, 21).

The examples discussed here illustrate the force of public opinion on the operation of professional archaeology in its early days. The initial work at the site of the temple of Mithras (the Mithraeum) in London took place in 1954 concomitant with the changes that O’Neil and the people working for the Office of Works were instigating in terms of establishing archaeological ‘rescue’ projects, but some 30 years prior to the publication of the Cunliffe report. The site was saved as a result of public awareness. In contrast, the example of the Six Hills Ancient Monument, Stevenage illustrates that public opinion can also lead planning authorities to downplay the importance of ancient monuments so as to avoid the costs of

protecting archaeological remains at development sites (Mullan 1980, 4), thereby leading to neglect and invisibility.

3.2.1 The Temple of Mithras, London (Mithraeum)

Much has already been written about this project and its implications for the establishment of pre-development and ‘rescue’ archaeology in England (Wainwright 2000, 910). In this short section, I aim to focus attention only on the parts of this story that are particularly relevant to the issues discussed in this thesis. The following section is a brief summary of a complex saga which had far-reaching effects on every aspect of the operation of CRM-based archaeology in England (Gordon 2000, 736).

The importance of the story of the excavation, preservation and exhibition of the Temple of Mithras during the autumn of 1954 cannot be overstated. It is widely considered to have been one of the primary catalysts for the establishment of pre-development archaeology as we know it today (Wainwright 2000, 910). In addition, this pre-development project became a precedent for utilising both the methodological tenet of ‘preservation by record’ and the principle of ‘environmental damage mitigation’ in combination (Shepherd 1998, 21).

The fate of the remains of the Temple of Mithras, unearthed during construction work at Walbrook Street, London, in 1954, was the concern of many. From the then Prime Minister, Winston Churchill, the Minister of Works, David Eccles, the Chief Inspector of Ancient Monuments, Baillie Reynolds (O’Neil’s predecessor), the archaeologists in charge, W. Grimes and A. Williams, to almost every newspaper in the country and, of course, the thousands of people who queued for hours for the chance to marvel at the site, it seems that everyone had an opinion as to what should be done with the remains of the temple (Gordon 2000, 736).

The project director archaeologist was Professor Grimes, who was quoted in *The Times* newspaper as saying that preserving the temple itself was less important than the knowledge and understanding which could be gained through the meticulous records made during the excavation project – ‘we have a complete record of the finds and the materials here, that is the scientific information which interests archaeologists, and the actual preservation is a secondary thing’ (*The Times* newspaper, September 21, 1954, 8).

Professor Grimes’ line of thought and scrupulous methodology resulted in the largest assemblage from any single piece of pre-development archaeological fieldwork undertaken in the City of London, comprising over 14,000 registered finds which were, until recently, kept by the Museum of London (MoL) and LAARC (Fowler, L. 2018, 34). It is worth noting at this point that Gordon has argued that Grimes was not very enthusiastic about discovering the temple and would have been happy to let the site be bulldozed had it not been for the arousal of public interest (Gordon 2000, 736). Be that as it may, Grimes insisted on rigorous recording methods and ensured that every piece of object found at the site was appropriately recorded and kept in the archive at the MoL (Shepherd 1998, 16).

On September 20th 1954, *The Times* newspaper published an editorial credited with prompting the Government to take ‘an immediate action’ (Shepherd 1998, 16). The line in *The Times* which was to be most effective, as it turned out, was,

There is something grievously wrong with our planning if an important antiquity of this sort can be destroyed almost before it has been seen. What other civilised nations may think of the matter is a point upon which one can only speculate apprehensively. (*The Times* newspaper, September 20th 1954, 7).

On the same day as the publication of this editorial in *The Times*, Churchill asked Eccles to visit the site and report back to the Government with recommendations. The Minister of

Works and other members of the Ministry then had a guided tour of the site with Grimes. Their report (presented to the Cabinet as WORKS14/2592 – the Minister Brief; see Shepherd 1998, 17) included an item which precisely correlates with the issues discussed in this thesis, namely, the principles behind, and legislation applicable to, the protection of archaeological sites and records and the reasoning for not utilising these legislative powers. This requirement is therefore worth repeating here:

Item 4: that there were powers to protect the temple under the Ancient Monuments Acts. Firstly, the temple could be listed under the Acts as a monument of national importance. This would hold up demolition and would require three months' notice to be given of any intention to destroy or damage it. Once the Ministry had been notified of a threat of destruction a preservation order could be made and the monument taken into compulsory guardianship. This would require payment of compensation to the owners of the site. (Shepherd 1998, 17 (my emphasis)).

The 'damage mitigation strategy' ultimately decided upon, however, was a compromise made in order to avoid paying compensation to the owners of the site. The temple was rebuilt, inadequately, in an open space some 300 metres from its original location, and remained in that location for 63 years. This was funded by the owners of the site, which meant that they in effect lost money as a result of the discovery of the temple on their land – compensation would have meant putting the site development on hold while the matter was deliberated for an unknown length of time (Shepherd 1998, 16). Thus, although Grimes was the director of the MoL at the time and responsible for the discovery and excavation of the temple, he had limited say in either the fate of the temple itself or the function of the assemblage of recovered artefacts. The public fascination with the temple and its discovery is evident from the tens of thousands of visitors who were willing to pay an entrance fee and stand in hour-long queues to view the site (more

than a hundred people have recorded their experiences of this at <https://www.londonmithraeum.com/oral-history/> (accessed in September 2019)).

The subsequent remarkable reconstruction of the temple some 63 years after the original excavation project is of note at this point. In 2016, the London Mithraeum re-opened to the public (see <https://www.londonmithraeum.com/> (accessed in November 2017), also for a display of the original excavation project) after the temple was reconstructed again, this time in its original location with correct alignments, following the acquisition of the site by Bloomberg Media corporation in 2010. Thanks to the original excavation records being conducted meticulously by Grimes and his team, and all records, information obtained and material collected properly conserved in the archive, the Temple of Mithras could be reconstructed and made accessible to the public for the second time.

The fate of the Temple of Mithras is a classic example of the compromises that sometimes have to be made in the face of public opinion and financial constraints, as well as in the interest of mitigating damage to the historic environment. The combination of the discovery of the temple, its excavation, the ‘preservation by record’ method employed during the work, and subsequent public attention have all had a long-lasting impact on operational doctrines of archaeology in England. The London Mithraeum project is an illustrative example of enhancing ‘the mental equipment of rational humanity’ (Brown 1905, 12) through scientific archaeological work.

3.2.2 The Six Hills Ancient Monument, Stevenage

The example of the Six Hills Ancient Monument in Stevenage, Hertfordshire, stands in contrast to the Temple of Mithras example because neither the Ancient Monument itself nor

the objects collected from the site during development works have ever been offered any measurable protection by the authorities (Mullan 1980, 4).

The Six Hills were officially recorded in Gough's *Camden's Britannia* in 1607 (Andrews 1906, 181) and since then there have been a number of interference (unofficial, probably members of the public 'digging for treasure' (Mullan 1980, 4)) excavations carried out at the site (Methold 1902, 42). The monument is officially recorded as 'impressive earthwork features which form the largest surviving group of burial mounds dating to the Roman period in England' (Historic England 1996) and 'are assumed to be constructed about AD 100, although the few records of their exploration are old, scanty and inconclusive' (Hertfordshire CC, HER No. 1577 (listed under HeritageGateWay.org.uk; https://www.heritagegateway.org.uk/Gateway/Results_Single.aspx?uid=MHT1577&resourceID=1008 (obtained in April 2014)).

The importance of the Six Hills monument has been acknowledged for centuries. Nonetheless, between 1969 and 1971 the Stevenage Corporation Company constructed roads causing serious damage to the monument's area as part of the development of Stevenage town. These works were carried out with complete disregard to the potential discovery of archaeological remains in the vicinity (Mullan 1980, 4). Some objects were collected during these works by volunteers from Lockleys (now Welwyn) Archaeological Society who had to insist on being allowed onto the site (Rook 1971), although they likely collected them at Collenswood Leg which is about a mile and a half away from the site. These recovered objects are now in a box in a shed which serves as the society's archive facility (email correspondence with Dr K. Lockyear, the current head of the Welwyn Archaeology Society, ref. in appendix C). The Stevenage Museum, which should have been the archive repository facility, only keeps a box with some photocopied documents in its archive (a shelf in the office of the museum

curator). The Stevenage Museum has no archaeological material archive facility (as per my visit to the museum).

This approach by the Stevenage Corporation Company to hinder access to information and hide the potential of archaeological remains at the site is considered to be a calculated strategy to reduce costs (Mullan 1980, 4). In the box of archive documents at Stevenage Museum there is a typed memorandum of a meeting which took place on 11th December 1969. Section D of the document states:

an embargo was to be placed on publicity of the site, on the grounds that there existed in the new town (Stevenage) a large untapped interest in local history, which, if aroused, might prove embarrassing.

It is plausible that the decision of the Stevenage Corporation Company to silence the publicity of the potential for archaeological remains which could be found during the development of the town might have had something to do with the case of the Temple of Mithras unearthed only a few years before. When the extent of the (potential) damage caused by the development of Stevenage became known, many letters of complaint were sent to the Corporation and there were even small but vocal demonstrations in front of the Corporation's head office (Mullan 1980, 13). Amongst the letters sent by Stevenage residents, that written by the curator of Stevenage Museum is worth quoting here:

The planning of the site has been done piecemeal without any regard for its historic associations. Future generations will rightly call anyone involved in this decision a Philistine – someone who knows the cost of everything and the value of nothing. (C. Dawes, Curator of Stevenage Museum, August 9th 1984. Internal memorandum to Mr E. Harris, the Head of Planning Committee, Hertfordshire County Council; letter available in the Six Hills archive documents box at the Stevenage Museum).

On a final note, if we draw a line in time over the past 60 years to measure the level of protection offered to archaeological remains in Stevenage, we get a clear indication that very little has changed. This is clearly evident in the photo below of the tarmacked road cutting the Ancient Monument boundaries, the road was constructed in 1971 (as mentioned above) some eight years before the Ancient Monuments and Archaeological Areas Act 1979, which would have made placing the road in its current location a criminal offence.



Figure 5: The Six Hills Ancient Monument, Stevenage

View looking south, the closest hill in the photo is hill number one when counting North to South.

Source: by the Author.

As discussed in the next chapter, on 15th November 2017, the House of Commons rejected a proposed amendment to the EU Withdrawal Bill known as clause 67, which was aimed at ensuring that the environmental ‘Precautionary Principle’ remains applicable after the

UK leaves the EU. This suggests that the political agendas that were at play in Stevenage during the 20th century, and the opinion so vehemently expressed by Lord Francis more than a century ago that archaeological remains should be regarded nothing but nuisance, are being brought back to the fore. During recent discussions regarding the status of archaeology in Hertfordshire, a prominent local archaeologist referred to Stevenage as ‘a cultural vacuum’ – the example of Six Hills appears to support his contention (see anonymised emails in appendix C). As the following chapter demonstrates, the reasoning behind the applications of CRM procedures is exactly to prevent the recurrence of such instances as presented in the case of the Six Hills Ancient Monument in Stevenage.

Chapter 4: Current policies, rules and guidelines

4.1 PPG16 to Environmental Impact Assessment

Following from the cautionary tale illustrated by the Six Hills site, we need to bear in mind that albeit conducted as a scientific endeavour, professional archaeology takes place within a three-tier framework of legislation, policies and industry guidelines, all of which are heavily influenced by political agendas. This chapter concerns current legislation, policies and international agreements that impact the assemblage, function and protection of archaeological material. Regarding the research method used here, this chapter represents a part of the second strand of research – the policy implementation of the legislation. As mentioned in chapter two above, the aim of this line of research is to examine why archaeology is conducted in a particular way and how the policies governing it define the ‘product’ expected at the end of the work.

The publication of the MAP2 (Management of Archaeological Projects 2) (Andrews 1991) and PPG16 (published under DoE, today DEFRA) guidelines created a nationally-accepted standardised approach to the management of archaeological field projects from initial planning through to the publication of the results (Carver 2011). The publication of PPG16 in 1990 also established the practice whereby developers fund archaeological projects when a development approval condition is imposed by the Local Planning Authority (LPA) in order to produce an Environmental Impact Assessment (EIA) report. PPG16 was implemented in England by Section 106 of the TCPA (England) 1990 authorising LPAs to impose conditions on land development applications. This also created the difference between ‘development-led’ archaeology and ‘rescue’ archaeology by giving LPAs the role of directing where and when an investigation project should take place (Schofield, Carman & Belford 2011, 11). The collection

of objects by archaeologists, however, is not a prerequisite of the EIA report which can be produced and submitted without a single object being collected or archived. Thus, the recovery of discovered items is not part of the work that developers intend to pay for nor is it explicitly stated in the contract (Cooper-Reade 2015, 36). The mosaic of approaches to the technical aspects of the work (how it should be conducted) and the understood value of the results (why the project should take place) have resulted in an obscure definition of what the expected ‘product’ of archaeological work should be – a report, an enhanced understanding, a physical archive or all of the above and, equally importantly, who should pay for which type of ‘product’ (Merriman & Swain 1999). This, in a nutshell, is the current operation of development-led archaeology that takes place within the CRM system.

The legal correlation between land development and archaeological field investigative works was established by the Civic Amenities Act 1967. Since the 1960s, and to a large extent due to the O’Neil and RCHME reports, planning and heritage conservation legislation have been steadily integrated, culminating in the Planning (Listed Buildings and Conservation Areas) Act 1990, which led to the publication of the Planning Policy Guidelines 15 and 16 (Pendlebury 2001, 289). Today, the applicable Act is the Town and Country Planning Act 2017, but this is an ever-changing series of legislative documents that go through Parliament on a regular basis. The continuous devolution of legislative powers to LPAs over the past century means that today planning authorities have the legal power to instruct that an archaeological investigation project take place and, if they so wish, and to determine the fate of the consequent archive. Prior to discussing the powers of LPAs, it is useful to examine national and international guidelines and regulations which ‘provide general indications of what might be desirable policy and practice’ (Crickhowell 1994, 8).

4.2 Precautionary Principle to National Planning Policy Framework

In the following chapter, I discuss the application and impact of CRM on the operation of pre-development archaeology in England. This chapter examines policies and regulations relating to the ‘development application’ phase of archaeological investigative projects before the commencement of fieldwork. A number of contradictions exist between the theoretical principles of mitigating environmental damage and their application in the field through the system of CRM (Cooper-Reade 2015, 35). The question of who should pay for the storage of collected objects and data is a primary example. Environmental protection policies and principles are the catalysts for archaeological work conducted by CRM methods. Therefore, the discussion here begins by examining those theoretical notions, policies and regulations as well as international conventions, although these have surprisingly little to do with development-led archaeology in England. The discussion continues by looking at relevant EU regulations and concludes by examining national policies specifically pertinent to the issues discussed in this paper. Despite the ratification of the European Convention on the Protection of the Archaeological Heritage (revised) 1992 (known as the Valletta Convention) in September 2000, the policy requirements set out in the convention have not, thus far, been implemented within the archaeology sector. Explicitly, article 3(ii) of the convention requiring signatory states to ensure that archaeological excavation projects are carried out only by ‘qualified, specifically authorised persons’ has been, by and large, disregarded in England. This issue is a source of much contention encapsulated by the raging debate between the Council for Independent Archaeology and Historic England and English Heritage (the entire debate is available online at the Council for Independent Archaeology website, <http://www.independents.org.uk/the-valletta-report/english-heritage-position-statement> (obtained in December 2017)). The purpose of the convention, and explicitly of article 3, is to

regulate commercial archaeological work by aiming to ensure that work which is carried out for a fee adheres to acceptable international standards (see O’Keefe & Prott 2011, 102). The convention is not concerned with the work of amateur volunteers, as long as they are acting in good faith and not intending to take objects for their own personal benefit. In respect of the issues discussed here, the Valletta Convention has deliberately had little measurable impact, as ‘the convention does not interfere with ownership’ (O’Keefe & Prott 2011, 102). Nevertheless, the UK Government’s response to the legislative requirements set out in the convention is noteworthy because it encapsulates the current vacuum in policy-making:

Current measures in place in the UK already meet the Convention’s requirements.

The Government do not believe that additional legislation, requiring a licensing system, is necessary to fulfil Article 3. Much archaeological work is already controlled through existing mechanisms. In England, English Heritage will be taking forward consultations with appropriate bodies representing all parts of the archaeological community on any necessary improvements to the operation of existing systems of control and on the development of a voluntary Code of Conduct for those who wish to undertake archaeological work outside those existing systems. (Dr. Howells, Under-Secretary of State in the DCMS (in the Blair Government); House of Commons, *Bound Volume Hansard* – Written Answers, 15th Oct 2001, Column, 805W.

The importance of this response, reiterated in similar words by the Government in 2016 (Barton & Curley 2018, 52), is that it characterises consecutive Governments’ attitudes towards archaeological work and illustrates why the existing regulations cannot be relied on for ascertaining the ownership of archaeological material. What the Government is referring to in its answers is the legislative arrangements for conducting pre-development archaeological field investigations that were integrated into English (Scotland, Northern Ireland and Wales ratified

it separately) law in what is known as the ‘Precautionary Principle’ (see below). These legislative arrangements incorporated the principle of ‘polluter pays’ into planning legislation and created a mechanism for legally obliging planning authorities to take measures to mitigate potential impact to the environment (Bodansky 1994, 205).

The ‘Precautionary Principle’ is the overall umbrella policy under which the ‘polluter pays’ principle sits (Fowler, D. 2018). This policy deals with who should fund required environmental damage mitigation work. Both of these principles were enshrined into EC policy by the ratification of the Maastricht Treaty article 130(r). Article 130r (2) introduces the words ‘that the polluter [of the environment] should pay’. This was then reinforced by the European Council Resolution of December 1992, reference to the European Council’s Declaration of Dublin 1990 (also referred to as the ‘Environmental Imperative’) which specifically states – ‘effective implementation’ of the ‘Polluter Pays Principle’ (Haigh 1994, 235). The EC directive setting the ‘Precautionary Principle’ and the ‘polluter pays’ into legislative framework is the Environmental Liability Directive 2004/35/EC.

All of these EC directives and regulations are today incorporated into English law by the Environmental Damage (Prevention and Remediation) Regulations 2009 (Environmental Protection UK 2009). The problem is that the 2009 regulations do not apply to development-driven archaeological work because the policies focus solely on damage to the environment through the introduction of contamination. The regulations define ‘environmental damage’ as such:

Environmental damage to land means contamination of land by substances, preparations, organisms or micro-organisms that results in a significant risk of adverse effects on human health. (Environmental Damage (Environmental Protection UK 2009, part 1 section 4(5)).

It would be difficult to argue in court that ownership of collected archaeological material is transferred from landowners to archaeologists by virtue of the archaeologists removing ‘contamination’ from the ground. This is not exactly a legal problem – refuse collection centres, for example, accept ownership of contamination all the time – it poses more of an ethical problem. Saying that archaeological archive centres and some museums’ entire collection consists of ‘contamination’ collected by archaeologists from someone’s land is floccinaucinihilipilification of the archaeological record and would also make it very difficult for those centres and museums to apply for public funding. Peculiarly, if archaeological material is regarded as contamination, then archaeology contractors should be paid by the Government under the Environmental Matters (Aarhus) Convention 1998, precisely because they are, ostensibly, removing contamination from the land (Georges-Stavros 2005, 142).

The Government’s lack of attention to the ‘polluter pays’ principle in the proposed amendments for the European Union (Withdrawal) Bill has been vigorously and profusely debated in the archaeology sector (<http://rescue-archaeology.org.uk/open-letter/> obtained in November 2017). This is unnecessary. The term ‘polluter pays’ was imported to Europe from the US where it is simply a mechanism for determining who is responsible for paying to clear, or mitigate, damage or contamination of land. Before the enactment of the ‘polluter pays’ principle in the US, landowners had sole responsibility for clearing contamination. They could sue for compensation in court under previous US environmental legislation but the financial onus of clearing the contamination was solely on the landowner (Bodansky 1994, 215). European land and environmental laws are very different. It seems that in focusing on ensuring that developers pay for archaeological fieldwork, the ‘polluter pays’ principle has received too much emphasis, which may have the undesirable consequence of deflecting attention from other issues. Specifically, in the UK:

the concept of polluter was taken too literally and archaeology became a site-clearance product, divorced from the concept of public benefit (Cooper-Reade 2015, 36).

Having said that, with respect to the function and transfer of ownership of archaeologically-recovered material, by far the biggest issue is that consecutive Government-issued policies have shied away from explicitly dealing with this problem (as illustrated by the Government response as per the quote of Dr Howell above). In addition to the Environmental Damage (Prevention and Remediation) Regulations 2009, the 'Precautionary Principle' is also incorporated into the National Planning Policy Framework(s) (NPPF) (both the 2012 and the newly issued 2018 versions). Unfortunately, however, the wording in the NPPFs documents is too vague for it to be regarded as a legally-binding policy.

When the NPPF was published in 2012 it replaced 45 previous Government-issued policy documents (Ministry of Housing, Communities and Local Government 2012, Annex 3). The main problem with the NPPF documents (2012, 2018/19 and the recently updated version issued in 2020), in respect of the issues discussed in this thesis, is that the terminology used in the document is neither clear enough nor sufficiently explicit, as to establish the law. It would likely be difficult for the courts to rely on the NPPF as a legally-binding document since the language used suggests that it is a recommendation rather than a legislative document. The best example of this, which is specifically related to this research, is that it is unclear whether the courts would consider a footnote in a Government agenda document as sufficiently binding to effect the conveyance of private property rights without specific consent – the transfer of title to archaeological material. This example of the ambiguity imbedded in the NPPF is encapsulated in the sentences below of paragraph 141 of the 2012 document, which was duly copied and became paragraph 195 of the 2018/19 document, and was then copied into the updated version of 2020, using the same wording but different numbering:

They [Local Planning Authorities] should require developers to record and advance understanding of the significance of any heritage assets to be lost (wholly or in part) in a manner proportionate to their importance and the impact, and to make this evidence (and any archive generated) publicly accessible.^{30/56/64} However, the ability to record evidence of our past should not be a factor in deciding whether such loss should be permitted. (Ministry of Housing, Communities and Local Government (MHCL) 2012, paragraph 141; MHCL 2018, paragraph 195; footnote 30 to paragraph 141 in the 2012 document was changed to footnote 56 to paragraph 195 in the 2018 document, this became footnote 64 to paragraph 1999 in the 2020 document; the wording is exactly the same except the first sentence (my emphasis)).

^{30/56/64} Copies of evidence should be deposited with the relevant Historic Environment Record, and any archives with a local museum or other public depository. (Ministry of Housing, Communities and Local Government 2012 footnote 30 to paragraph 141; Ministry of Housing, Communities and Local Government 2018 footnote 56 to paragraph 195; MHCL 2020 footnote 64 to paragraph 199 (my emphasis)).

As well as highlighting the legal uncertainties discussed in this thesis, this section of the NPPF (2012/2018/2020) epitomises precisely the woes of the archaeology and museum sectors in England who are faced with a Government which appears to refuse to acknowledge the problem. In the NPPF, the Government puts the responsibility for ensuring that developers adhere to the regulations and pay for archaeological ‘preservation by record’ work entirely on Local Planning Authorities. This then rolls the problem to regional museums, archive repository facilities and archaeology contractor companies which are forced to accommodate the repercussions of the LPAs’ decision. This is exactly what Duncan Brown is referring to

when he derides ‘uncontrolled collecting on behalf of planning authorities that seem to take the museum archives for granted’ (Brown 2015, 248).

From a legal point of view, the problem is that the NPPF does not mention the landowner as a party to the agreement or that any consent might be required prior to the ‘deposition of the evidence in a local museum or other public depository’ (the NPPF section quoted above). This can be interpreted to mean that, as far as the Government is concerned, permitting the investigation project also entails allowing archaeologists to gather evidence in the form of collecting objects from the ground. I discuss the legal implications of this in chapter seven so here a brief reference would suffice. In legal terms, consenting to a pre-development archaeological investigation using a ‘preservation by record’ method entails consenting to the relinquishing of one’s title to objects discovered in the land during fieldwork as a form of ‘waiver by informed consent’.

The amalgamation of ratified European and international conventions with the ‘Precautionary Principle’, ‘polluter pays’ and the National Planning Policy Framework regulations firmly points to Local Planning Authorities as having the power to be the instigators and arbitrators of all issues concerned with development-driven archaeology in England.

4.3 The power of Local Planning Authorities (LPAs)

Before engaging with the administrative authority of LPAs under the UK’s statutory regime, it should be clarified that development approval conditions imposed by LPAs can be divided into three types:

- a) investigative/informative conditions which are imposed in order to inform the planning committee as to whether to grant a development application. This type of condition is based on the NPPF and the ‘Precautionary Principle’;
- b) restrictive conditions which are imposed when there are known archaeological remains at the site and the LPA aims to mitigate or offset (see Thomas 2019) their destruction through a CRM strategy of requiring ‘preservation by record’ work to take place. This type of condition is the evolution of ‘rescue’ archaeology;
- c) combined or consecutive conditions which can be imposed after an initial desk assessment leads to a watching brief. This may lead to a field evaluation investigation (trial trenches) which may lead to restrictive conditions requiring full-scale excavation work. This type of condition is based on the ‘Precautionary Principle’ and may develop into a full-scale CRM strategy for mitigating environmental damage.

As identified in the case studies discussed below, the type of conditions imposed by LPAs can depend on many factors including, but not exclusive to, the significance of the archaeological remains found, the presumed impact that development would have on the environment, and whether the LPA is inclined to impose conditions in the first place – some LPAs do not appear to be imposing development consent conditions, which could be explained as reducing costs for developers (see Six Hills example at s3.2.2 above). The current powers of planning authorities are the result of social and political changes as discussed in the preceding chapters. This section concerns current legislative and practical approaches to the management of archaeologically-recovered material.

The legislation and political agendas that resulted in the powers of planning authorities to determine the fate of archaeological material predate international and European regulations, while the instruments for protecting archaeological remains in the UK predate EU policies. The main impact of the implementation of EU regulations in the UK was to shift the centre of gravity from ‘known’ archaeological remains to environment (land) which may contain ‘unknown’ remains (Rahtz 1974; Rahtz 2001). Today the mandate of planning authorities to choose the level of consideration to give to archaeological remains and to decide the type and extent of conditions to be placed on proposed development applications is established by the Town and Country Planning Act (TCPA) 1990, section 106 in conjunction with the decision in *Pyx Granite*⁴⁹ (Turpin & Tomkins 2007, 148).

Five years after the TCPA 1990, section 106 was extended in England by Circular 11/95 – The Use of Conditions in Planning Permissions (1995). Circular 11/95 was then replaced by Circular 02/2005 (Office of the Deputy Prime Minister publication), which was later replaced by Planning Policy Statement 5 (Ministry of Communities and Local Government publication). Eventually all the Circulars and other land development related documents (but not the TCPA 1990, section 106) were replaced by the National Planning Policy Framework (NPPF) and the National Planning Policy Guidelines (NPPG) in 2012. The TCPA 1990 ratified into English law the EU requirement to submit an Environmental Impact Assessment (EIA) report in accordance with the European Council Directive 85/337/EEC, that states:

Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location are made subject to an assessment with regard to their effects. (EEC Directive 85/337/EEC Article 2 paragraph 1).

⁴⁹ *Pyx Granite v. Ministry of Housing and Local Government* [1960] A.C. 260

The statutory requirements of the EEC directive 85/337 are applied in England by the Town and Country Planning (Environmental Impact Assessment) Regulations 2011. Originally the EEC Directive was ratified as the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988, schedule 3, section 2(c), and the TCPA 1990, part III, section 106, subsection 1(b) (see *Halsbury's Laws* 2010, volume 81, paragraphs 1-618; volume 82, paragraphs 619-1,034; volume 83, paragraphs 1,035-1,656). Thus, the TCPA 1990 consolidated a number of previously existing common law rulings, such as *Pyx Granite*⁵⁰, and common practices such as 'rescue' archaeology discussed in the previous chapter (Harwood 2012).

Section 106 of the TCPA 1990 states that planning authorities have a legal right to impose certain conditions and stipulations on proposed developments which have to be satisfied before the planning authority makes a decision on whether to grant an application. The TCPA 1990, however, makes neither reference to heritage or archaeological remains, nor provides any definition of what the expected product of such pre-development conditions should be. Planning authorities can legally choose the level to which they will adhere to Government-issued policies (at the time PPG16 now NPPF 2012/2018) or archaeology sector recommendations. Legally speaking, LPAs are not required to impose pre-development conditions, they are only expected to show consideration to the environmental impact that the development may have (see *Rescue Planner*, 2019, 7). Today, in addition to s106 of the TCPA 1990, the authority of LPAs to place pre-development conditions is granted under the Localism Act 2011, the Housing and Planning Act 2016 and numerous related planning Acts (predominantly the 2011 Act but the particularities of the rules are amended annually). These Acts, in conjunction with the precedential common law decision taken in *Pyx Granite*⁵¹ and in

⁵⁰ *Pyx Granite v. Ministry of Housing and Local Government* [1960] A.C. 260

⁵¹ *Pyx Granite v. Ministry of Housing and Local Government* [1960] A.C. 260

combination with EU regulations and ministerial issued policies all serve as the kaleidoscope of rules applicable to development-led archaeological work undertaken in England (and this is without mentioning additional regulations that apply to listed buildings, see Harwood 2012).

The reason for this rather complicated state of affairs is that LPAs' legislative authority is divided into three aspects:

- a) the authority to impose planning conditions and to approve or deny development applications (granted under s106 of the TCPA 1990);
- b) determining when and under which conditions planning applications are required (debated and decided upon by the courts in numerous cases. For example, do temporary agricultural structures require planning permission, see *South Oxfordshire*⁵²);
- c) the LPAs' requirement to adhere to Government-issued guidelines and regulations and the authority of the Secretary of State for Environment, Food and Rural Affairs to have the final say in disputes relating to planning applications (see *Alconbury Development*⁵³ for example).

It is important to note that none of the Acts of Parliament, Government-issued regulations (Circulars) or court cases mentioned above stipulate what should happen to archaeological material assembled during the process of considering and determining whether to grant a development application. The only Government-issued paper which does mention what should be done with recovered archaeological material is the NPPF in an inconspicuous footnote to the last paragraph.

⁵² *South Oxfordshire District Council v. Secretary of State for the Environment and another* [1981] 1 WLR 1092

⁵³ *R (on the application of Alconbury Developments Ltd) v. Secretary of State for the Environment, Transport and the Regions and other cases* [2001] All ER (D) 116 (May)

It is also worth noting that it is easy to confuse planning legislation and regulations with the Planning (Listed Buildings and Conservation Areas) 1990 Act (see Harwood 2012). General planning laws such as the TCPA 1990 provide a system for protecting the environment through the regulation of development, they are not aimed at providing protection for archaeological material which is no longer considered a part of the environment when it becomes movable property (the term used by archaeologists and by the Government within the NPPF is 'Historic Environment'. This idiom is not used in the Acts themselves, presumably because it would be difficult to define legally).

Archaeological material generated under the mechanism of planning legislation becomes movable property because it is designated so by the actions of archaeologists when they choose which objects to collect from the site and which of these objects to conserve in an archive (see Palmer 2012; Bennett 1998; Barber 1998). Archaeological object collections assembled during pre-development work come under the TCPA 1990 because they are not listed for protection under the Planning (Listed Buildings and Conservation Areas) Act 1990. Generally speaking, for an object to be listed, notice has to be made prior to the commencement of the excavation project, which, from an archaeological perspective, is rather paradoxical because the existence of important artefacts at the site might not be known prior to the excavation (see example of London Mithraeum above). Furthermore, the occurrence of listed monuments or other such objects at the site would/could also impact or determine whether the development, or any other such land interference, may take place (e.g. if there were designated remains at the site then the considerations for approving the interference project would, potentially, be entirely different).

Unlike the over-convoluted Government-issued policies and Acts, the common law has been clear and consistent in deciding that LPAs have the authority to determine whether to grant land development applications in their respective constituencies. Under common law, the

notion that archaeological remains should be of material consideration was recognised in *Pyx Granite*⁵⁴ (Turpin & Tomkins 2007, 148).

Pyx Granite is a very important court precedent because it established that LPAs have the authority to override Acts of Parliament, in this case the Malvern Hills Act 1884 (amended 1909, 1924, 1930), in matters of land development and conservation of tangible heritage by imposing conditions on applications for proposed development (note that *Pyx Granite* took place 30 years prior to the TCPA 1990 and PPG16). In theory, the Government cannot force an LPA to approve a development application, although this has recently been challenged by the application for shale oil extraction development and compulsory land acquisitions in the HS2 railway project. To be clear, LPAs may impose such planning application approval conditions but in the event of an appeal, the final say as to whether the proposed development may go ahead is either in the hands of the Courts or the Secretary of State (as per the decision in *Alconbury Development*⁵⁵; see also Turpin and Tomkins 2007, 149).

The above list of complex laws, regulations and considerations is the reason for a confusion which sometimes occurs in discussions concerning which legislation applies for the protection of archaeological remains; the Planning (Listed Buildings and Conservation Areas) 1990 for protecting the artefacts themselves, or the TCPA 1990, part III, section 106, subsection 1(b) for protecting the environment. For the purpose of clarity, it needs to be stated here that neither of these Acts confers any legal protection to archaeological material once the assembled objects are removed from their original site and are kept in boxes on shelves by an archaeology contractor, museum or an archive repository facility. With the exception of the footnote to the last paragraph of the NPPF 2012, the above-mentioned Acts, court cases,

⁵⁴ *Pyx Granite v. Ministry of Housing and Local Government* [1960] A.C. 260

⁵⁵ *R (on the application of Alconbury Developments Ltd) v. Secretary of State for the Environment, Transport and the Regions and other cases* [2001] All ER (D) 116 (May).

regulations, guidelines and Government agenda papers refer only to archaeological remains whilst the objects are still in the ground. Once the objects have been selected, extracted and collected, property law based on contract law becomes the predominantly applicable legislation – for this reason, after the objects have been recovered, the question of ownership shifts from land, development, planning and environment legislation to property law.

As a final note to this chapter, a further peculiarity should be pointed out. The specifications for compiling an EIA report (as per EEC directive 85/337 mentioned above) and decisions about which factors should be taken into account are administered, with slightly conflicting guidelines, by two Government departments. The planning part of the process comes under the Department for Communities and Local Government (DCLG), while assessing the environmental impact of proposed developments comes under the Department for Environment, Food and Rural Affairs (DEFRA). Currently, the draft consultation paper of the NPPF 2018 (issued in March 2018) sets out the Government's agenda in respect of archaeological remains and the extent to which LPAs need to take these into account when considering development applications. Although much of what I have discussed in this section could become irrelevant once Britain leaves the EU, one thing which can be said for certain is that the NPPF will provide the vehicle for inferring Government agendas for the foreseeable future. From reading the draft consultation document, I deduce that the pendulum of political agendas is now oscillating back to where it was during the first half of the 20th century when archaeological remains were considered a nuisance worthy of compensation instead of the 'assets' and 'resource' definitions which have been used for the last 50 years.

In June 2020 the Business and Planning Bill and the Town and Country Planning (Permitted Development and Miscellaneous Amendments) (England) (Coronavirus) Regulations 2020 were passed into law by Parliament. In accordance with the new regulations there is no longer a requirement on LPAs to consider archaeological remains at the site of a

proposed development, it does, however, remain at the LPA's discretion as to what aspects of environmental protection to include in the EIA requirement. Sections 1.4 and 1.5 of the Bill state that LPAs may include certain stipulations on granting planning permission and that consideration must be given to EIA, however, the permission to develop is absolute and LPAs may no longer impose condition prior to granting the permission. Undoubtedly the impact of this on pre-development archaeology will be significant (see <https://simonicity.com/2020/06/26/new-planning-legislation-a-detailed-guide/> (accessed in July 2020)).

Chapter 5: Cultural Resource Management and Public Benefit

5.1 Cultural Resource Management and divisions within the sector

Having explored the reasoning behind development-driven archaeological work, being based on conditions imposed by LPAs prior to granting development applications, we can now examine the method and philosophy under which these projects are conducted. After World War Two in the US, there were many deliberations on how to define archaeology as a profession. In contrast to the UK, the debate in the US was driven mostly by archaeologists who were concerned with protecting the historic environment through commercially-motivated work. These discussions led to what became known as the ‘Four Statements for Archaeology’ which defined (1) the ‘field of archaeology’; (2) recording, analysis, curation and reporting standards; (3) ‘ethics for archaeology’ guidelines; and (4) teaching methods (Fowler, D. 2018, 82). These principles were later developed into a mechanism through which pre-development archaeological projects take place, which is referred to as Cultural Resource Management (CRM). The system of CRM can be regarded both as a strategy dictating what should be done and how projects should be managed (the method), and also as the philosophy which explains why such projects should take place (the principle behind the method). The operational concepts of the CRM system emerged as a scheme for protecting archaeological remains threatened by land development in the 1974 Denver CRM conference (McManamon 2018, 12), and were introduced in the 1975 Society for American Archaeologists (SAA) annual conference in Dallas, Texas.

Henry Cleere, who attended the SAA 1975 conference, extended the idea of CRM to examine its applicability internationally as ‘comparison-contrast between the systems in operation in different countries’ (Cleere 1987, 54). Cleere proposed a resolution to the

International Council on Monuments and Sites (ICOMOS) to implement CRM as an international instrument for maintaining standards in archaeological fieldwork. Cleere's proposal was accepted and the principles imbedded in Cultural Resource Management became the internationally accepted approach to pre-development archaeological work. The CRM approach can be broken down as:

- Cultural – meaning that archaeological remains are the tangible manifestations of heritage, and as such they should be protected as part of people's culture.
- Resource – connotes the notion that archived archaeological material can and should be used to further the study of the past and to preserve the tangible aspects of social heritage.
- Management – refers to the system by which archaeological material is assembled, preserved and studied, primarily, but not exclusively, within development-led archaeological fieldwork projects.

The philosophy of the CRM system directly correlates with the principle of 'preservation by record' which, as mentioned in chapter two, itself originated from the much older scientific inductivist idea of extrapolating general ideas from particular facts (Bell 1994, 148). The combination of CRM with 'preservation by record' is the reason that today archaeology contractor companies feel obliged to select, collect, study and keep a sample of the archaeological data and material which they discover in the process of conducting commercially-funded projects (Merriman & Swain 1999).

The ethical-scientific principle of mitigating the destruction of archaeological sites through records and the preservation of the information obtained and material gathered has been established in England by many regulations and guideline documents, such as the aforementioned reports by the Frere et al. (1975) and Cunliffe (1982) committees, MAP2,

PPG16, PPS5 and most recently NPPF 2012/18. It is important to clarify here, nonetheless, that none of these documents is legally binding; the procedures and policies of the NPPF and the principles of CRM and ‘preservation by record’ are only legally applicable if and when they are explicitly mentioned in the contract for pre-development work. Although this point is discussed further in chapter seven of this thesis, it is sufficiently important to reiterate here; archaeology contractors study and store the material that they collect despite the fact that this is rarely explicitly specified in the contract with their clients and, in most cases, it is the companies themselves which have to fund this (see appendices B and C for ref.). The ethical choice that (most) archaeology contractors make, to fund the conservation of the material without being legally obliged to do so, warrants further explanation.

The ideas imbedded in CRM systems and the tenet of ‘preservation by record’ which result in the operational ethics of collecting and conserving material and data as the representations of past cultural activity has been described as:

an important stimulus to the development of theory and method in archaeology. The need to produce rational justifications for efforts to protect from destruction the material remains of past human action, be it structural remains, monuments, or portable artefacts and their stratigraphic context, is recognised both by professional archaeologists as well as by interested members of the public. For the archaeologist this is a matter of protecting the data base of the discipline. (Murray 1989, 58).

The actions of archaeologists in selecting and collecting objects during investigation projects is one link in a long chain of events which are all connected by a single thread – the premise of being carried out with the aim of providing a measurable public benefit. This metaphoric chain is commensurate with other preventative measures put in place for protecting

the environment. This brings us to the question of who decides that CRM is the right approach for pre-development work.

A CRM strategy is one possible approach that LPAs and councils may take, but they are under no legal obligation to do so and they can pick which aspects to implement and enforce (as per the Localism Act 2011, the TCPA 1990, and the 'Precautionary Principle' discussed above in section 4.2). Where LPAs opt for a CRM approach for evaluating potential environmental damage, initially an office-based assessment, obligatory under the NPPF 2012, consulting the Historic Environment Records (HER) will take place (Schofield, Carman & Belford 2011). If this assessment suggests the possibility of archaeological remains at a site which is about to be destroyed as part of a new land development then the LPA may require that further investigation and assessment take place (fieldwork which may include excavation) as a condition to granting the development application. When such conditions are placed by LPAs prior to granting development applications, this is done in the public's interest for an assumed public benefit, not as an automatic reaction to the submission of the application (Merriman & Swain 1999). In many county councils and other LPAs, no such conditions are imposed. Stevenage Borough Council discussed in the Six Hills Ancient Monument example in section 3.2.1(2) above is one such LPA.

CRM strategies may include, but are not limited to, a Written Scheme of Investigation (WSI) which sets out the proposed research aims and methodology, and a Post-Excavation Assessment (PXA), which is part of the report produced after completion of fieldwork. The purpose of CRM strategies that include WSI and PXA is to carry out field research with the aim of offsetting the destruction of archaeological remains through records and the conservation of the archive for public benefit. Accordingly, the expected product of CRM projects, whether carried out for commercial clients, the LPA or anyone else, is an archaeological archive which includes all the reports produced, objects collected and all other

data gathered and recorded during the process of the investigation. In contrast, under academically-driven archaeological projects, which are concerned with theoretical research questions, the expected product of the project would be an enhanced understanding of the historic environment through data analyses and research (D. Perring, supervisory meeting). As a result, there is an apparent divergence of opinions regarding what constitutes ‘public benefit’; an archaeological project which is initiated to offset the impact of land development by way of preserving the archaeological resource necessarily places a high value on things that can be conserved (Cooper-Reade 2015).

5.1.1 An ostensibly divided sector

The current situation of archaeology in England has been described as two parallel archaeological sectors – academics aiming to enhance understanding through research, and archaeological contractors aiming to offset the destruction of cultural resources by carrying out field research and recording and conserving the results (Bradley 2006, 4; Carver 2011, 75; Southport Group 2011, s3.4.9). This description leads to the perception that there is a rift between development-led archaeology, which aims to inform planning authorities regarding the management of cultural resources, and academic-led archaeology as a social discipline providing a cultural value (Merriman & Swain 1999, 251). In recent years, as development-led archaeology became the predominant force driving the entire archaeology sector forward, both financially and in terms of work volume, it became viewed as a self-interested industry separated from the principles of social research-driven academic archaeology discipline – ‘what began as an intellectual enquiry can easily become a technical exercise’ (Bradley 2015, 24). In a previous publication, Bradley refers to the effect of these perceptions:

For at least forty years it has seemed as though there are two distinct traditions in field archaeology, one devoted to academic research and the other to the documentation of antiquities threatened with destruction. Each is undertaken by different people, funded by different sponsors and their results are disseminated in different ways. The contrasts between them seem so pervasive that it is tempting to describe them as two cultures. (Bradley 2006, 1).

This perception is primarily the result of development-led archaeology being based on an empiricist scientific methodology in which data is considered an important representation of a plausible ‘truth’, whilst academic archaeology is more focused on gaining knowledge through a process of testing the fallibility of theoretical arguments. This point is of crucial importance to the issues discussed in this paper; it is the scientific ethos of collecting and studying data and conserving the evidence so that proposed hypotheses can be re-examined and contested which has resulted in the modern archaeological practice of keeping recovered material and obtained information as a representative sample of the evidence collected.

Nevertheless, a primary aspect of the ostensible divide between academics and contractor archaeologists is the very limited use of archaeological material collections and archives as an academic research resource (Southport Group 2011; Fulford & Holbrook 2011, 324; Edwards 2013). This creates an apparent separation of values between those who regard archaeology’s primary purpose as conservation (particularly evident in previous Government regulations such as PPG16 and MAP2, hence the concepts of ‘rescue archaeology’ and ‘preservation by record’), and those who consider the pursuit of knowledge through research to be the main objective of archaeology (Andrews & Barrett 1998, 41; Lipe 1996, 24; Southport Group 2011, s3.2.1). Although these values may seem complementary, in the sense that the conservation of the past through the records of archaeological investigations can, and do, go together, these two positions require such different methodologies in research theory, fieldwork

practices, and the use of the expected product, that indeed there appears to be a disciplinary fracture between them (Perring 2016). Archaeologists working within the regulations of the planning-led industry of CRM conceive, consume and produce archaeology so differently from academic archaeologists that it is difficult to see much common ground in their seemingly parallel pursuits of providing measurable public benefit through recording, studying and conserving the past (Tilley 1989, 276; Carver 2011, 67; Holtorf 2015, 410). Such views may lead to:

the unwarranted perception that archaeological work has become a planning-driven routine of uncertain public benefit, a box-ticking exercise of fleeting attention that offers poor rewards to all involved (Perring 2016, 12).

It has even been argued that CRM-led projects cemented archaeological archives as a substitute to research design, as there was less need to worry about research objectives since the entire record of the site would be preserved (Chadwick 2000). A counter-argument has been made, however, that development-led archaeology has to operate under rigorous procedures, which archaeological contractor companies also have to adhere to, so that research design (WSI) and post-excavation reports (PXA) are now produced to a higher standard than they have ever been (Perring 2016; Schofield, Carman & Belford 2011, 103; Nixon 2017).

The quality of excavation work and project reports notwithstanding, there is an apparent divide of philosophies between the expected product of CRM projects, where the emphasis is on the final archive and reports, and the more abstract values of theoretically-driven academic research. The difference between the hypothetical product of academic research and the measurable product, in terms of reports produced and archive generated, of development-driven archaeology, creates the aforementioned perception of a fractured archaeology sector. This perception is the unwelcomed and an unnecessary side-effect of the fact that today most

commercial archaeological investigation projects are driven by and conducted under the umbrella of development-led CRM strategies using a ‘preservation by records’ method.

A further caveat here is that the perception of a growing separation between contractor and academic archaeologists is also leading to an ostensible dichotomy between the archaeology sector and the museum sector who are expected to curate the material assembled during pre-development work (Perring 2016). As contracted archaeology becomes more commercially-motivated and reliant on the housing development industry, the apparent separation between the museums and the archaeology sectors is becoming increasingly difficult to bridge. Worse still, the bigger and more efficient development-led archaeology becomes, the wider this perceived gap appears to be. The effect that these unfortunate views are having on the archaeology sector has been described thus:

That there are two cultures [contractors and academic archaeologists] here is undeniable... those with an archaeological pedigree see it as fundamental to ensure the long-lasting record in the HER (Historic Environment Records) and archive centre and through publication; the other considers the records to be of little value once they have been [used to] enable the right decision to be made. (Southport Group 2011, s3.4.9).

As well as highlighting the issue of a perceived disciplinary fracture within the archaeology sector, this quote also raises further questions such as whether the archive generated in small pre-determination investigation projects should be considered as having the same value as archive generated in larger, more informative projects. Should archive from pre-determination projects, where the objective is to inform decision-making authorities and the value of the archived material is probably lost once the decision has been made, be preserved in perpetuity in the same way as archive from larger projects where the archive itself is

considered an important mitigation exercise to the destruction of the site? The answer, which is discussed further in the next section under Public Benefit, is a complex one and should, in theory at least, depend on the potential research and public interest which could be obtained by preserving the archive. This then raises the questions of whether public interest might not be better served by discarding archived material which is of little value in terms of potential research, and, if so, who should be making this decision?

The apparent separation within the archaeology sector is compounded by legal misinterpretations concerning the transfer of title to objects discovered during archaeological investigation projects because, especially for archaeological contractor units, it is difficult to promote researchers' access to the material without knowing for certain who owns it. Legal uncertainties can thus hinder the use of archaeological archived material, limit the potential public benefit of this resource and even reduce the value of archaeology as a social discipline. The aim of providing a public benefit through the instigation of CRM procedures and 'preservation by record' methods is the strand connecting the various links in the chain that make up the archaeology sector. This 'thread', this legal concept, this notion of providing a measurable social benefit is the one thing interwoven through all archaeology-related endeavours – whether it is the bureaucratic workings of a council's planning committee, the hypotheses contested by academic archaeologists, the actions of trowel-wielding archaeologists or the work of a museum curator putting a box on a shelf – ultimately the purpose is to provide a benefit to society.

The aim of providing a measurable public benefit is the bridge connecting academic and development-led archaeology (Cooper-Reade 2015). The archaeological material and data recovered during pre-development work is the vehicle from which academic hypotheses should be drawn and theories tested. The objects collected during development-driven work and conserved in a box on a shelf can be perceived as 'the impartial witnesses to the past, bearing

the marks of their makers, their uses and the social and cultural value attributed to them in the past and in the present' (Chapman & Wylie 2015, 3). With this in mind, it is clear that archaeological archives and the data, information and material contained within them are crucial tools for archaeology, allowing the archaeologist to maintain the public benefit of the discipline in providing a cultural resource for future social use.

5.2 Public benefit

Providing a benefit for society through scientific work is the key premise of archaeological enterprise (Cowell 2008, 128) and is, therefore, also the centre of gravity of this research paper. This section concerns the notion that archaeology is primarily a scientific endeavour aimed at providing a public benefit. The discussion in this section also directly relates to the charitable status of most archaeology contractor companies, and also serves to clarify legal issues by substantiating claims of possessory entitlement (e.g. taking possession of someone else's property may be considered lawful when it is done for public benefit reasons, as discussed at section 7.2 regarding *Sorrell*⁵⁶). Furthermore, understanding the legal issue of demonstrating public benefit can serve as a bridge to overcome the apparent gap between academic and development-driven archaeology. This section examines the concept of 'public benefit' within development-driven CRM archaeology and the application thereof.

The concept of 'public benefit' should be questioned at every step of archaeological projects, considering the public benefit of:

- (i) aiming to protect the environment through applying the 'Precautionary Principle';
- (ii) prioritising the protection of archaeological remains (the historic environment);

⁵⁶ *Sorrell v. Paget* [1950] 1 KB 252 [1949] 2 All ER 609, 93 Sol Jo 631, 65 TLR 595

- (iii) imposing a development application approval condition (by an LPA);
- (iv) carrying out a brief and/or desk-based assessment;
- (v) recovering, collecting and retaining objects discovered during fieldwork;
- (vi) selecting which objects to remove from a site;
- (vii) analysing the material (recording data obtained, submission of report);
- (viii) choosing a sub-sample of objects to conserve in the archive or discard;
- (ix) storing the archived material (rationalisation);
- (x) funding the preservation of the entire archive in perpetuity.

As a result of archaeologists tending to work only at certain segments of the entire investigation project, it might be easy to overlook the requirement that ‘public benefit’ be demonstrated for each of the above stages. As Holtorf put it:

It is essential for archaeologists to understand better in which ways their subject matter and professional practices are meaningful and valuable to people and how an applied archaeology can provide concrete benefits in contemporary society, beyond amassing ever more objects and knowledge of the past. (Holtorf 2013, 15).

Following Holtorf’s argument, it is important that archaeologists, both in the pre-development sector and in academia, know and can explain how their pursuit of collecting archaeological data serves the public’s interests. Nevertheless, persuasive as the quote above from Holtorf first appears to be, the key here is to understand that archaeologists do create a resource in the form of data obtained, information preserved and material conserved (Cunliffe 2011, 7). Without archaeological investigation projects, this resource will not come into being – this is the public benefit which archaeology provides (Cooper-Reade 2015). Archaeologists do not focus on the collection and conservation of material; it is the study of the collected data

and material in order to ascertain information and enhance understanding which is the primary aim of archaeology (Thomas 2019).

The verification of ‘public benefit’ can look very different across the various stages of archaeological investigation projects. Whether it is in academia where the resource is utilised for research and acquisition of knowledge, or in the development-driven sector of archaeology where the resource is created and, in most cases, conserved, the creation and utilisation of a cultural resource is at the heart of archaeological scientific pursuit (Thomas 2019).

The consensus is that archives are often seen as the end product of a project and that once in store they are left gathering dust and fulfilling no useful function. In reality they are often regularly accessed to inform other projects, either planning-led or academic and they also serve to inform a growing knowledge base in museums (as the typical archive repository) and the communities they serve. They already facilitate the work of researchers, schools and other learning groups and individuals. Archaeological archives are the principle source of information about the archaeology of a local or a subject. They have the potential to inform and enhance many routes of enquiry into the past. (Southport Group 2011, s3.3.1)

Philosophical and pragmatic debates notwithstanding, public benefit or public interest is a social concept and a legal term which has to be viably demonstrated. The problem is, however, that because archaeological material is continuously assembled, the proportion of material being used to enhance understanding is getting increasingly smaller (Merriman & Swain 1999, 257). This negates the notion that the material is collected and kept, as a cultural resource, for a specific public benefit – because such a function needs to be demonstrated. Planning conditions and Written Schemes of Investigations are put in place in the public’s interest. The discussion here, however, refers to the use of archived material many years down

the line after the initial benefit from the project has been attained. It can be difficult to argue that archaeological archives have an intrinsic and innate cultural value, derived from their social function as a resource, if there is very little use of them (Merriman & Swain 1999, 256). These issues have been identified since the early days of professional archaeology in Britain, and were met with demands that archaeologists demonstrate the social benefit that their work provides. As Gathercole asserted in 1975:

British archaeologists have been slow to capitalise on their initial breakthrough in publicising their subject, by translating their discoveries into the solid stuff of history. It is not surprising, therefore, that the support they receive from outside their discipline is emotional rather than intellectual. The... British public, plagued by the manifold inadequacies of a failing social system, may not be prepared to subsidise for much longer a subject which makes so much of its appeal on the basis of the wonderment of digging. (Gathercole 1975, 313).

Currently, all regional archaeological archive repository centres and the majority of museums throughout the country require some form of public funding to support their budgets (Museums Association 2017). Archaeology contractor companies enjoy some financial support as most are listed as charities, meaning that they are exempt from paying taxes. Furthermore, in development-driven projects, archaeologists' actions are aimed at getting paid for producing a report for their client who can use the report to discharge a planning condition imposed by an LPA (Cooper-Reade 2015). The gathering, recording, analysing and conserving of material and data is a choice made by archaeology contractors. They choose to act in a scientifically ethical manner but this remains their choice, they are under no legal obligation to operate within the principles of CRM using a 'preservation by record' method. This choice by archaeology contractors has been referred to by D. Perring as, the 'ethos of archaeology' (Perring 2018, supervisory meeting, ref. in appendix B). With few exceptions, most archaeological contractors

provide archive facilities for the material which they collect during pre-development fieldwork and seem to be doing so out of a sense of civic duty to protect cultural artefacts, which also helps them to demonstrate the public benefit of their work.

On the other hand, archaeologists' choice to amass more and more objects leads to a situation where the assembled material can potentially be viewed as a financial burden rather than a resource (Merriman & Swain 1999; Shepherd 2015, 135). All the more so because the companies are not paid for the long-term conservation of the material – by and large, archaeology contractors are only paid for the work stipulated in their contract which would very rarely include any reference to the long-term conservation of the assembled material. Currently archaeology contractors factor into their budgets the costs of conserving material (D. Perring, supervisory meeting), but perhaps in the future they might make a different financial choice (for the legal aspect of these contractual obligations see further discussion at chapter seven).

The understanding that there are already too many object collections being kept in boxes on shelves and that this situation negates the notion that archaeology is carried out for the benefit of society is aptly percolating into the minds of everyone involved in development-led archaeology work (Merriman & Swain 1999; Brown 2015, 4). Archaeology should be a scientific endeavour aimed at pursuing the acquisition of knowledge for the benefit of humanity (Rathje, Shanks & Witmore 2013, 6; Thomas 2019). Nonetheless, the continuous collection of ever more objects and data makes manifesting the cultural-scientific value of archaeology as a discipline excruciatingly difficult to demonstrate because it blurs the social benefit which can be attained through the conservation and study of archaeological material (Merriman & Swain 1999; Brown 2015). Thus the archaeology sector is now at what appears to be a crucial crossroads in its history – archaeologists need to make a difficult choice between carrying out scientific work with the aim of contributing to society, or being labourers who collect objects

and compile records of finds because this is what they are paid to do (Chadwick 2000, 2; Cooper-Reade 2015).

In addition to this point, public benefit is not simply a theoretical philosophical-ethical construct; it is also a legal concept that has to be viably demonstrated and exercised.

5.2.1 Public benefit in law – possession of property for public benefit reasons

As well as the ethical difficulties discussed in the section above, the opaque nature of the social value and function of keeping increasing quantities of archaeological material also creates a legal difficulty in establishing ownership of the objects recovered during pre-development work. Determining title to object collections can depend on ascertaining the purpose for which the objects were collected and kept, which relies on showing a clear functional basis for the action (taking possession) and demonstrable public benefit to it (Palmer 2002, 384; Palmer 2009, 1463; and also the decisions in *Waverley*⁵⁷; *Tucker*⁵⁸; and *Sorrell*⁵⁹). In order to address these issues clearly, I present here a court case (*Sorrell*⁶⁰) that illustrates the circumstances in which the possession of someone else's property is allowed, and two examples (the wallet and the bomb) for elucidating the difference between possession and title as applied to archaeological material collections.

The problem with invoking property legislation for managing archaeological material collections is that it can be a double-edged sword; if archaeology is conducted so as to provide a demonstrable public benefit then there should not be legal uncertainties regarding title to the recovered objects; if there are legal doubts regarding who has title to the material assembled

⁵⁷ *Waverley Borough Council v. Fletcher* [1995] 4 All ER 756 at 757

⁵⁸ *Tucker v. Linger* [1883]. 8 App. Cas. 508

⁵⁹ *Sorrell v. Paget* [1950] 1 KB 252, [1949] 2 All ER 609, 93 Sol Jo 631, 65 TLR 595

⁶⁰ *Sorrell v. Paget* [1950] 1 KB 252, [1949] 2 All ER 609, 93 Sol Jo 631, 65 TLR 595

during development-led work then such doubts could undermine the notion that archaeology is a social discipline carried out for a viable public benefit. If the public benefit of an action can be viably demonstrated then it would be permitted by law.

This was the explicit ruling in *Sorrell*⁶¹, in which Mr Sorrell's cow was discovered standing on a railway line and the court considered the removal of the cow by Mr Paget as lawful even though the action of taking possession of the cow could have been considered as tortious trespass (interference with someone else's property). In this case, after many years of neighbourly feuding, Mr Sorrell sued Mr Paget for taking his cow off the railway lines and keeping it for two days. Before Paget removed Sorrell's cow from the railway line, he called the rail company requesting that they stop the train – this was a clear demonstration of his intentions to protect the train passengers and his concern for public safety. The court ruled that Mr Paget acted lawfully and in the public's interest and that therefore Mr Sorrell should cover Mr Paget's expenses in feeding the cow for the two days when it was in his possession. Archaeologists employed in pre-development work should strive towards being able to demonstrate the public benefit merit and potential social gain of their actions to the same level as Mr Paget.

From an archaeological perspective, it is difficult to define CRM and 'preservation by record' as procedures which only take place in the public's interest. This is because the majority of pre-development work is undertaken in a commercially-motivated environment where payments are exchanged for a product and the assumed public benefit is a form of commodity (Cooper-Read 2015). Alas, the common law is even more ambiguous than archaeologists in defining precisely when an act constitutes 'public benefit':

⁶¹ *Sorrell v. Paget* [1950] 1 KB 252, [1949] 2 All ER 609, 93 Sol Jo 631, 65 TLR 595

The authorities do not provide a comprehensive statement of the public benefit requirement but provide rather a series of examples of when the public benefit requirement is or is not satisfied. There is no application of some overarching, coherent, principle by which the Courts have been guided. (*Attorney General*⁶²).

The difficulty in demonstrating a specific social function for collecting and storing archaeological material may, therefore, create a legal uncertainty regarding the transfer of title to objects collected during development-led fieldwork. In order to ascertain ownership of, or title to, archaeological object collections we would need to first determine the value of the material; in order to define the value of archaeological material we must define its social function or the public benefit of its collection. Thus, the purpose for which archaeological material is recovered and kept could be essential in establishing who has title to it. The ownership of the archaeological record, as a form of movable property, could depend on demonstrating its social function, the public benefit of its collection and its potential value in the contextual information it may contain. These difficulties can be illustrated by the complex convolutions of the Human Rights Act 1998, Part II, Article 1 – Protection of Property:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law (my emphasis).

The issue then becomes how to establish whether the legal definition of ‘public interest’ has been achieved during the course of pre-development contractual archaeological work, and whether this legal definition applies to the conservation of assembled material. The key to the apparent oxymoron in the Human Rights Act 1998, and its contradiction with the Attorney

⁶² *Attorney General v. the Charity Commission (The Poverty Reference)* [2012] WTLR. 977, 34

General v. the Charity Commission case, is to demonstrate the public interest or benefit, of an act which could otherwise be considered as tortious. This can be particularly complicated once we consider that the archive generated in the course of development-led projects takes the form of a cultural resource extracted from privately owned land (Merriman & Swain 1999; Brown 2015).

The answer is not to look at the ownership of the items but at whether their possession was obtained in good faith (Palmer 1998; Ulph 2015). For example, finding a wallet in a public building and handing it over to the building's receptionist could be considered as tortious intervention with someone else's property (the owner of the wallet). There is nothing in the law which states that one is authorised to take possession of the wallet or indeed to hand it over to the receptionist, or for the receptionist to accept possession of the wallet without knowing for certain who owns it – except when it is done for a demonstrable public benefit, i.e. in good faith and not for personal gain (as per the decisions in *Sorrell*⁶³ and also discussed in *Parker*⁶⁴ per Donaldson LJ (see chapter seven at s7.1.2). Assuming, for the purpose of this example, that the receptionist refuses to accept possession of the wallet then the person who discovered it and picked it up becomes bailee of the property and potentially liable towards its owner (bailor). The person who picked up the wallet and has taken possession of it is thus responsible for its safekeeping (Palmer 1998). If the receptionist did accept possession of the wallet then the legal duty of care transfers from the person who discovered the wallet to the receptionist and the receptionist becomes bailee with the legal responsibilities entailed. In such circumstances, legal responsibility and obligations (duty of care) transfer as per acceptance of possession but without entailing a transfer of title (as the receptionist at no point obtains title to the wallet, they may only have entitlement to possess the wallet which is derived from the action being

⁶³ *Sorrell v. Paget* [1950] 1 KB 252, [1949] 2 All ER 609, 93 Sol Jo 631, 65 TLR 595

⁶⁴ *Parker v. British Airways Board* [1982] 1 All ER 834

carried out in good faith and not for personal gain). Following this example, we can consider archaeology contractors as the person who finds the wallet and archive repositories or museums as the receptionist who may or may not accept responsibility for property without knowing who has title to it. Bearing in mind that museums intend to keep accessioned material in perpetuity, this example explains some of the initial reasonings behind museums' refusal to accept possession of archaeological material without also gaining title to it (see Ulph 2015, and further discussion at chapter seven below).

The problem is that picking the wallet up (taking possession of it) can be regarded as wrongful interference with goods under the Tort (Interference with Goods) Act 1977. The only reason such an act would be lawful is when it is done in good faith for public benefit – the aim and intention of returning the wallet to its owner (Palmer 1998; there could be other justifications, such as preventing injury, but these are not relevant to the discussion here). Assuming the receptionist, in the example used here, does not know whether the person handing the wallet in picked it up in good faith or whether he intentionally took it out of someone's bag, the receptionist then has to make a decision based on trust. For this reason, it is crucial that archaeology contractors are able to demonstrate that their actions are undertaken in good faith for public benefit (as per decision in *Sorrell*⁶⁵).

This is not a theoretical-philosophical issue; it has clear legal and practical implications. This also makes clear, however, that property legislation is not the be-all and end-all in determining the function and value of assembled archaeological material (Prott & O'Keefe 1992; Smith 2011). The management of archaeologically-recovered material is determined by a whole range of factors, including financial constraints, storage space difficulties and, above all, trust in the notion that the acquisition of the objects was done in good faith for a viable and

⁶⁵ *Sorrell v. Paget* [1950] 1 KB 252, [1949] 2 All ER 609, 93 Sol Jo 631, 65 TLR 595

demonstrable public benefit (Holtorf 2015). This presumes that this ‘trust’ between archaeology contractors and archive repository facilities already exists – if it does not then it means that the archive repository or museum are accusing the contractor of committing a civil wrong under the Tort (Interference with Goods) Act 1977.

A further example that can help to clarify legal issues relating to pre-development archaeological fieldwork is the case of an unexploded WW2 bomb being discovered during archaeological excavation in March 2017, during the Brondesbury Park in London excavation project (Powell & Smith 2017). In such an event, for public safety reasons and in accordance with health and safety regulations, the bomb disposal unit would have to be called and the device would need to be deactivated and removed from the site. It would be counterproductive and illogical for anyone to say that the disposal or deactivation of the bomb would have to wait until permission from the landowner was obtained. If the landowner wished to regain possession of the bomb after its decommissioning, they would be free to do so by contacting the police. The point here is the legal difference between the actions of an officer of the bomb disposal unit and those of a professional archaeologist employed in pre-development fieldwork – they both discover and take possession of something which does not belong to them as part of their job. The difference is in their ability to demonstrate a clear public interest in their actions.

Thus, in order to eliminate legal uncertainties regarding the ownership of material assembled during pre-development work, archaeologists must strive to clearly demonstrate the public benefit merit of every aspect of their endeavours – from the imposition of planning conditions (by the LPA) through the fieldwork and the recovery of artefacts and ending with the storing of the assembled material in a box on a shelf (Holtorf 2013).

Following the examination of the policies and guidelines governing how and why development-led archaeological work is conducted, the case studies presented in the next chapter concern the application ‘on the ground’ of these policies, regulations and guidelines during and after archaeological CRM-based work.

Chapter 6: The case studies

6.1 Introduction to the case studies – research method and data selection parameters

The analysis and discussion of the case studies is used here to examine the practice of CRM-based archaeology and as examples to illustrate many of the broader issues discussed in this thesis. To reiterate and clarify the discussion from chapter two, it is worth noting that the research method and data analysis technique used in this part of the thesis follow the ‘qualitative case study research methodology’ guidelines recommended by J. Gerring, of conducting ‘un-interfering observations’ (Gerring 2007, 26). The underlying aim of this method was to address the questions of (i) why is the work taking place? (ii) why are objects collected during the work? and (iii) why is a sample of the recovered objects retained in the archive? Addressing these questions correlates with the legal issues examined in this thesis, the focus here is on identifying patterns of practices. The data analysis method used here aimed at ascertaining whether discovered objects are collected as a matter of practice by extrapolating meaningful information through the examination of a small synodic sample to achieve general observations that indicate common practices, rather than to provide a comprehensive account of development-driven archaeology across England. The case studies sampling strategy and data analysis method aimed to be an illustrative cross section of a variety of contracts and curatorial arrangements by delineating the operational relationships of archaeology contractors with their clients, planning authorities, consultants, archive depository centres and museums. Therefore, the case studies presented here provide an illustrative example of archaeological practice, from excavation through to storing recovered items, across various counties and planning authorities and for different scales of work. The seven case studies are presented here as narrative/descriptive accounts, tracking the decision-making exercises involved and the

issues arising from them. As well as illustrating certain issues discussed in this thesis, the use of project-based case studies adds an important source of primary data in terms of exploring the creation and management of an individual archaeological object collection which forms a part of an archaeological project archive. The project-based case studies are presented here with particular reference to the instruments (i.e. regulatory, commercial, scientific, etc.) which determine their operational method; the agents involved in the process, such as the LPA, county archaeologist, developer, consultancy company, archaeology contractor; and the expected archive repository centre or museum.

Where permission was given and in accordance with UCL data protection rules, some of this data is included in appendices B and C (information and data not included in the appendices is available on request per UCL's procedures). A conclusion of the analysis of the case studies is provided at the end of the chapter. With the exception of the Wiltshire Museum case study (at s6.6), where the data collection method was in an interview format, the research method is based on the direct examination of data, as opposed to survey methods used in other publications (i.e. site visits, not surveys, see Edwards 2013, survey report). UCL data protection policy and guidelines (as per <https://www.ucl.ac.uk/legal-services/data-protection-overview> (accessed in June 2018)) were followed throughout this research with no exceptions. Although much of the information discussed here regarding the case studies was corroborated through correspondence, ultimately the research presented here is the result of analysis of data gathered, selected and examined specifically for this research.

The strength of case studies as a data collection method, within the parameters of this particular research, has been to highlight specific issues that characterise many problems in development-driven archaeological work. This research method enabled the evaluation of the availability of information and material obtained during pre-development projects which took place in different places and for different reasons, with an emphasis on examining the function

that holding a sub-sample of the objects collected during these projects provides. In order to gain relevant and effective results, case studies were selected that took place consequent to a development approval condition imposed by an LPA and that information relating to the entire project (from planning through to boxes on shelves) was available. When it came to presenting the results, case studies which did not meet these criteria or did not show anything new had to be excluded or were reused as shortened examples elsewhere in this paper.

The stipulations used here for selecting case studies are, therefore, that all the information relating to the project is available and that a sub-sample of the material recovered during the fieldwork is conserved in an archive. Consequently, the main weakness of this research method can be identified as the necessity to rely on the information that people chose to make available. Admittedly, this research method also created a strong bias in favour of projects where data is accessible and material is kept. However, to use case studies with partial information, where certain information was refused or where no material has been kept in the archive, would have been too speculative. Furthermore, an archaeology contractor which does not maintain an object collection as part of its archive facility would most probably not be interested in publicly announcing this fact. After the fieldwork is completed, archaeology contractors are under no legal obligation to report to anyone how much material they collected during the project, what sample size they selected out of the recovered material, what standards of material preservation they adhere to, or indeed whether they have long-term curatorship facilities for the material that they keep (Boyle, Booth & Rawden 2016). Currently there is no archaeology ombudsman position in England.

Pre-development archaeological projects, by definition, differ from one another. If they did not, they would repeat results of previous projects which would negate the need to impose the development application condition in the first place, as the information should already be

available (as discussed above in s2.3; see Curwen 1937, 6; Bradley 2015, 24). The sample provided here is therefore a synecdoche example of the whole.

The case studies are largely discussed in ascending order, starting from the smallest, in terms of the project itself and the quantities of recovered material with the Honeywood case being an exception (because it is discussed within the Kent case study).

In the first two case studies, Deyntes Cottage and Moorfield School, the requirement to provide a documented transfer of title to the material which archaeologists recover before the collected objects can be deposited in an archive repository facility or museum is scrutinised. The exploration of these case studies provides a particular reference point for addressing the practical difficulties caused by the legal issues discussed in this thesis.

The situation in which no archaeological material repository facility is available in the counties concerned is addressed in the case studies of Hoo Road and Kent County Council (CC). In the Kent CC case study, the example of the Honeywood Parkway project is used to illustrate the issue of availability of information and to examine the argument of who should keep the collected material and data. This enables scrutiny of whether the type of CRM strategy employed by Kent CC can be regarded as mitigation of potential environmental damage when the project archive is, as is often the case, kept by a private company in a different county. Additionally, in the Kent CC case study, the council's decision not to provide archaeological archive repository facilities is measured in terms of compliance with current legislation and policies, in particular the requirements of NPPF 2012/18.

The Wiltshire Museum in Devizes case study presents problems relating to the long-term curatorship of archaeologically-recovered object collections. This case study is different from the others because it primarily concerns a museum which is expected to receive and house archaeological material irrespective of the potential archaeological value of the objects

themselves and regardless of the fact that the museum was never set up to be a storage facility. This case study provides the museums' perspective on the issues discussed in this thesis. The analysis of the data from this case study clearly shows that museums cannot provide a long-term storage solution for archaeological material obtained during pre-development archaeological work because, by and large, museums have a limited and finite storage capacity and are not financially aimed at curating the ever-increasing amount of objects assembled by archaeologists. This case study shows that museums and archaeologists operate under different guidelines and policies and have different criteria for accepting objects into their collections. This case study also further illustrates the practical and ethical contradictions caused by councils and LPAs employing CRM strategies, of imposing development conditions, irrespective of the fact that there is no available space for keeping the collection of objects resulting from the work associated with these conditions – thus potentially negating the underlying 'public interest' purpose of imposing such development conditions in the first place.

The issues of shortage of funding and lack of facilities for housing archaeologically-recovered object collections were also identified as pertinent to Sussex, Leicestershire and Rutland. The case studies of Leicestershire and Rutland were ultimately excluded from the presented thesis as the analysis of the evidence did not contribute to advancing the research, however, some of the information relevant to these case studies was included in other parts of the thesis (referenced accordingly and in appendix C). The examination of these case studies suggests a good level of collaboration between the people involved in the implementation of CRM strategies in these counties, which makes archaeology accessible to the public and in the same time enables land development to proceed.

The last case study discussed presents an optimistic view that, after many years of being used as an example to illustrate the problem of lack of archive storage facilities for archeologically-recovered materials (Brown 2015), Northamptonshire CC has been awarded a

National Lottery grant to construct a regional archaeological archive repository centre which is expected to become operational in mid-2021 (verified in a phone call with the facility curator in October 2020). Nonetheless, this case study also illustrates the practical issues arising from the legal misunderstandings discussed in this research due to potential inaccuracies in its newly issued (January 2020) procedures. This encapsulates the prevalence of the issues addressed in the research presented here and the imperativeness of publishing this thesis to reduce superfluous bureaucracy in the sector.

6.2 Deyntes Cottage, Ealing Road, Northolt, UB5 6AD

This small and, as it turned out, archaeologically insignificant project is a good example of many of the problems discussed in this thesis regarding practical issues caused by the misapplication of property legislation for the curatorship of archaeological material obtained during pre-development work. The purpose of the Deyntes Cottage evaluation project was to provide supporting information to the Ealing planning authority in order for them to make informed decisions on whether to grant planning applications at the site and in the surrounding area (Warshaw, Beech & Cartel 2006/2007, at s54). The aim of this case study is to examine the issues which occur as a result of the supposition that archaeologists do not obtain title to the objects which they collect and also to scrutinise the necessity for the paperwork relating to this supposition.

From an archaeological perspective, the evaluation work had a ‘negative’ result as no significant archaeological features were discovered and only six small pieces of fragmented pottery (probably late Medieval) were collected and retained. As the project took place in London, the London Archaeological Archive Resource Centre (LAARC) was designated in the WSI as the appropriate archive repository facility. As LAARC operates under the rules of the

Museum of London (MoL), however, it cannot accept any object without also obtaining title to it. Therefore, due to problems in establishing title to the six potsherds collected during the project, Museum of London Archaeology (MoLA) who carried out the work had waited more than a decade before transferring the archive to the LAARC (emails ref. in appendix C). The inference of the legislative issues which are pertinent to this case study and the argument that property law is misapplied in projects such as Deyntes Cottage is provided in the next chapter. In this case study, these problems are presented and addressed but without going as far as suggesting alternative legal interpretations or possible solutions for the issues identified.

The research method used in this case study included correspondence and meetings with the MoLA Head of Archives and a review of all the documents relating to the project, from the planning application through to the report submitted to the council. In addition, I carried out a site visit to Deyntes Cottage in August 2009, for the purpose of establishing whether the people who live there are interested in maintaining any property rights to the items which were recovered during the evaluation work. This site visit entailed taking the box containing the six potsherds and all the relevant communication to Deyntes Cottage, which today is a highly secured property surrounded by a fence with CCTV. I rang the gate-bell at Deyntes Cottage and presented myself and the reason for disturbing the current owners of the cottage and asked if they were interested in seeing the material (the box with the six potsherds) or any of the related documents. The person who answered (names with MoLA Head of Archives) said that they were not interested and did not wish to receive any further correspondence from MoLA. These were the final results of this visit, which is logged with MoLA in the project archive.

6.2.1 Deyntes Cottage project background

The plot of land known as Deyntes Cottage has been privately owned since 1331, but has changed hands many times. The current building structure, the cottage and a swimming pool, are thought to date from 1935, although the building has been renovated and extended a number of times since. As the site is located less than 80 metres south-east of a Scheduled Ancient Monument, the Northolt Manor moated site (see map below), in accordance with the AMAA, it was deemed necessary for a field evaluation project including an excavation phase to take place prior to the council granting planning permission. The purpose of the evaluation project was to ‘determine, as far as was reasonably possible, the location, extent, date, character, condition, significance, and quality of any surviving archaeological remains liable to be threatened by the proposed development’ (Hoad 1999, 7). The project was carried out by MoLA in October 1999 and comprised the excavation of two trenches (trench one measured 12m by 2m to a depth of 1.10m, trench two measured 6.40m by 12.50m to a depth of 0.50m).

The evaluation project was commissioned by the developers Knapp, Hick and Partners, on behalf of their clients (presumably the owners of the cottage and the land, although this is not mentioned in any of the documents as the contract between developers and their clients is not made public), in accordance with a development approval condition imposed by the London Borough of Ealing LPA. Sections 3 and 7 of the ‘condition of planning consent’ document issued by the Ealing LPA required that:

an archaeological evaluation work will take place in accordance with a pre-submitted WSI and pursuant to any other planning permission (Ealing Council 2000, the project’s reference numbers are, P/2000/3387; P/2000/2309; P/2000/1988; P/2000/1833).

MoLA was hired to carry out an archaeological evaluation of the potential significance of the site (Hoad 1999) prior to Ealing LPA's approval of a proposed development of extensions to the cottage (north extension of 5.4m by 8m, south extension of 6m by 5m, and an additional basement extension of 9.8m by 5.3 by 2.2m in depth). The standards and guidelines referred to in the planning application conditions, and also in the WSI (Hoad 1999), were based on the policies set by the TCPA 1990 and the AMAA 1979 which allows the 'temporary' collection of items from sites at section 54. As can be seen by Figure 5 below, Ealing Council's requirement for an archaeological evaluation of the site, prior to granting the development application, was by virtue of the Cottage being in the vicinity of a listed Ancient Monument, and the principles and guidelines of PPG16. It should be noted here that at the time the development application was submitted to Ealing LPA, neither the 1979 Act nor the Ealing Council's policies stipulated a requirement to convey property rights to objects recovered during such work. This was changed in 2007 when Ealing Council adopted amended planning policies (Warshaw, Beech & Cartel 2006/2007).

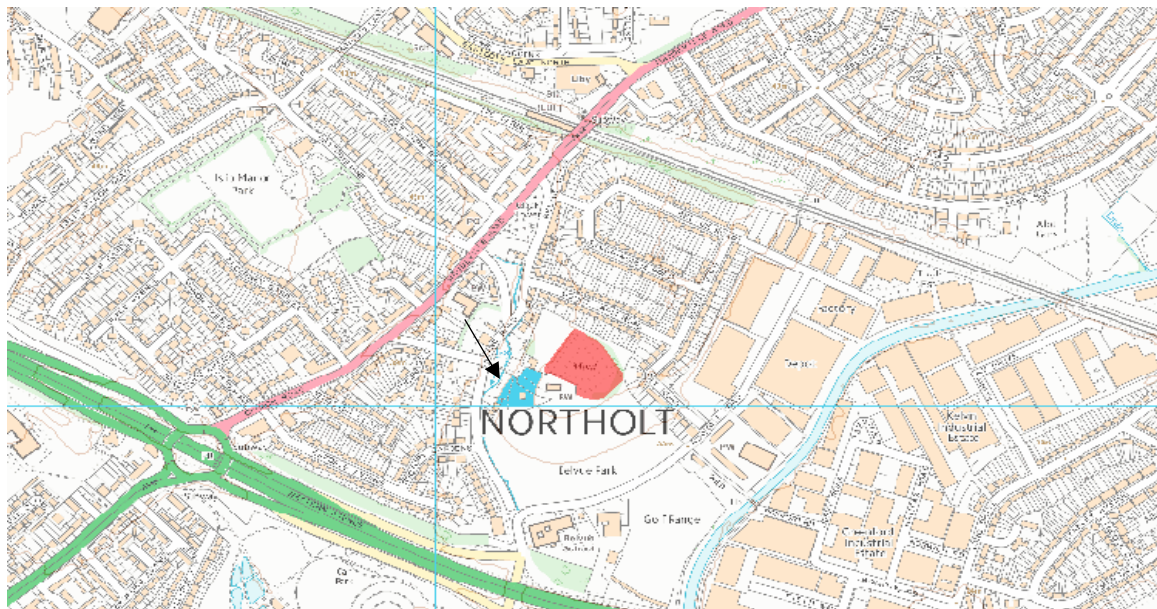


Figure 6: Map of Northolt

The map shows the Deyntes Cottage site marked with arrow and in blue colour, and the Northolt Manor Scheduled Ancient Monument marked in red.

Source: project report by MoLA. OS map Crown copyright.

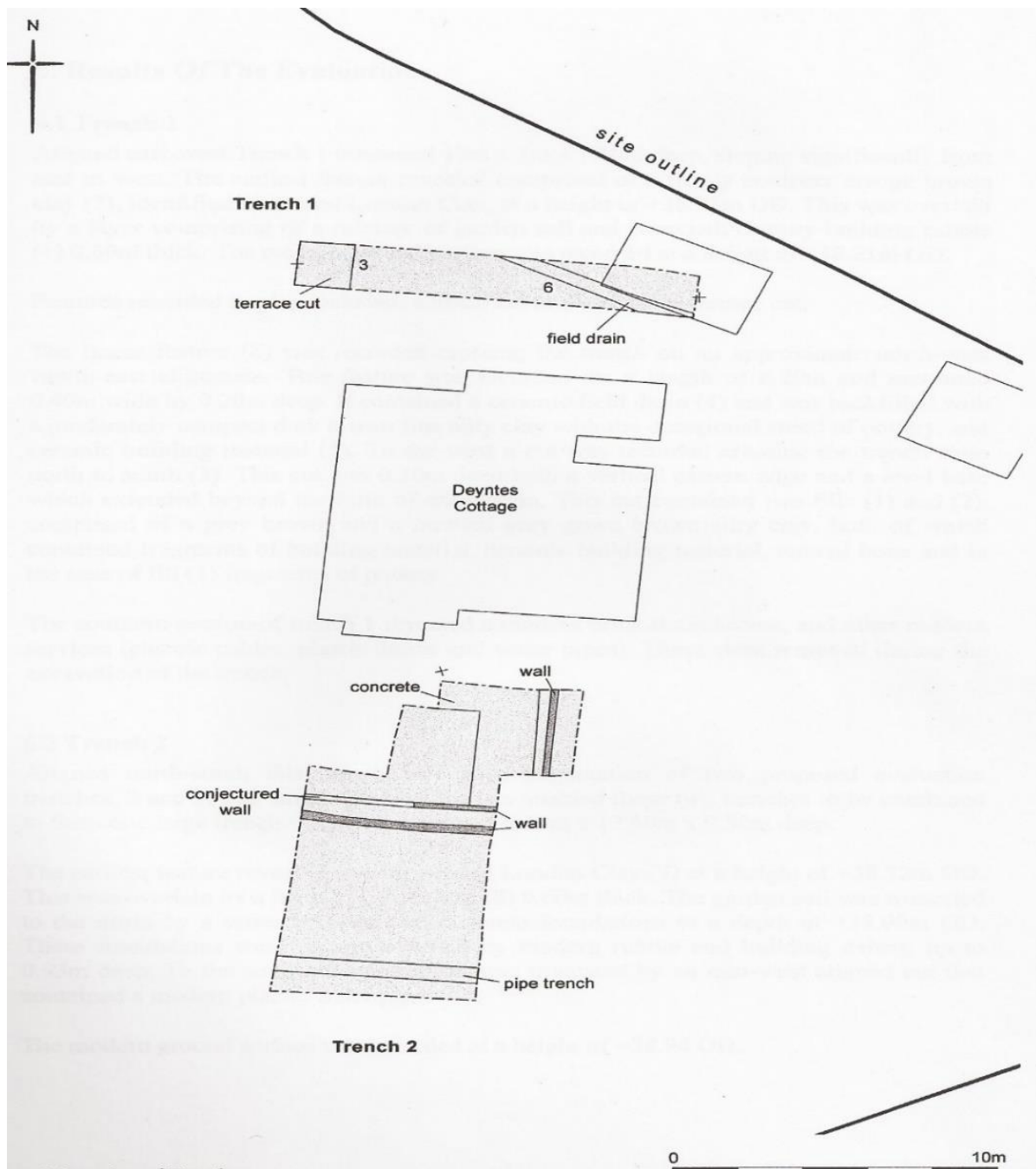


Figure 7: Trenches at the Deyntes Cottage site, excavated by MoLAS in October 1999

Source: project report by MoLA.

The land around the cottage has been substantially truncated for gardening and building works and all the archaeological features and finds have been disturbed. Consequently, no records of prehistoric, Roman or medieval activities or any clear evidence of prior occupations at the site were identified during the evaluation project. Some cuts and fills were identified, but

they were mostly intersected by modern rubble and building debris. During the project, some fragments of modern building material, fragmented ceramic building material (pieces of bricks), un-stratified animal bones and (in fill 1 in trench 1) six small late-medieval potsherds were discovered (Hoad 1999).

These six small late-medieval fragmented potsherds, consisting of less than half a shoebox in volume, are the only objects which were selected for storage in the archive.

6.2.2 Discussion of the Deyntes Cottage case study

When the project was completed in 1999, the box with the six potsherds was stored on a shelf in the MoLA archive facility. Four years later, after LAARC was opened, when the MoLA wanted to deposit the potsherds in the LAARC, the LAARC could not accept them because it was assumed that title to the potsherds was still with the landowners of Deyntes Cottage (MoLA Head of Archives, email correspondence, see appendix C). The cover letter which the MoLA sent to the owners of Deyntes Cottage includes the line:

there were a few artefacts recovered from the site (see inventory enclosed) and under English law these belong to the landowner, *i.e.* yourselves (standard form cover letter issued by MoLA to their clients, available in the MoL General Standards (Museum of London Archaeological Archive 2006).

Until 2011, the LAARC and MoLA were sister companies, albeit separate legal entities, but in 2011 MoLA became an independent registered charitable trust no longer under the wing of the MoL. During the years 1999 to 2009, the timeframe of this case study, both the MoLA and the LAARC were subsidiaries of the Museum of London, and as such, both had to operate under the policies as accepted by the Board of Governors of the MoL, as per the Museum of

London Act 1986. The MoL acquisition policy (4th edition published in 2015, this quote is from the Legal Supplement to the Acquisition and Disposal Policy published by the MoL) states that:

The Museum will exercise due diligence and make every effort not to acquire any object or specimen unless the Board or responsible officer is satisfied that the Museum can acquire a valid title to the item in question. (Legal supplement to the MoL Acquisition and Disposal Policy, s2(a), published in 2006; this policy was superseded by a newer version in 2011 (which was updated in 2016. The current version is based on s1.6 of the ACE Accreditation policy 2014). This was the applicable policy at the time of the case study discussed here).

Therefore, LAARC could not accept any item, irrespective of whether it came from its (then) sister company, without being completely satisfied that it would also receive title to the object at the same time. Consequently, as part of its operations the London branch of MoLA created a 'secondary archive' for keeping material which it cannot deposit at LAARC. In July 2009, this secondary archive contained material from 470 London sites, today there are 510 archives awaiting deposition. Thus, the same policies and legislation which require the LAARC, as part of the MoL, to preserve and protect London artefacts (MoL Act 1986, part 2, s1(a)) prevents it from accepting such items from the MoLA even when the items were lawfully obtained as part of the archaeological services required under the same piece of legislation (MoL Act 1986, part 2, s3(a); and see also ACE Accreditation policy 2014, s1.6; ICOM Code of Ethics, s2.2; MoL Acquisition Policy, s2(a), latest edition 2016).

The MoLA archaeologists collect objects during fieldwork as part of the scientific method and principles of 'preservation by record', therefore when the owners of Deyntes Cottage consented to the evaluation project, they also consented to relinquishing their title to

certain objects collected as part of the work. The problem is that the MoL has to comply with the Museums Association (MA) (or ACE) Accreditation policy (MA 2014, s9.2), which are based on the policies set by the International Council Of Museums (ICOM) which require museums to obtain title to any object prior to accepting it, regardless of whether or not it was collected during pre-development work (this issue is discussed further in the Legal Research at s7.3).

The MoL policies for overcoming this purported legal issue constitute a three-phase strategy.

Initially, the MoLA archivist attempts to contact the (presumed) owners of the object by sending a 'Deed of Title Transfer' document, a cover letter and an inventory list of all the artefacts recovered (and retained, not including the discarded objects) to the site landowners which, if they sign it, convey title to the objects to the MoL (not to the MoLA as they are (ostensibly) acting as agents facilitating the conveyance of title to, and custody of, the material from the landowners to the MoL/LAARC (MoLA Head of Archives email correspondence in appendix C).

The attempt to contact the site owners is repeated if needed, allowing a reasonable length of time between attempts – in this case study, the box with the objects was only deposited at the LAARC more than a decade after the initial attempt to contact the site owners failed. Note that MoLA does not mention the Statute of Limitations Act 1980, which states that title to objects may be forfeit six years after the action (the collection of the finds during the project) took place, which effected a statutory conveyance of title in the six potsherds to MoLA in 2005.

Lastly, assuming failure to contact the site owners fails the second time, prior to being able to deposit the material in the LAARC, the MoLA archivist completes and signs a 'Record of Due Diligence for the Transfer of Title' form (included here in appendix A). This form is a

record of all the attempts made to contact the site landowner(s) and any other information relating to the transfer of title. The Due Diligence form is used by any company who wants to deposit material at the LAARC without having had a successful response from landowners. The Due Diligence form itself does not, however, state that on completion, title to the material is conveyed to the MoL – this is only implied. It is then the MoL's or LAARC's decision as to whether or not to accept the material.

All the MoL paperwork relating to accepting objects obtained during pre-development archaeological work is available in *General Standards for the Preparation of Archaeological Archives Deposited with the Museum of London* (originally published by MoL in 1999, 2nd ed. in 2006, Museum of London Archaeological Archive 2006; and another Legal Supplement document published in 2011). The latest version of the Acquisition and Disposal Policy was published online in 2015 (although the document refers to the 2011 version), <https://www.museumoflondon.org.uk/application/files/9714/5812/8419/AcquisitionDisposalPolicy2011amended2015.pdf> (obtained in Nov. 2017). Note in particular s9.1 of the 2015 document which proclaims that:

The Museum will assert title in all its collections. (MoL Acquisition and Disposal Policy, online version, 2011 [2015], as referenced above).

The MoLA archivist sent the inventory list, cover letter and Deed of Title Transfer to the owners of Deyntes Cottage in 2006, 2007 and 2009 to no avail, eliciting no response at any time. The paperwork created by MoL policies is time-consuming, requiring allocation of dedicated personnel, and is often simply ignored by the site landowners, as illustrated in this case by the three letters sent by MoLA and the visit to the cottage that I carried out. From a legal perspective, the MoLA is under no legal obligation to send any correspondence to the owners of Deyntes Cottage. Furthermore, the Deyntes Cottage owners' response, or lack

thereof, and their failure to express or manifest in any way any intention to maintain property rights to the potsherds, can be interpreted as an intentional relinquishing of their title. Additionally, since this project took place in 1999, today, as per the Statute of Limitations Act 1980, no further claim can be brought for the retrieval of the six potsherds. The MoLA has therefore obtained a possessory entitlement to the potsherds which it can (and could have at the time) convey to the LAARC as well as the physical possession of the box of archived material. This potentially means that the MoL's policies and paperwork relating to the transfer of title to the six potsherds collected during the work at Deyntes Cottage are probably misapplied in this particular case.

It is also worth mentioning that, even if the interpretation of the legal issues pertaining to this case study were incorrect, then the alternative scenario would be that a court would rule that the owners of Deyntes Cottage own the potsherds obtained during the project. If that were the case, then the court would be looking at two possible remedies – restitution of property (returning the objects and/or property rights), or financial compensation as per the determined monetary loss calculated at the point in time when the potsherds were still in the ground, i.e. negligible (Bridge 2002, 24; *Tucker*⁶⁶, per Kay, J., 29; and see further discussion of this point in chapter seven at 7.8).

Returning to the research questions, the Deyntes Cottage project case study demonstrates the value and function of collecting and preserving material obtained during small evaluation work. The value of collecting and conserving the six potsherds is derived from the understandings obtained through the examination of the potsherds themselves as part of the tent of 'preservation by record'. Ultimately, the aims of 'preservation by record' can only be achieved by maintaining the integrity of the archive and information it contains. Therefore, the

⁶⁶ *Tucker v. Linger* [1876] T. 41 – [1882] 2 at 29

Deyntes Cottage archive, including the six potsherds, should be conserved as part of the LAARC material collection where they may be used as a teaching aid for example, or as part of wider future research.

6.3 Former Moorfield School site, Bunhill Row, London, EC1

This case study concerns a small-scale project which took place in Islington, London, in 2012. The work was carried out by Archaeology South-East (ASE). The site known as the Former Moorfield School (today it has a different postal address) was bought by Southern Housing Group Ltd in 2011 after being vacant for a number of years. Southern Housing buys properties all over the south of England and then either renovates them or demolishes the existing building in order to construct new housing. Today there is a five-story building consisting of 65 privately-owned apartments at the site. The location of the Former Moorfield School site is immediately adjacent to the Bunhill Fields Cemetery which is a Grade I listed conservation area in the Historic England listings (see map below).

The main differences between the projects of Moorfield School and Deyntes Cottage relate to the size of the project and the nature of the contractual arrangements for the work. In terms of the size of the project and the retained sub-sample, during this project five trenches were excavated and some 49 kilos of material collected, from which approximately 6 kilos were retained. In terms of the contractual arrangements for the work, in this case CgMs Consultancy was hired by the developers, Southern Housing, to negotiate the approval of the development application with Islington LPA and to deal with all the paperwork relating to the application process. This means that ASE operated in a sub-contractor capacity providing a service to another sub-contractor, CgMs Consulting, who were hired by the developers who also owned the land (while the archaeological work took place). The contractual agreement as

to the extent and type of work to be carried out, which CgMs submitted to Islington LPA, included the WSI, which asserted that:

The site archive is to be deposited with the Museum of London within 3 months of the completion of work. It will then become publicly accessible. (Section 35 of the WSI that CgMs submitted to Islington LPA, Meager 2012, CgMs Ref. RM/14466).

This means that the retained sub-sample of the material recovered during the project was expected to be deposited at the LAARC (the WSI document was written when the LAARC was still a sub-division of the MoL, which is why the WSI referred to the museum instead of the archive centre). Therefore, the MoL policies and paperwork requirements regarding a transfer of title to the material prior to deposition, which were discussed in the Deyntes Cottage project above, also apply here. The project archive, including the sub-sample of collected objects which were selected to be retained, is currently still with ASE awaiting deposition at the LAARC, although this is mainly due to ASE's operational procedures and the cost of transporting material from ASE to the LAARC. All the information relating to the project, the project archive and the collection of objects obtained during the work is available to the public by arrangement with the ASE archivist (note, however, that this is in contradiction with the stipulated contractual arrangements as per the WSI section quoted above).

6.3.1 Moorfield School project background

The research method I used in this case study included visits to the site while the work was taking place for the purpose of liaising with the archaeologists regarding their excavation and sampling methods. In addition, I visited ASE's archive facility (at their head office near Brighton) after the project was completed as part of the research into the function of the retained

sub-sample of material in order to assess the criteria by which certain objects were selected for conservation and whether the material was used after it was placed in a box on a shelf. Finally, I used correspondence and meetings with ASE's relevant personnel (the finds processing officer and the Archive Manager) and reviewed all the documentation relating to the project, including the planning application, the Islington environmental services and planning policies, the planning application consent conditions imposed by Islington LPA, the WSI submitted by CgMs, all the way to the final report which was produced by ASE and submitted to Islington Council by CgMs.

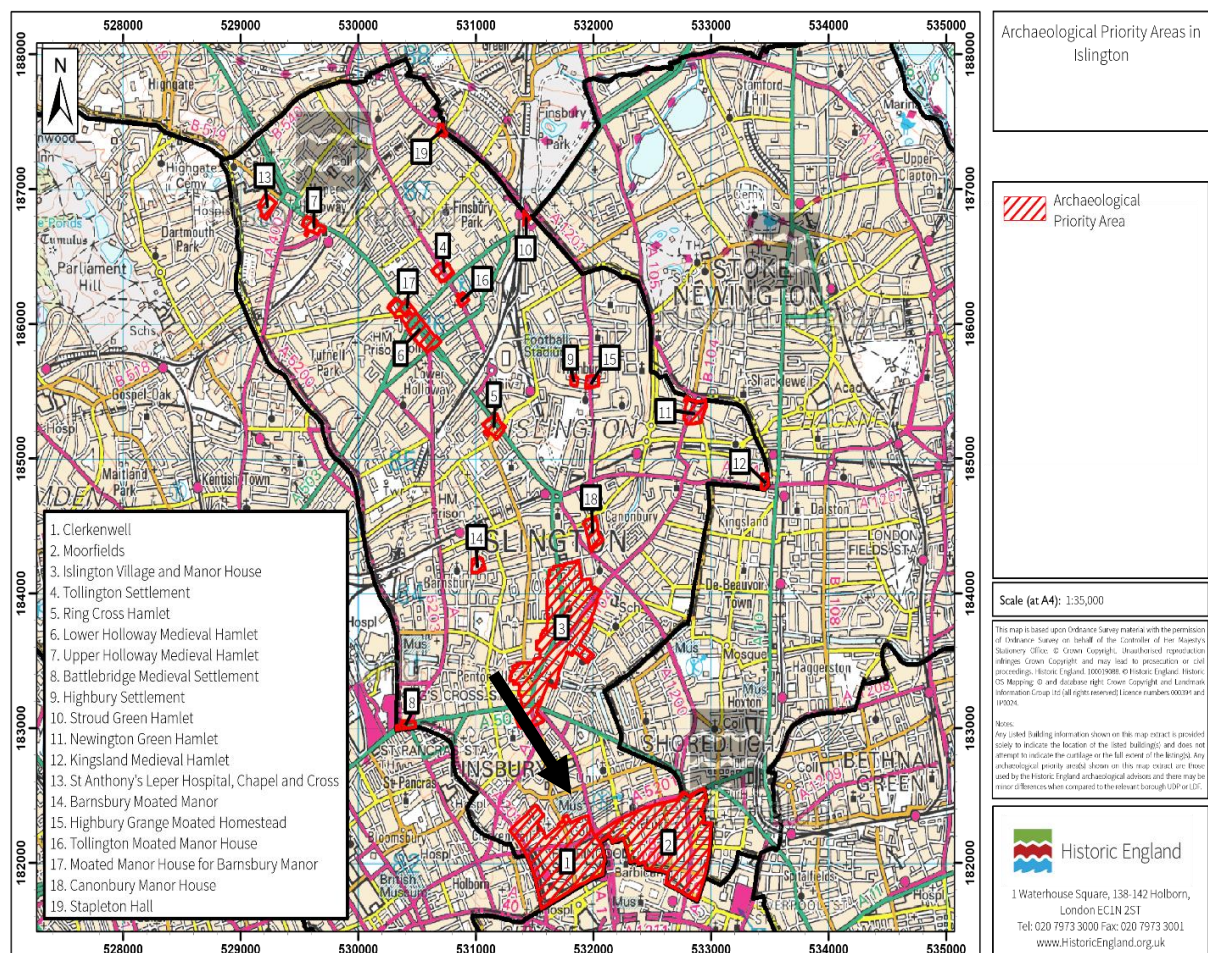


Figure 8: Map of Islington Archaeological Priority Areas

The Former Moorfield School project site is located within area 2, the excavation site, located at the lower end of the map, is marked by a black arrow, the tip of the arrow marks the exact location of the area where the trenches were excavated. Map from Historic England website <https://www.islington.gov.uk/~media/sharepoint-lists/public-records/planningandbuildingcontrol/publicity/publicnotices/20182019/20181119localplanstrategicandmpoliciesdpdreg18nov2018reducedsize1.pdf> (obtained June 2017).

Prior to the demolition of the old building, there were court proceedings to evict illegal squatters, which cost Islington Council over £10,000. This took place regardless of the fact that the initial application for the development of the site had been refused (Dean 2012). Southern Housing employed CgMs Consulting as their agent in order to apply to Islington Council LPA for approval to develop the site (Planning Ref. P112564, Islington County Council Planning Committee). As the site is located within an Area of Archaeological Priority, which is specified in the Islington Core Strategy and the Islington Unitary Development Plan, and due to the site's proximity to a Grade I listed conservation area, the Islington LPA imposed pre-development planning approval conditions (an informative/evaluation condition, the committee wanted to know the nature of the archaeological remains at the site prior to granting the application) in accordance with the AMAA. The initial development application was refused (Ref. P102545; Thorby 2012), which led to an appeal (Ref. APP/V5570/A/11/2162902; Thorby 2012) which was also denied.

The developer and the consultant appealed again to the Islington planning committee (Ref. P112564; Thorby 2012) and this time the application was granted subject to stipulations which included a requirement for an archaeological field investigation, and a report submitted to the LPA, prior to any development work commencing. The stipulated level of archaeological work required that the investigation included a substantial excavation phase, (substantial in terms of proportions of sampling size per area of land). In terms of the archaeological work required by the LPA, this project was a level above the evaluation work conducted at the Deyntes Cottage project.

The conditions which Islington LPA imposed prior to granting the third development application (2nd appeal), included the following stipulations:

No development shall take place unless and until the applicant, their agent or successors in title has submitted to and had approved by the LPA (in consultation with English Heritage) a WSI which has to include,

the implementation of a programme of archaeological work; and

(if necessary) a detailed design and method statement for the discovered foundations and all ground works. (Islington Planning Committee No. P112564, Condition 3(b), Islington County Council Planning Committee).

The reason specified by Islington LPA for imposing the development application conditions was that:

Important archaeological remains may exist on this site. Accordingly the planning authority wishes to secure the provision of archaeological investigation and the subsequent recording of the remains as well as careful design of discovered foundations prior to development in order to minimise damage to the archaeological resource in accordance with the guidance and model condition set out in PPS5, policy 7.8 of the London Plan 2011, policies, D43; D44; D45; D46 and D47 of the Islington Unitary Development Plan 2002 and policy CS7F, CS9B of the Islington Core Strategy 2011. (Islington Planning Committee No. P112564; see also - <http://democracy.islington.gov.uk/mgConvert2PDF.aspx?ID=11605&ISATT=1#search=%22P112564%22> (obtained in January 2018)).

Note that neither the conditions placed by Islington LPA nor the justification for imposing these conditions mention collecting archaeological objects which might be discovered during the work, or any requirement to preserve the data obtained during the project or to publish the results. At this stage, there was also no mention of the LPA's expectations regarding what should be done with the objects assembled during the investigation work. In

fact, the words ‘finds’ and ‘archive’ only appear later in the WSI which CgMs submitted to the LPA (see below). It is probable that Islington LPA expected that the collection and retention of objects discovered during the work would be conducted according to the policies and guidelines of the GLAAS (Greater London Archaeology Advisory Service, part of Historic England), but this was not stipulated in writing in the Development Approval Conditions document issued by Islington Planning Committee.

CgMs, acting in their capacity as consultant agents for Southern Housing, hired Archaeology South-East (ASE), which is a division of UCL IoA Centre for Applied Archaeology (which means it has a charitable status because UCL is a registered charity), to carry out the field project and compile the required Archaeological Evaluation Report (AER) including the data analysis. The project was carried out and the reports were submitted, by CgMs, to Islington LPA and the GLAAS in 2012, and subsequently the development application was granted (Islington LPA Ref. P112564, Thorby 2012). Figure 7 shows the excavation work at the site of the Former Moorfield School and the process of identifying and collecting particular discovered items from the ground. The specificities of how the archaeologist should be conducting the work and which particular objects should be collected are not referred to in the correspondence between CgMs, ASE, GLAAS and Islington LPA. The archaeologist in the trench, depicted in Picture 3 below, is expected to make professional informed decisions during the work.



Figure 9: Excavation in progress and finds collected from trench 3 at the Moorfield School site

Note that the collection of these objects is not stipulated in the documents relating to the project, the archaeologist is making a professional decision as to which items to select, collect and retain. View looking north.

Source: Author's own, courtesy of ASE.

During the excavation work, the initial plan for the location of the trenches had to be changed due to unstable land and trees on site but the sampling strategy, in terms of area excavated, was maintained. The earliest activity identified on the site was dated to the late 15th to early 16th centuries. This was identified through a series of large quarry pits which were backfilled with domestic refuse and sealed by dump deposits (Hart 2012). This was interpreted as an indication of efforts to reclaim the site from Moorfields Marsh. Identified 17th-century activities included further pitting and the importation of thick deposits of soil, which were also interpreted to mean that a large-scale effort was made during that time to dry the land. Few activity features were identified after the 18th century, although a series of 19th-century concrete

and brick foundations as well as backfilled basements were interpreted as evidence of the built-up nature of the site (Hart 2012).

The items recovered from the site included 43 kilos of CBM (ceramic building material – in this case mostly roof tiles and bricks), 68 grams of iron pieces (mostly nails), 4.4 kilos of marine mollusc (mostly common oyster), a few clay tobacco pipe fragments, a few glass pieces, some pieces of fired clay, other metallurgical pieces and worked flint fragments, and some 236 animal bone fragments (mostly bovine). Note that only diagnostic or ‘important’ objects were retained. The majority (approximately 41 kilos) of the items collected during the project consisted of well-documented London-type fabric CBM (roof tiles and bricks) which was deemed to be not worth archiving as it is already well represented in archive repository collections (Hart 2012 s5.3.2, also referenced in appendix C). The decision on CBM sampling and discard strategy took place during the work and was based on discussions and feedback between the project manager, the local curator (LAARC) and the client (CgMs Consultancy). After the work was completed, the final sorting of the collected objects was carried out by a specialist (the ASE finds processing officer) who made the decision as to which objects were to be retained and which were to be discarded.

The selection of the sub-sample to be retained and archived was based on the MoL procedures and the intended recipient repository centre which in this instance was the LAARC (Museum of London 1994, at s4.1) and, specifically regarding discarding CBM, the *Finds Procedures Manual* (Museum of London 2006/07), at s2.3.1.1). This means that ASE’s finds processing officer discarded CBM material obtained during the project after consultation with the client (CgMs) and in accordance with the MoL policies but before the Evaluation Report was submitted to Islington Council’s planning committee – which means that the CBM was discarded before the landowner was notified precisely which objects were discovered and collected from the site (see references in appendix C).

This is the point where the legal issues discussed in this thesis arise; the problem, which is an example of a broader issue which is prevalent across the development-led archaeology sector, is that in the proposal which CgMs submitted to Islington LPA, in the WSI for the project (Meager 2012), CgMs makes the following statement:

The finds retrieval policies of the English Heritage archaeological guidance papers will be adopted. All identified finds and artefacts will be retained, although certain classes of building material can sometimes be discarded after recording if an appropriate sample is retained. No finds will, however, be discarded without the prior approval of the English Heritage Archaeological Officer. (Meager 2012, at s28).

CgMs submitted the WSI and, after the project was completed, the Evaluation Report and all the other documentation relating to the development application to the Islington LPA. However, it was ASE employees who selected and collected objects during the work and, after the work was completed, made a choice as to the nature and size of the sub-sample which was to be retained in their custody until it could be deposited at the LAARC. In addition, ASE are also paying for the preservation of the material and will be expected to pay approximately £70 fees for Deposition Charges when the boxes are transferred to the LAARC (referenced in appendix C). Therefore, the responsibility of compiling the necessary paperwork and ensuring adherence to the MoL policies prior to the deposition of the recovered objects at the LAARC is ASE's.

To emphasise, CgMs were making contractual arrangements (promises) regarding the collection of objects obtained during the work which ASE were expected to follow even though these arrangements were not stipulated in the conditions imposed by the Islington LPA, or by the policies of the MoL or the LAARC as the intended recipient of the material. The WSI,

which CgMs submitted to Islington LPA, included a stipulation for the deposition of archive material that depended on the consent of a third party, namely LAARC. Since LAARC have their own Acquisition and Disposal Policy, the contract between CgMs and ASE cannot compel the LAARC or MoL to take the archive (or any part thereof). In respect of the issues discussed here, the biggest problem in the WSI document which CgMs submitted to Islington LPA is that it is silent on the issue of transfer of title to the objects collected during the work. Consequently, since the MoL does not accept that ASE have title to the objects, the LAARC cannot accept the collected material until sufficient time has passed for the stipulations of the MoL policies as stated in the Due Diligence form to become applicable (as per MoL Acquisition Policy, s2(a), 2006, reissued in 2011, updated in 2015; similar to the issues discussed above regarding the potsherds collected at Deyntes Cottage).

Legally speaking, the contract between CgMs, as agents for Southern Housing, and Islington LPA is incomplete as the terms specified in the contract were not fulfilled. However, since neither of the parties to the contract seem concerned by this, or have expressed any intention to maintain title to the objects collected during the work, then this breach of contract is not a problem. Contracts are often breached – it is only a problem if there is a fault which one of the parties sufficiently care about or if one of the parties is at a loss due to the breach of contract. The problem here is that this blasé approach by the developers, by CgMs Consultancy and by Islington LPA as to the fate of archaeologically-recovered material makes it all the more difficult for ASE to demonstrate to the LAARC and the MoL that they obtained title to the objects as well as possession. ASE has possessory entitlement to the collection of objects obtained during the Moorfield Project by virtue of: a) it being a term which is implied into their contract, as per the principle of work conducted in a ‘preservation by record’ method; b) the landowners’ relinquishing their title as ‘waiver by informed consent’ when they agreed for the work to be carried out according to the stipulations set in the conditions placed by the LPA;

and c) the landowner's failure to manifest or express an interest in maintaining or regaining title to the material connotes an intentional relinquishing of their title. These legal issues are discussed further in chapter seven.

6.3.2 Analysis of the Moorfield School project case study

Following from the understanding that the contract between the developer and the consultant as their agent and the Islington planning authority is incomplete, we can now discuss the main resulting problems. Two issues become apparent when we examine the incompleteness of contracts for pre-development archaeological projects – the first is the discarding of objects after fieldwork is finished, and the second is the retaining of a sub-sample from the assemblage of recovered objects when the project is completed.

In this example, after the post-excavation analysis was carried out on the collection of objects obtained from the Moorfield School site, some 41 kilos of CBM (mostly broken bricks and suchlike) were discarded. The collected items were recorded and sorted and an inventory list was compiled in ASE's lab a couple of months after the material was removed from the site but prior to CgMs submission of the Archaeological Evaluation Report to the Islington LPA (referenced in appendix C). It would therefore have been difficult for the developer/landowner to know in advance the quantity and nature of the property which was destroyed (the objects which were discarded). This is not really a problem because in most cases the strategy for discarding CBM is agreed prior to the work commencing, and usually there is good communication between the project manager, the local archive recipient (LAARC in this instance) and the consultant/developer/landowner (CgMs and Southern Housing in this instance) as to the sampling strategy which is adapted and changed according to what is discovered during fieldwork (referenced in appendix C). However, notwithstanding the

continuous communications between the archaeologist, the archive centre and the consultant or site owner, the discarding of CBM points to a peculiar, albeit regular, legal and ethical conundrum – the insistence of museums and archive repositories to have a documented transfer of title to all the material collected during the work comes after the selective discard of certain types of objects.

In the example of this case study, this quandary can be explained as follows – if ASE had sufficient property rights to the objects that they collected to allow them to discard CBM without any paperwork being required, then surely it can be assumed that they had sufficient property rights to allow them to deposit the objects at the LAARC without the obligatory documentation. On the other hand, if ASE did not obtain property rights to the material, as can be deduced by LAARC/MoL insistence on a Deed of Title Transfer and the Due Diligence forms, then this could imply that by discarding the CBM, ASE might be liable under the Tort (Interference with Goods) 1977 Act regarding material belonging to someone else, as they can no longer return the CBM to the landowner. Note, however, that the LAARC, MoL and indeed the majority of the archaeology sector, are regularly misapplying property legislation in respect of the conveyance of title to objects discovered, collected, retained or discarded during development-led archaeological work, as discussed in chapter seven. In this particular case study, a further difficulty arises due to the WSI containing the requirement that:

The site archive is to be deposited with the Museum of London within 3 months of the completion of work. It will then become publicly accessible. (Meager 2012, at s35).

Before the six-year time limit specified by the Statute of Limitations 1980, ownership of the recovered material would depend on the question of what causes the delay in depositing the archive at the LAARC and on the purpose, or intent, of ASE keeping the material. The aim

of the exercise was to inform Islington's planning committee on whether archaeological remains existed at the site which should be taken into account prior to granting the development application. This is a short-term goal which had already been achieved when the Archaeological Evaluation Report was submitted. Therefore, the continued preservation of the collected objects can be seen as an unnecessary financial expense which can add to the problem of lack of storage space. Furthermore, the Evaluation Report is 'grey literature' which means that after it has been used to inform the LPA's decision it will probably be of very little further use. On the other hand, the tenet of 'preservation by record' or 'offset through enhanced understanding' (per Thomas 2019) means that the objects were collected as data to support the archaeological inferences, negative results in this instance, made in the report. This means that at least a sub-sample of the objects collected during the project needs to be preserved as evidence should someone want to re-examine or test the credibility of the interpretation of the site which the ASE archaeologists reported. This does not, however, solve the issue of conveying title to the material or the problem regarding the collection and discarding of CBM.

Regarding the issue of discarded CBM, the responsibility of ensuring that this is carried out in accordance with the contract cannot be passed to the MoL and the LAARC, the intended recipients of the material, as they are only interested in objects which they receive and not in material which has been discarded before they were even notified of its existence. This puts the archaeology contractor, in this case ASE, in a precarious position – they cannot pass the CBM to LAARC because LAARC is neither interested in receiving CBM, nor will they accept it without the required documentation; ASE are not interested in storing it because there is simply too much and it is of very little value; and the landowner is evidently not interested in it otherwise they would have done something to indicate such interest before or during the fieldwork, which is also why the CBM cannot be returned to the site because the landowner/developer would not be interested in putting perceived rubbish back into the land.

Nonetheless, in order to conduct a proper archaeological investigation, objects made of CBM (roof tiles, bricks and suchlike) need to be recovered, measured and recorded prior to being discarded because negative results are equally valid to further understanding (Drewett 2004). Clearly, therefore, the sensible practice for discarding CBM would be to incorporate a CBM discard strategy within the WSI, and thus the contract, so that all parties were aware of this practice before commencing archaeological work. Although the CBM sampling and discard strategy was discussed during the project between ASE archaeologists, their clients, the developer and the Islington Council archaeology office, it perhaps would have been better if the strategy had been mentioned in writing in the WSI, for example, by reference to the MoL Acquisition and Disposal Policy. The WSI lists MAP2, MoRPHE and the Institute for Conservation guidelines (Meager 2012, s32-34) for specifying the required standards of archive preparation prior to deposition, but then goes on to specify the LAARC as the intended recipient of the archive under the MoL procedures. In this case it perhaps would have been better for CgMs to have stated in the WSI that the project archive would be organised in accordance with the intended museum/archive repository centre's guidelines, and not (or as well as) according to English Heritage procedures which might differ substantially.

Regarding the issue of title to the sub-sample of objects which were retained as part of the project archive, although this issue is discussed and elucidated at length in the next chapter, it is worth stating here that ASE has possessory entitlement to the material on the basis that:

- the work was carried out under contract (between ASE and CgMs) and there was no indication of trespass onto the land;
- the developer/landowner has not manifested or expressed any intention to maintain or regain title to or possession of the objects collected during the project;
- a sufficient length of time has passed since the completion of the work (ASE have been holding the collected objects in their custody for more than six years; referenced in

appendix C) and during this time the landowner has not requested or claimed return of the objects (see the six-year stipulation in the Statute of Limitations 1980 discussed in the next chapter).

Taking into account the combined effect of these factors, it can be safely asserted here that ASE has a possessory entitlement to the objects collected during the Moorfield School site project which is superior to that of the landowner/developer and that ASE can therefore convey this title to the LAARC without any additional documentation being required. On this basis, in this specific case study, it is likely that the MoL/LAARC insistence on the submission of the Deed of Title Transfer and the Due Diligence forms is redundant and might even hinder the potential public benefit which could be obtained by using the material.

The final point here is that it has now been more than six years since the project was completed but ASE has yet to transfer the box of archived material to the LAARC (at the time of writing; see reference in appendix C). Although it is less than 20 minutes' walk from the Moorfield School site to the LAARC, ASE had to carry the material to their head office in Portslade, Brighton, and would now need to transport it back to Islington in North London. If we multiply the issues identified in this case study, namely the accumulation of recovered objects which serve very little purpose, by the number of pre-development archaeological projects taking place across England every year, we get a picture of the scope of the problems faced by the archaeology sector. In this case study, issues concerning the requirement for a documented transfer of title contributed, although were not the only issue, to the delay in depositing the project archive. This case study is, therefore, an illustrative example of broader issues which are prevalent across the archaeology sector.

6.4 Hoo Road (B2108), Wainscott, Rochester, Kent, ME3 8AA

This case study concerns a project which took place in Wainscott, Kent (HER listing – TQ 77 SE1 – MKE 2631, 519 7872). Unlike the two previous case studies, the archive from this project was never intended to be deposited at a repository facility – because no such facility is provided by Wainscott or Medway councils or Kent County Council (CC). The Hoo Road project was a post-evaluation project (excavation after archaeological remains were identified). The project was carried out in accordance with a condition imposed by Medway LPA (the Wainscott planning committee comes under the Medway Council) which imposed development restrictions because there were well-documented archaeological remains at the site (identified in an earlier evaluation brief, in 2005, and also in a publication of excavation work undertaken at the site in 1992-1997 (Clark, Rady & Sparey-Green 2009)).

Since it was assumed that there were significant archaeological remains at the site, the Medway LPA, acting on the advice of the Kent CC archaeology officer, decided on a CRM strategy involving archaeological excavation work. This was secured by a restrictive planning condition which was, it can be assumed, intended to allow for ‘preservation by record’ in keeping with the CRM objectives enshrined in planning guidance (although this was not made explicit in the justification given for the condition (McCutcheon 2004)). It can be noted, however, that since the development had already received planning consent, the archaeological work can only have been aimed at improving understanding and was not needed to inform the decision-making exercise. This emphasis on preserving data obtained during the work derives from the Wainscott sustainable heritage environmental plan (Medway Council 2005, p15). Nonetheless, and as can be seen in the other case studies presented above, Medway LPA did not make any stipulations in the planning conditions themselves with regard to any expectation

that the data and the objects collected during the archaeological works should be preserved or that the archive should be deposited or otherwise retained for future use.

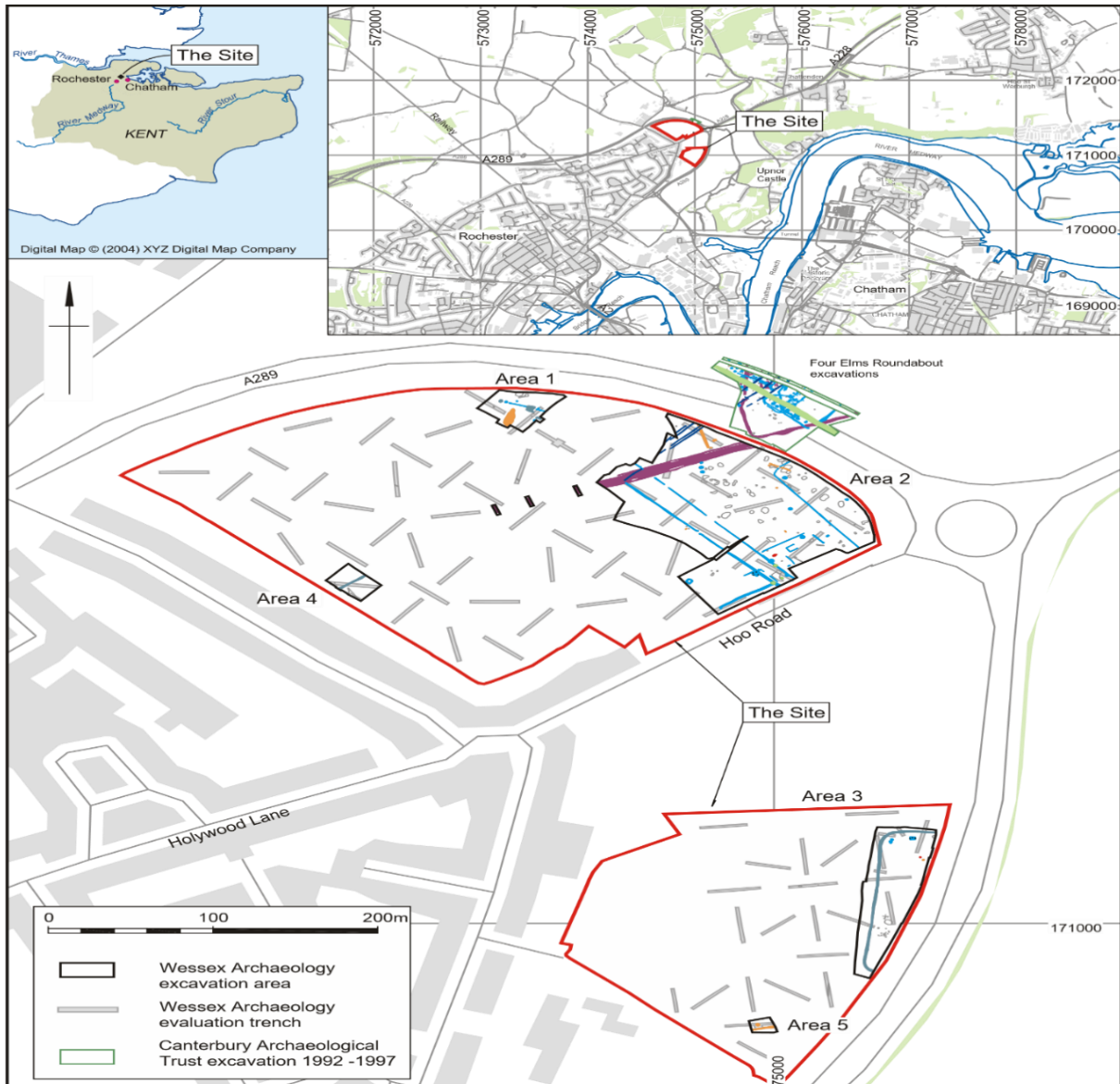


Figure 10: Map of Hoo Road, Wainscott, Kent, site location

Note, the evaluation trenches were dug by machine, then the five trenches (marked as areas 1-5 in colour within the highlighted areas in the map) were excavated by hand.

Source: site report with permission from Wessex Archaeology. OS map Crown copyrights.

Wessex Archaeology was commissioned by CgMs Consulting to carry out the required pre-development archaeological work at the site, with the aim of recording their findings and

informing the Medway LPA (McCutcheon 2004). The proposed development plan, which was adopted in 2003, included the conversion of agricultural land to residential use incorporating the construction of 280 houses, a medical centre and 3.16 hectares of communal open space (McCutcheon 2004). Prior to the 2007 project, there was an initial brief, which was carried out in 2005, with the purpose of determining the extent of the work which would be necessary in order to study, record and preserve (*ex situ*) the archaeological remains known to be at the site. This led to the stipulations that the planning committee placed on the proposed development (Medway Council 2005). The second evaluation project, which was also undertaken by Wessex Archaeology from June to July 2007, comprised the excavation of 80 trial trenches which confirmed that there were substantial archaeological remains at the site. The scale and the importance of the archaeological features identified during the evaluation project led the Medway LPA, on the advice of the Kent CC archaeology officer, to require a third excavation project including five additional trenches at specifically targeted areas. The purpose of the third project, the additional trenches, was specifically to carry out a ‘preservation by record’ exercise in order to mitigate the impact that the proposed development would have on the archaeology at the site:

The primary aim of the 2007 archaeological fieldwork on the site was to characterise, excavate and record the archaeological remains encountered and to disseminate the results of the investigations, placing their findings within an appropriate local and regional context. (Cooke & Seager-Smith 2007, 7).

Note that this quote from the Method Statement of the report that Wessex Archaeology submitted to Medway LPA does not mention the selection, recovery, collection or retention of discovered artefacts. The report only refers to the analysis of the findings and the publication of the information obtained. This takes us back to the discussion regarding the question of why Wessex Archaeology would conserve the material even though they had not been asked to do

so. As discussed elsewhere in this thesis (chapter three), the answer is that the recovered objects are kept as part of the principle of ‘preservation by record’ and to serve as evidence to support the inferences made by Wessex Archaeology about the data obtained from the site. However, unlike the other case studies discussed here, in this case there is a large amount of material which requires curation and there is no designated museum or archive centre which may accept the objects collected. Ideally the project archive should have been deposited at the Guildhall Museum in Medway, as this is the closest archaeological archives repository facility to Hoo Road. However, as noted by the Archaeology Data Service (ADS) in 2013 the museum could not accept additional archives at that time because the museum’s storage facilities were not up to the standard required by the ACE (formerly the Museums Libraries and Archives or MLA). This situation is acknowledged by Medway council:

The museum does not yet have access to storage facilities that fully meet the minimum national Accreditation standard for the storage of archaeological archives (objects and documentation). Medway Council hopes to be able to upgrade general storage facilities for the museum in the short to medium-term to create capacity for the storage and long-term curation of local excavated archaeological material. (Medway Council 2008-2012, section 2/3.9(d)).

Consequently, the entire collection of archaeological objects obtained during the excavation projects at Hoo Road is kept by Wessex Archaeology. Peculiarly, because Wessex Archaeology is not interested in owning the objects, aiming only to preserve the material until a suitable deposition place can be arranged, they hold the material without a signed Transfer of Title document. Without knowing which museum or facility will ultimately receive the material, they are unable to ask the landowner to transfer title (Wessex Archaeology Archive Manager, email communication in appendix C). The digitised project report and the recorded information are available online (at the websites of Medway LPA, Kent CC, Wessex

Archaeology and the ADS websites) and Wessex Archaeology facilitate public access to the project archive by request, although this does require travelling to their office in Salisbury which is some 120 miles from the site at Wainscott.

Medway LPA and the Kent CC planning committee, which instigated the project, knew before they placed the development evaluation/restrictive conditions that, since there is nowhere else to put it, Wessex Archaeology would end up storing the entire archive, most probably, in perpetuity. Evidently, in the CRM strategy chosen by Medway LPA and the Kent CC planning committee the preservation of the sub-sample of the records, data, objects and information obtained during the Hoo Road project is considered as sufficient mitigation for the destruction of archaeological remains, regardless of where the collected material is to be kept. To be clear, housing archaeological material wherever facilities are available is common practice, and keeping archives in a different county does not in itself negate the premise of ‘preservation by record’ or achieving an offset to the destruction of the site through enhanced understanding, but does lead to questioning the value of keeping the collected objects some 120 miles away from the site.

6.4.1 Hoo Road project archaeological findings

The archaeological remains discovered during the Hoo Road project indicate several phases of activity, dating from the Late Palaeolithic era to the modern day, with periodic settlement sequences. An example of the density of the features and identified archaeological remains is shown in Figure 10 below. The results of the archaeological investigation at the site shows six sequences of occupation during the late Palaeolithic, Neolithic – Early Bronze Age, Middle Bronze Age, Late Iron Age and Romano-British, Early/Mid Saxon, through to the modern day. Consequent to the long period of occupation at the site and the size of the

excavated areas, a substantial number of objects were discovered, recovered and taken off site to the lab. After analysis in the lab, the most important and diagnostic items were retained for conservation in the archive. As Figure 10 shows, however, the archaeologist in the field makes a decision that certain items, such as large non-diagnostic stones which are perhaps indicative of geological processes but do not contain much further information, are recorded and left in the ground.



Figure 11: The north-west facing section of Beaker pit 234

This shows the saddle quern fragment (bottom right) which was recorded and left in the ground (scale = 1m), note the concentration and size of the finds within the soil.

Source: Wessex Archaeology, Hoo Road, Wainscott, Kent site report, courtesy of Wessex Archaeology, copied with permission.

The retained items include worked flint, animal bones, coins, decorative metal objects, diagnostic potsherds and environmental remains and samples were taken of all these materials.

The most significant finds (listed chronologically) are:

- Palaeolithic – a mammoth tooth discovered below the subsoil in area 3.
- Neolithic – mostly struck and worked flint (108 pieces) from areas 1 and 3, including (probably intrusive) some potsherds belonging to Clarke's East Anglian type Beakers.
- Early to Middle Bronze Age – worked, struck and burnt flint, Middle/Late Bronze Age flint-tempered pottery, Deverel-Rimbury type pottery, and some animal bones and other organic remains (samples collected and used for carbon dating).
- Iron Age and Romano-British – features including a metalled trackway were identified, diagnostic items include worked and burnt flint, Romano-British type pottery, ceramic building material, a copper alloy brooch and an iron knife.
- Saxon period – the finds recovered suggest settlement in both the Early/Mid-Saxon period (probably ranging from the late 6th into the 7th century) and the Mid-Late Saxon period (8th to 9th centuries). Most of the Saxon features appear to be associated with the organic-tempered and handmade sandy-tempered pottery of the Early/Mid-Saxon period, and some later shell-tempered pottery.
- Medieval and later – finds include pieces of lead shot probably dating to the 17th or 18th centuries (Cooke & Seager-Smith 2007).

In addition, the archived object collection includes 47 coins and a jetton ranging in dates from Roman to late Medieval, substantial assemblage of metalworks – 513 diagnostic objects and 8,862 grams of metalworking debris, and a pottery assemblage amounting to 605 sherds (8,164 grams), which include material of early prehistoric, late prehistoric, Romano-British, Saxon, medieval and post-medieval dates. Some worked animal bones, glass, marine shells and

Palaeo-environmental remains were recovered as well and were retained and conserved in the project's archive (Cooke & Seager-Smith 2007). It is worth noting that because the collected material from the Hoo Road project includes a copper alloy brooch and an iron knife which were discovered in the metallated trackway (296) in area 2, it is possible that the entire collection might be considered as treasure under the Treasure (Designation) Order 2002, SI 2002 No. 2666 (an order by the Secretary of State pursuant to the Treasure Act 1996, which extends the definition of treasure to include objects (where more than a single object is discovered) containing base metal of an Iron Age or earlier date; see in particular, the decision in *Attorney General of the Duchy of Lancaster v G. E. Overton (Farms) Ltd*⁶⁷). If that is the case, then title to the collected objects vests with the Crown, regardless of the function of the material. Figure 11 shows some of the items selected for preservation in the project archive – note in particular the standards of material conservation and the size-requirement of the box.

⁶⁷ *Attorney General of the Duchy of Lancaster v. G. E. Overton (Farms) Ltd* [1981] EWCA Civ J1118-3



Figure 12: Some of the finds from the Hoo Road site

Source: Wessex Archaeology archivist by email.

In 2012, AOC Archaeology Group carried out a machine evaluation excavation exercise at Wainscott Primary School, on behalf of BAM Construction in accordance with a condition placed by Medway LPA on a proposed extension to the school building. The excavation project comprised four trenches of approximately 10m by 1.8m (the lack of detail is in the original report, in which the size of the dug trenches is unclear (MacQuarrie 2012).

AOC Archaeology Group's project at the Medway Primary School did not identify any archaeological remains of any type at the site – no archaeological, historic or environmental features of any kind were recorded during the excavation of the site. The proximity of the Wainscott Primary School to the Hoo Road and the Four Elms excavation sites, where substantial archaeological remains were discovered, is less than 100 metres (the school is located south of the Four Elms roundabout on the map of the site above). This suggests that perhaps more attention could have been paid to the excavation methodology and the finds retrieval strategy, perhaps by excavating by hand. Nonetheless, the planning approval condition imposed by Wainscott LPA was satisfied and the extensions to the school building were completed without delay. This example illustrates the hiatus in the expectation of LPAs that a report will be submitted regardless of the archaeological significance of the site, and that of archaeologists who, at least should be, aiming to enhance understanding while protecting the archaeological record.

6.4.2 Discussion of the Hoo Road project case study and Kent CC

The value and function of the archaeological material collected during the Hoo Road project is derived from the data analysed and recorded during the project and from the information contained within the collection of artefacts. However, although the material recovered during the project is adequately preserved and readily available for further research, in terms of the function of the archived material, the public benefit of its storage for the people of Wainscott is rather limited. This is primarily because the collection is stored in a different county more than 120 miles from Wainscott. Of course, this does allow the people of Wainscott to avoid financial responsibility for the archive's curation, but consultation on this matter was never carried out, so it is unknown what the local people would have chosen. The charitable

aims of Wessex Archaeology aside, as long as neither Medway LPA nor Kent CC facilitate the storing of archaeological material within their constituencies, then the function of the collected objects, as measured in terms of public benefit for the residents of Wainscott, is restricted to mere boxes on a shelf which are kept with the hope that one day someone will look at them (see Merriman & Swain 1999 for discussion of this point). Housing the project archive in a different county, more than two and a half hours drive away from the site of their collection, means that access to the material is much more restricted for Wainscott residents. The alternative view is that the information and data obtained through the project have been recorded, analysed and made public, and the material is properly conserved, is available for further research and for testing the plausibility of the archaeological inferences made by Wessex Archaeology. Therefore, it can be surmised that in the case of this project the principles of enhanced understanding and ‘preservation by record’ have been achieved.

In respect of the legal issues discussed in this paper, in this case study, the question of title to the material is not the primary factor limiting the use of the collected objects. The main problem is more to do with funding and the lack of storage facilities which hinder the availability of the archived material for the people of Wainscott. In fact, very cautiously and without suggesting that otherwise the material might be discarded, it is argued here that perhaps it is precisely Wessex Archaeology’s belief that they do not own the material which obligates them to conserve it, regardless of whether or not the material is used (see email correspondence referenced in appendix C). In legal terms, prior to the six-year timeframe stipulated in the Statute of Limitations 1980, this is according to the rules of bailment, discussed in chapter seven below. Wessex Archaeology thus becomes an archaeological archived material repository facility, which provides adequate preservation and curatorship of the material with very little public funding allocated towards it – as the company is a registered charity there is some public funding in the form of tax exemptions but without any direct public spending.

This case study indicates that the value and function of archaeological archived material is not necessarily correlated to establishing title, but rather the questions of funding and the availability of archive storage facilities dictate whether the material is preserved and the function of the recovered objects.

Following from the discussion of these project-scale case studies, and bearing in mind the understanding of which aspects of archaeological pre-development work determine the function and preservation of archived material, we can move on to examining these issues from the viewpoint of county councils which, ultimately, have the final word on these matters.

6.5 Kent County Council (CC)

In this section, I present an analysis of observable data – most of the information discussed here is available online or by contacting the county council. To verify the research observations and for academic integrity, all the information discussed here has been corroborated by the relevant people (archivists, museum curators, county archaeologists, etc.) before it has been presented here and elsewhere. This was done in complete adherence to the UCL data protection procedures and ethical research guidelines as per <https://www.ucl.ac.uk/data-protection/> (accessed in September 2020).

For the purpose of illustrating and discussing the situation in Kent CC, two pre-development projects are used as examples which indicate broader issues. These examples are Hoo Road, Medway, which is the project discussed in the previous section, and a much smaller project at Honeywood Parkway, Whitfield. The project examples used in this case study illustrate that when LPAs in Kent place restrictive or evaluation conditions on applications for land development, they know that the resulting archive, including the collected material, would

have to be kept by the archaeology contractor company which carries out the work, most probably in a different county (only Canterbury Archaeological Trust (CAT) has archive storage facilities located in Kent). This is because most, if not all, of the museums currently operating in Kent are full to capacity and can no longer accession additional material. Even the few localised museums which still accept archaeological material only do so if the material came from within their limited collecting boundary (Archaeology Data Service 2013).

Kent CC itself does not provide a regional archaeological material collection facility. It can be deduced that according to Kent CC, conserving assembled archaeological material in a different county provides sufficient mitigation to the damage caused to Kent's historical environment through land development. In respect of the principles of CRM and 'preservation by record', the approach taken by Kent CC is correct – as long as the data was analysed and the information and the material are conserved then the baseline purpose of Kent's CRM strategy is achieved. The question is 'who is it done for?' – if the CRM strategy applied by Kent CC means that archaeological material collected in the county is stored elsewhere then it becomes much less accessible for the people of Kent. There have been some attempts to change Kent Council's attitude and CRM approach. For example, there was a collaboration between Kent University, Canterbury Archaeological Trust, Historic England and Dover Museum to apply for National Lottery funding for a regional archive repository which failed (Edwards 2013, 8.3.5; apropos, the money went to Northamptonshire, discussed in the case study at s6.7).

6.5.1 The Honeywood Parkway, Whitfield, pre-development project



Figure 13: Location of the Honeywood Parkway near Dover

Source: Google maps

This was an evaluation trenching project which took place consequent to Dover District Council LPA imposing an informative pre-development application approval condition (project code HPW-EV-10; site location code NGR, 631291 144243). The work was undertaken during January 2010, with an inspector from the Kent CC Heritage Conservation Group visiting the site twice during the work. A total of 45 trenches were dug, which revealed archaeological features ranging from the Palaeolithic to the Roman periods. The finds assemblage includes an Acheulian handaxe and part of an ovate handaxe, Neolithic-Bronze Age worked flint, Roman period (2nd century) cremation burials and a number of occupation-related features and posts. The analysis of the archaeological data gathered from the site provided clear evidence of activity and occupation at the site from the Palaeolithic through to the Roman periods (Parfitt 2010). As Figure 13 below shows, there were significant archaeological remains identified at the site, including cremation burials, which does not

appear to have been regarded as material consideration in terms of granting the development application, on the basis that ‘preservation by record’ would suffice.



Figure 14: Cremation burial from F147 (cremation B), Honeywood Parkway, Whitfield project

Source: CAT report at the Dover District Council website at: https://planning.dover.gov.uk/online-applications/files/4CB2A35DAF64E06F0271423448A4B50C/pdf/10_00155-Archaeology_REPORT-38287.pdf (obtained in May 2018). Scale 50cm

The CAT evaluation report submitted to Dover District Council states that:

There can be little doubt that the soil stripping and initial excavation work associated with the new development programme will reveal further archaeological remains. Any additional Roman burials containing human remains present ought to be removed before development takes place. (Parfitt 2010, s10.6, 45).

Nonetheless, on July 18th 2010, exactly five months after the evaluation project took place, Dover LPA granted the development application without any further restrictions (Dover LPA ref. 10/00155; pursuant to DOV/05/00519; https://planning.dover.gov.uk/online-applications/applicationDetails.do?activeTab=summary&keyVal=DCAPR_217442 (obtained in January 2018)). The entire archive generated in the course of this work is currently kept by Canterbury Archaeological Trust and ‘will be transferred to Dover Museum in due course’ (Parfitt 2010, s8.2). As part of the data gathering for this research, I contacted CAT a number of times, had a constructive phone conversation with their Research Project Officer and sent them a number of emails with requests for information regarding the project (email correspondence in appendix C). Despite my correspondence with CAT personnel, I have not been able to gain access to the project archive or the WSI document. This illustrates that even when pre-development work is undertaken by a reputable archaeology contractor and the archive is housed in Kent, the decision by Kent CC not to provide archive storage facilities renders the project archive and primary data much less accessible. Furthermore, as the quote above indicates, in Kent, there appears to be little correlation between the archaeologist’s recommendations and the LPA discharging the planning condition. This suggests that Kent LPAs consider the product of archaeology to be defined by the report produced and the archive assembled, and that basic CRM work is sufficient mitigation to the destruction of important pre-historic environments.

6.5.2 Discussion of the Kent CC case study

Land development works in recent years in Kent have resulted in large numbers of archaeological archives being assembled and stored by archaeology contractor companies (ASE, CAT and Wessex Archaeology are all storing significant numbers of boxes of archive

material from Kent). This clearly indicates that although the council does not provide archive storage facilities, regional and district LPAs within Kent continue to impose development approval conditions. The CRM approach currently employed by LPAs in Kent suggest that they regard ‘preservation by record’ as sufficient mitigation to environmental damage regardless of who provides and funds this ‘preservation’ and whether the archive is accessible. In Kent, there appears to be little correlation between LPAs imposing development approval conditions and the availability, or lack thereof, of storage space for the resulting archaeological archives. Nevertheless, the principle of ‘preservation by record’ seems to be achieved, albeit with limited benefit for the residents of Kent.

Kent CC has taken an approach for managing its cultural resources by transferring the responsibility and the cost of conserving archaeological archives to the archaeology contractor companies operating within the council’s jurisdiction area. In itself, this CRM strategy is not necessarily a bad thing – it means that the information, data and material contained within archaeological archives collected in Kent are professionally preserved and curated to a high standard (by the three companies examined here, Archaeology South-East, Canterbury Archaeological Trust and Wessex Archaeology). Although the material is less accessible to the residents of Kent, at least the funding of the long-term storage of the archived material is not paid for by Kent’s residents’ taxes. That said, the obvious social cost of this is that Kent’s archaeological archives only provide a limited social function because they are difficult to find, or even to find out about. Furthermore, anyone who might be interested in examining the archived material has to travel to the office of the contractor company who holds the material and, pending their permission, gain access to it. This is clearly not a viable option for enthusiast pottery study groups, for example. Apart from being a cost-cutting exercise, it is difficult to see much public benefit from Kent CC’s approach to the management of its archaeological archives, particularly if we consider these archives as a form of cultural resource.

In response to a question regarding the specific issue of ‘undepositable’ archives (archives which cannot be transferred from the excavator to an archive repository), Kent County Council’s Heritage Team responded that:

The situation regarding storage in Kent is critical. Except in rare cases, e.g. where museums will accept archaeological archives particularly relevant to their existing collections or where Kent County Council has taken responsibility for the HS1 archive, all the contractors have to hold their archives until a long-term solution can be discovered. We are working to do this but as the county needs c.875 cubic metres of storage to cope with current backlogs plus c.1000 more for the next 20 years we have a huge and expensive problem. (Edwards 2013, 106).

This situation raises the question of whether adequate public benefit can be achieved purely on the basis of ‘preservation by record’. Is the imposition of the development approval condition and the recording and analysis of the data, sufficient, without the archaeological archives being kept within the county itself? The straightforward answer here is yes – there is a demonstrable public benefit to imposing the development application approval conditions and the recording and analysis of the data, however, this refers to the ‘public’ of England, whilst the measurable benefit to the people living in Kent is rather limited.

In terms of the transfer of title to objects recovered from excavation projects in Kent, the situation is unclear; it is not stipulated anywhere that title to objects collected during pre-development projects transfers from landowners to excavators by virtue of there being no available archive repository facility. The legal question regarding the transfer of title to objects collected during pre-development work taking place in Kent is not a substantial material consideration in terms of the function and value of archaeological archives. The main factor which limits the use of archived material from Kent is the fact that, in most cases, the archive

has to be stored by a private company in a different county. In addition, the archaeology contractors operating in Kent are not necessarily interested in obtaining title to, or indeed the long-term custody of, these object collections. The conservation of archaeological material generated from Kent is imposed upon the contractor companies by virtue of Kent CC and its regional LPAs not facilitating an archaeological archive centre.

As a final note, it should be pointed out that public interest might be served by the knowledge gained from the exercise rather than the underpinning finds and records, i.e. the enhanced understanding gained (per Thomas 2019). On the other hand, the situation in Kent leads back to questioning whether there is any measurable public benefit to keeping the physical material of archaeological archives in perpetuity as the spatial requirements for storing recovered items is significantly larger than those for storing digital or paper records (see Merriman & Swain 1999). As suggested by this case study, much depends on the role that is identified for the archive in allowing for tests of plausibility of inferences and the advancement of knowledge on the basis of the research undertaken. This reverts to the role of the archive as an instrument of research which is undertaken in the public interest, rather than as a collection of material with a theoretical value. There are circumstances in which public interest is served by an archive that is only accessible to the few who might wish to question a research finding, and over the limited period of time in which that research finding was seen as susceptible to important tests of falsification. Such public benefit does not depend on open-ended permanent public accessibility to the material. This notion is based on archaeological identifications of value and of how what is discovered helps in gaining understanding and requires consideration of the different classes of information which can be attained through the recovered objects and recorded data, rather than some nebulous idea that there is a ‘general public’, defined in part by being local, that is waiting to look at archaeological material because of its (presumed) intrinsic value.

6.6 Wiltshire Museum and Wiltshire CC

This case study serves to illustrate the plight of museums operating under the current scheme of development-led CRM. The research method used here was to visit the museum in order to liaise with the museum's director regarding the issues discussed here and to examine first-hand the problems associated with lack of storage space in regional museums. Note that as the submission of this thesis at the end of 2020 is in electronic format, the raw data (minutes of semi-structured interview) are only available through a specific request to UCL IoA. Email correspondence which was not part of the interview is included in appendix C. This is in order to comply with the data protection procedures stipulated in <https://www.ucl.ac.uk/data-protection/> (updated and accessed in September 2020). Additional data for this case study was gathered through the study of published reports, official correspondence (such as the letter to the Wiltshire councillor presented below) and other publicly available documents including the 'Seeing the Light of Day' (Ferne & McNulty 2017), relating to the museum's operations.

The Wiltshire Museum in Devizes represents the problem of lack of funding and shortage of storage space for curating archaeological material generated consequent to planning conditions – the museum is simply full to capacity with boxes of material from various field investigation projects. Most of these boxes have been left with the museum without the museum having much say in the type of material which should, or should not, be collected and retained. Today the museum has clearer standards and guidelines for the collection and deposition of archaeological material, based on the ACE Accreditation Guidelines (section 2, issued in 2014). However, some of the boxes were deposited in the museum many years ago and even today the museum does not always have contact with the archaeology contractors prior to project completion and the deposition of the archive boxes.

Currently, the museum only accepts archaeological archive material after formal arrangements have been made in writing to transfer title to the material from the landowner to the archaeology contractor and from them to the museum. The *Wiltshire Archaeological and Natural History Society Collection Trust 2019* states: ‘Wiltshire Museum will only accept archaeological archives to which it has full legal title.’ (section 5). The evidence for this transfer of title is by a Transfer of Title form that the museum issues. This clearly relates to the legal issues discussed in this thesis and does not need to be reiterated here, however, it is important to note that the museum has every right to require whatever documentation it deems necessary notwithstanding that these requirements directly contribute to the issue of recovered material remaining with the contractor. The museum also has in place deposition charge procedures as follows: ‘For projects notified after 1st January 2020, a flat fee of £80 (+ VAT) per standard size box will be charged: box size is approx. 530 x 260 x 180 mm.’ (*Wiltshire Archaeological and Natural History Society Collection Trust 2019*, section 11).

Section 106 of the TCPA 1990 (stipulating that LPAs can impose conditions on proposed development applications) is frequently mentioned in many of the documents related to planning considerations by LPAs in Wiltshire (Wiltshire planning committee online search <http://www.wiltshire.gov.uk/planninganddevelopment/planningcommitteeandmeetings.htm> (obtained in November 2017)). This means that there are sufficiently robust procedures in place in the county that if LPAs in Wiltshire intended to require developers to pay for both deposition charges and the long-term storage of archived material, the administrative tools for them to do so are available. The current scheme of applying s106 by LPAs in Wiltshire seems to be focused solely on funding deposition charges and not on the long-term storage of the material collections (Ferne & McNulty 2017).

Wiltshire Museum’s storage rooms became full in 2013. The museum’s director had to notify the council and all the archaeology contractors operating in the area that it could no

longer accept deposits of archaeological material. Nonetheless, Wiltshire CC and LPAs within the council's jurisdiction have been ensuring that most, if not all, planning application conditions include a requirement to submit a report on the impact that the proposed development would have on the Historic Environment. Until recently, land development planning in Wiltshire was administered by five district local authorities, each with its own team of administrators and slightly different development strategy priorities. In January 2015, Wiltshire CC adopted a Local Development Framework – the Wiltshire Core Strategy (WCS) – and the accompanying Infrastructure Delivery Plan (IDP) which comes under the Wiltshire CC Core Policy 3. This states that the council will consider the protection of heritage assets a priority (as per the NPPF 2012) and that, therefore, the council will endeavour to facilitate and fund the:

Maintenance and improvement of Wiltshire's heritage assets, including the storage of archaeological remains. (Wiltshire County Council 2015, s4.10, 29).

Wiltshire CC and regional LPAs within Wiltshire implement a CRM strategy, as stipulated in the WCS above, which makes imposing informative/evaluation pre-development planning application conditions an obligatory priority (Wiltshire County Council 2015, appendix 1, Development Template for Strategic Allocation, 336). This is not surprising as Wiltshire is home to some of the most remarkable archaeological sites and monuments in England, including the World Heritage Sites of Stonehenge and Avebury and many important heritage sites such as the Westbury White Horse hill figure and many more. The online Historic Environment Records (HER) of Wiltshire CC lists more than 21,000 known important heritage sites (<http://www.wshc.eu/our-services/archaeology.html> (obtained in March 2017)).

The Wiltshire CC CRM strategy of placing informative planning approval conditions on all development applications was working very well in terms of mitigating potential damage

to the historic environment, until 2013 when the archive repositories of Salisbury and Wiltshire museums became full to capacity (Pitts 2013). The problem is that Wiltshire CC and the localised LPAs have continued, and are continuing, to impose development approval conditions on planning applications regardless of the fact that there is no storage space available to keep the material generated. This is particularly the case in the museums at Salisbury and Devizes which are the main regional museums in Wiltshire.

In January 2013, Mr Dawson, director of the Wiltshire Heritage Museum and Mr Green, director of the Salisbury Museum, wrote to the Wiltshire County Councillor, who is also the Wiltshire Council Cabinet Member for economic development and skills, to say that their respective museums will no longer accession boxes of archaeological material assembled by archaeological contractors consequent to planning conditions imposed by the council or its regional LPAs. Furthermore, they stated that they intend to object to development applications on the grounds that the council has failed to require developers to fund the long-term conservation of archaeological archived material. The Wiltshire County Councillor also heads the Council's Strategic Planning Committee, whose remit, amongst other things, include ensuring adherence to the requirements of the NPPF 2012. Nevertheless, although the Wiltshire Planning Committee and local LPAs in Wiltshire acknowledge the importance of protecting the historic environment and archaeological remains, there is no implementation of any mechanism, by planning approval conditions or otherwise, to verify that such planning conditions have been followed with respect to archaeological object collections or archives in general. LPAs in Wiltshire and the Council Planning Committee place conditions on development applications that archaeological investigation work should be carried out with disregard to the fate of the subsequent archive generated as a result.

In the course of conducting the research for this thesis, the minutes of Wiltshire planning committee meetings from a number of LPAs in the county were examined (available

online, referenced below), and not a single example of a development application which was rejected on the grounds that there is no storage space available to house the material which will be potentially generated as a result of the planning conditions was found. Because of its significance and relevance to the issues discussed in this thesis, the letter that Mr Green and Mr Dawson sent to the Wiltshire Councillor is included here in full (Dawson & Green 2013).

Cllr Fleur de Rhé-Philippe

Cabinet Member for Economic Development and Strategic Planning

Wiltshire Council, County Hall, Trowbridge, BA14 8JN

16 January 2013

Planning Consents and Development Archaeology

Dear Councillor de Rhé-Philippe

We are writing to inform you that our two museums are now unable to store the archaeological finds and archives that result from archaeological excavation in advance of development, as our stores are full.

The vast majority of archaeological excavations are carried out in advance of development, as a result of planning permissions and consents agreed by Wiltshire Council. It is a condition of some planning consents that excavation takes place and that this is funded by the developer. There is currently no requirement made by Wiltshire Council for developers to fund the conservation and long-term storage of these archives.

The issue of archaeological storage has been recognised in the draft Wiltshire Council Core Strategy, and the accompanying Infrastructure Delivery Plan sets out the requirement for museum storage for the sustainable preservation of archaeological finds and archives. Planning Policy Statement 5, which covers the Historic Environment, remains in force, and provides the policy background.

As our archaeological stores are now full, any planning consents agreed by Wiltshire Council that require archaeological intervention are not sustainable under current planning policy. We will make appropriate comments during the consultation on planning applications.

It is essential that adequate financial provision for long-term storage should be provided through the Infrastructure Delivery Plan and the Community Infrastructure Levy. Wiltshire Council does not cover the cost of maintaining the archaeological finds and archives that are generated as a result of planning consents that have been approved by the Council. The most recent Government figures demonstrate the exceptional value for money that we provide – figures published in 2012 show that Wiltshire spends £0.43 per resident, in stark contrast to the spending by equivalent authorities of £4.91 per resident.

We hope that Wiltshire Council will be able to resolve this issue, once the Core Strategy has been adopted. Yours sincerely

David Dawson

Director, Wiltshire Heritage Museum

Adrian Green

Director, Salisbury Museum

Figure 15: Copy of the letter that Mr Dawson and Mr Green sent to Wiltshire Council in 2013

Source: Copy obtained from Mr Dawson. The letter was also referenced in British Archaeology magazine, Issue 129, March/April 2013.

The analysis of this case study shows that in Wiltshire, the conservation and function of archaeologically-recovered material is primarily constrained due to lack of storage space and insufficient funding allocated by Wiltshire County Council and its respective LPAs who instigate pre-development investigation works.

6.6.1 Western Way, Bowerhill, Melksham, Wiltshire, SN12 6TJ



Figure 16: Location of Western Way, Melksham, Wiltshire

Source: Google maps

This is an example of the disconnection between the presumed purpose of planning conditions imposed by LPAs and the function and potential value of the subsequent archaeological archive compiled during the fieldwork. The Wiltshire Planning Committee

instructed the LPA in Melksham to impose a condition on a land development application for a site at Bowerhill in Melksham in 2016. In the minutes of the Strategic Planning Committee from September 28th 2016 it is stated that (emphasis in original):

(19) - 'No development shall commence within the area indicated (proposed development site) until,

A written programme of archaeological investigation, which should include on-site work and off-site work such as the analysis, publishing and archiving of the results, has been submitted to and approved by the Local Planning Authority; and

The approved programme of archaeological work has been carried out in accordance with the approved details.

REASON, To enable the recording of any matters of archaeological interest. In addition, a further statement towards the end of the document also states that –

INFORMATIVE, The developer is advised that any archaeological work required by condition should be conducted by a professional archaeological contractor and there will be a financial implication for the applicant. (Wiltshire CC Strategic Planning Committee minutes of meeting held on September 28th 2016, <https://cms.wiltshire.gov.uk/mgAi.aspx?ID=65518> (obtained in March 2017)). The results of this evaluation project are available online at <http://reports.cotswoldarchaeology.co.uk/content/uploads/2015/04/CA5119-Land-at-Bowerhill-Evaluation-Report-final.pdf> (obtained in December 2017).

The work was undertaken by Cotswold Archaeology (CA) and 21 trial trenches were dug which established low potential for significant remains at this site, although some features and scatters of (mainly) CBM were identified:

a small scattered assemblage of post-medieval to modern ceramics and ceramic building material fragments was observed but not retained during the evaluation work (Howard 2014, s2.2).

As expected from an evaluation project, the primary public benefit gained through this work lies in the information obtained by the LPA so it could consider whether to permit new development without significant risks or costs (as per the 'Precautionary Principle'). Consequently, the archive generated from this project is unlikely to warrant much further attention or to require much curatorship management. Since the 'results' of this investigatory work are considered to be attained by the final report, by virtue of the archive recorded in the HER, rather than the primary records, objects recovered or data obtained, there is nothing in this condition that requires the creation and maintenance of a physical archive – except in the minutes of the planning committee meeting (quoted above). Therefore, it would be difficult for the LPA to refuse to grant planning application on the grounds that the developer/contractor failed to curate the physical archive (hypothetically, had the material been discarded).

The archive and artefacts from the evaluation are currently held by CA at their offices in Kemble. Subject to the agreement of the legal landowner the artefacts will be deposited with Devizes Museum along with the site archive. However, Devizes Museum is currently not accepting any further archives and until this situation is resolved the artefacts and archive will remain at the offices of CA in Andover. (Howard 2014, s1.10).

The requirement to include off-site analysis (highlighted in the previous quote, s19 of the planning committee conditions) could, however, be used to insist that the WSI stipulated recovery of the finds and records that require analysis, but this is simply a theoretical argument that has not been tested. It is probable that this planning condition was intended to secure proper

evaluation of the site and, if significant remains were discovered, any subsequent mitigation works which may involve archaeological excavation and conservation, or avoidance of areas of archaeological sensitivity, could have been based on the results of this investigation. None of this, however, suggests that the material has to be conserved in perpetuity. The primary feasible requirement to conserve the material arises from the principle of ‘preservation by record’ in case one day someone decides to test the plausibility or fallibility of the inferences made by Cotswold Archaeology. The Wiltshire planning committee must have known, when the planning conditions were imposed, that the contractor would have to retain the archive as there is nowhere else to keep it.

The point here is that Wiltshire LPAs appear to be placing planning ‘preservation by record’ and/or evaluation constraints against an unrealisable ‘ideal’ of how public interest should be served by establishing requirements for ‘publishing and archiving of results’ without ensuring that these constraints are adhered to, and where the facilities for compliance with such stipulations do not exist.

6.6.2 Discussion of the Wiltshire case study

To date, the situation of both the Salisbury Museum and the Wiltshire Museum storage rooms being full to capacity has not changed, although there has been a promise made by the council to allocate £200,000 towards creating a regional archaeological archive repository facility. Note that the museum’s website now states that they have recently purchased a building to be used for storing archaeological archives and plan for its commission to be mid-2021, see <https://www.wiltshiremuseum.org.uk/archaeological-archives/> for further details (accessed in September 2020). Wiltshire Museum, in collaboration with the Arts Council England and other museums and contractor units in the county, has commissioned a study of

the current situation of archaeological archives accumulation and deposition in the South-West. The report is known as '*Seeing the Light of Day*' (Ferne & McNulty 2017) and is based on desk research and interviews with museum curators, county archaeologists and contractor archaeologists. The preliminary findings of the report are that a third of the museums in the study area have stopped receiving deposits of archive boxes, and most of the museums which are still receiving material have reported that they expect to be full within the next two to five years (Ferne & McNulty 2017 s3.2.1, 10). It is also noted in the report that the majority of museums who participated in the study have deposition charges in place, as one-off payment ranging from £17 to £100 per box of archived material (only one museum responded that they currently have no deposition charges, Ferne & McNulty 2017 15). Furthermore, concerning the amount of archived material which is stored by contractor units, whether due to lack of appropriate storage facility or as a result of issues with the transfer of title, the researchers report that:

all archaeological contractors who have responded have stated that they currently hold archaeological archives on site (Ferne & McNulty 2017, 7).

To reiterate, all archaeology contractor units working in Wiltshire are storing boxes of archaeological archived material assimilated during pre-development fieldwork projects which were carried out due to an LPA placing development approval conditions on applications. This is by no means a surprise to anyone involved in development-led archaeology work as the collected objects have to be taken to the lab for sorting and analysis. However, the report identifies the length of time that the contractors are holding the boxes of material as the main point of concern. Half of the contractors who took part in the research reported that when material is stored by them for longer than a five-year period then the cost of storage jeopardises their business viability and that, therefore, expecting them to provide conservation of the

material in perpetuity cannot be considered as a viable long-term solution (Ferne & McNulty 2017, 7).

The situation at Wiltshire Museum raises an interesting question in respect of title to archived material. Legally speaking, it is feasible that archaeology contractors operating in Wiltshire gain title to the archaeological material which they collect by virtue of there being nowhere else to store the material (Palmer 2009, regarding involuntary bailment). On the assumption that the archaeology contractors operating in Wiltshire are collecting archaeological objects in good faith, under contract and with the aim of serving the public's interest, and in conjunction with the fact that the museums are full to capacity, the contractors gain a superior title to the material in their custody which supersedes that of the landowners. The archaeology contractors working in Wiltshire gain title to the material in their custody by virtue of having gained lawful possession, notwithstanding that their title to the material is not ultimate – it is shared between the people of Wiltshire, the landowner from whence the objects were obtained and the contractor who now has possession. Legally, ethically and practically the situation in Wiltshire is very similar to that of Kent and many other counties in England. In the majority of pre-development works undertaken in England, archaeology contractors become involuntary bailees of the material which they have collected on the basis that there is nowhere else to keep the material and no-one else is interested in gaining possession of it. The legal issue of transferring title to the material does not seem to have a significant impact on the function and value of archaeological archives in Wiltshire (Ferne & McNulty 2017, 11). Despite the fact that all museums in the county require a transfer of title to the material prior to deposition of archaeological material, this seems to be happening rather smoothly and legal issues were not identified as causing substantial concern.

This case study is an example of how the purpose for which archaeological archives are assembled, and their subsequent function, impacts the entitlement to possession. Since

Wiltshire CC and the LPAs knowingly, not to say deliberately, create a situation whereby the contractors are obliged to, or at least expected to, conserve archaeological archives by themselves then it is difficult to argue that the contractors do not also gain ownership of this material. To say that title to the material remains with the landowner would be to imply that Wiltshire CC, the LPAs and the contractor units are, ostensibly, in breach of the Tort (Interference with Goods) Act 1977 s10 (1, b). The analysis of the evidence for this research suggests, however, that it is section 12 of the Act which applies here, not section 10, so the contractors obtain possessory entitlement to the material by virtue of having gained lawful possession.

In terms of the purpose and value of archaeological material collected in Wiltshire, we should make a distinction between material which was collected prior to 2013 and that which was collected after the museums started refusing to accept additional boxes of material obtained during pre-development work. The boxes of material stored by museums in Wiltshire are accessed by researchers and other members of the public on a regular basis without any issues (emails reference in appendix C, and the museum's website <https://www.wiltshiremuseum.org.uk/archaeological-archives/> (accessed in September 2020)). From the museums' perspective, the main problems with enabling access to the archives in their collection are that storing archaeological archive boxes requires a lot of space, and facilitating access to the material requires the museums to allocate human resources and specific funding so that the material can be used as a resource.

There is, however, some light at the end of the storeroom. As previously mentioned, Wiltshire CC and the museum have recently purchased a building that is meant to be a dedicated archaeological archives deposition centre and is expected to be commissioned in mid-2021 (see <https://www.wiltshiremuseum.org.uk/archaeological-archives/> (accessed in September 2020)). Assuming that Wiltshire CC will also be willing to pay for the long-term

running of this facility, perhaps with money generated through deposition charges contributing to that, it could very well be that sometime in the not too distant future Wiltshire could set an example in its CRM approach. Perhaps one day, other county councils will follow suit (see the Northamptonshire case study at section 6.8). This remains to be seen.

In summary, albeit hopefully temporary, the main problem currently facing archaeological archives in Wiltshire is that there is nowhere to store them, which means that contractor units operating in the area have to keep the archive boxes. This results in archaeologically-recovered material assembled in Wiltshire being not easily accessible, which contravenes the notion that the data, information and material were obtained and conserved for a demonstrable public benefit. This situation is expected to be remedied when the newly acquired archaeological archives deposition centre becomes operational in mid-2021. It is recommended that when the new archive centre becomes operational, the updated procedures for depositing archaeologically-recovered material will reflect the findings of the evidence analysed in this research, and that documentation such as the Transfer of Title form currently used by the Wiltshire museum becomes redundant. The deposition of archaeologically-recovered object collections which were obtained during the course of CRM-based fieldwork at an archaeological archive centre does not require specific documentation to convey title from landowners to archaeology contractors and from them to museums or archive centres as it is implied into the contract by customary practices (see below discussion at chapter seven).

6.7 Sussex CC

The current situation in Sussex in terms of archaeological material preservation and use appears to achieve a balance between the significance of the archaeological remains and the financial expense of conserving the recovered material. (Both East and West Sussex are

included in this section as the main difference between them concerns the procedures regarding digitised records of archaeological archives, which is not included in this discussion). The research method used in this case study was primarily based on examining documents and information that is available online. The fieldwork phase of the Seaford Head School project discussed below has been completed, but at the time of writing (2019) the assemblage of thousands of worked flints has not yet been made ready for deposition, so the discussion here involves ‘expected’ outcomes which might not take place for a few years (see email correspondence in appendix C).

In Sussex, as a result of good collaboration between the county archaeologists and the contractors operating in the area, material assembled during development-led work is evaluated per its archaeological value. Where archaeological remains or recovered material are thought to be important enough, arrangements are made for *in situ* preservation, or with local museums for accessioning the archive, prior to the excavation project commencing. This is illustrated by local media interest in the Seaford Head School project report in the Sussex Express, <http://www.sussexexpress.co.uk/news/county-news/stone-age-artefacts-discovered-during-excavations-at-seaford-head-school-1-5966357> (obtained November 2015). Without this provision, the excavating contractor company is expected to provide adequate conservation of, and public access to, the archaeological archive. For example, ASE is holding significant quantities of material which they have collected during commercially-driven pre-development work in Sussex (referenced in email correspondence in appendix C). ASE is curating all such material at its own expense at its head office in Portslade, near Brighton, which happens to be right in the centre of Sussex.

6.7.1 Seaford Head evaluation project

Between 2014 and 2015, ASE carried out a desk-based assessment, watching brief, evaluation trenching and then full area excavation at Seaford Head Sixth Form Centre, Seaford, Sussex, in accordance with a planning condition imposed by East Sussex CC LPA (planning ref. LW/3173/CC, ASE project ref. 6432, <http://archaeologydataservice.ac.uk/library/browse/issue.xhtml?recordId=1104341&recordType=GreyLitSeries> (accessed in December 2017)). This was a classic case of an evaluation prior to the granting of an application for building works (an extension to the school) which, because significant remains were identified, turned into an excavation of the entire area. This project illustrates the principle of mitigating environmental damage through the implementation of CRM and ‘preservation by record’ methodologies which are based on the ‘Precautionary Principle’ and adherence to the NPPF regulations. The relevant sections are worth quoting here:

During the course of maintaining an archaeological watching brief ASE identified a deposit rich in flint artefacts sealed beneath a soil horizon. A rapid assessment of flint artefacts retrieved from exposed sections (ASE 2014) indicated that a number of periods are represented (Mesolithic/early Neolithic and Bronze Age). Following an initial site meeting on 20th February 2014 between Kier [the developer], ASE and the East Sussex CC Archaeologist it was agreed that as much of the accessible area as possible (western half of site) should be hand cleaned in order to better define the extent and nature of the deposit. This was carried out by ASE over the course of 25th and 26th February 2014 during which time a barbed and tanged arrowhead, two refitting flakes and a Mesolithic notched flake were identified providing further evidence that the deposit may represent in-situ flint knapping spanning a broad date range. A further site meeting was convened between Kier, ASE, the ESCC Archaeologist, Seaford Head Sixth Form College and Mace, the

college's Project Management company on 28th February 2014. The significance of the deposit was discussed and an appropriate mitigation strategy (preservation by record) developed. (Griffin 2014, s1.4-1.6 of ASE report of the Watching Brief WSI, at Seaford Head Sixth Form Centre).

It is only an hour's drive between Seaford and ASE, and ASE makes its entire collection available to the public, so expecting the Seaford Museum (accreditation No. 1497), which is very small and relies on volunteers to operate, to accession and curate the large quantities of worked flint assembled during the work might stretch the museum's resources. For that reason, it was agreed that ASE would accession and curate most of the finds while the museum would display a small number of representative worked flints (see email correspondence in appendix C). This demonstrates the importance of meticulous planning of CRM implementation all the way through to deciding who is expected to accession and curate the boxes of recovered material before the work commences. This is a useful example of how the principles of CRM and public benefit have to be carefully evaluated so as not to place unnecessary burden on local museums while maintaining public access and engagement with local heritage.

Sussex CC's pragmatic CRM approach is the result of collaboration between the county archaeologist office, local museums and the archaeology contractors operating in the county (Edwards 2013, s8.4.2). This balanced CRM strategy was established in 2012 when it was agreed that the county would be divided into museum collecting areas. Accordingly, today, prior to any archaeological work commencing in a county, a specified local museum is consulted on whether or not it can accept the archaeological material. This also facilitates and simplifies further research on assembled material as it is much easier to locate. On the whole, Sussex archaeological services seem to operate well with updated procedures and regulations with respect to the accession of archaeologically-recovered material.

The *Sussex Archaeological Procedures* document, which lists the procedures for undertaking archaeological investigations in the county and precisely what the WSI should include, albeit well written, contains references to MAP2, MoRPHE and the CIfA and AAF (Brown 2011) guidelines and requirements (Sussex Archaeological Procedures 2015, sections 2.1 and 5.1). This creates the legal issues discussed in this paper (full discussion in chapter seven) concerning the contractual contradiction of requiring that landowners transfer title to the objects collected during development-led work. The word used in the *Sussex Archaeological Standards* is ‘donate’, so landowners are expected to donate the material to the archaeology contractor (section 3.15). Section 5.6 of the *Sussex Archaeological Procedures* specifies that, notwithstanding the landowners’ donation of material (as in transfer of title), museums in Sussex have a deposition charge which is set at a minimum of £75 per box of recovered material. Landowners are expected to donate the material which the museum is charging for accepting, and this conveyancing of assets is facilitated through a charity (the contractor) which charges a fee for undertaking the work. This suggests that perhaps the deposition charging fees or the use of the word ‘donation’ should be avoided (similar issues arise and language used in Northamptonshire, see the following case study). The situation regarding archaeological archives in Sussex and the council’s archaeology officers’ position, as well as the proposed solutions to the issues discussed in this thesis, can be summarised by the *Sussex Museums Group Guidelines*, which are worth repeating here. Although lengthy, this quote refers to many of the issues discussed in this thesis and it merits repetition for this emphasis:

Due to a chronic lack of storage space in Sussex Museums there is a need to review the criteria used in the retention and disposal of material generated by archaeological excavation. Ideally, all would be retained for future study – this is now impractical. Many museums currently have no, or very limited space and so

have stopped accepting new depositions, meaning that archaeological units have to store material that would be better deposited with a museum. There is a danger that important site archives will be inaccessible or could be lost or dispersed. One solution to the problem is to reduce the volume of material being deposited in museums. However, any such reduction must be carefully considered so that there is the smallest possible impact on the research value of the collection. The value of research collections is in the stories that they can tell. If material has exhausted its potential to tell new stories then in theory it can be discarded. Even if this state has not been reached it is often possible to discard quantities of material without reducing the interpretative potential of the archive. (*Sussex Museums Group 2015, 3*).

This quote from the Sussex Museums Group encapsulates the danger of placing the entire decision regarding the size of the sub-sample of recovered material which is to be conserved and archived into the hands of commercially-motivated archaeological contractors. For example, this issue directly relates to the £75 per box of archived material deposition changes referenced above, which is also similar to the issue identified in the Wiltshire Museum and Northamptonshire (s6.6 and 6.8 respectively). Why would a commercial company choose to spend this money instead of discarding the material? The answer is that archaeology contractors are expected to behave according to the ‘ethos’ of archaeological scientific paradigms, aim for the tenet of ‘preservation by record’ and operate within and according to the principles of the CRM system. Thus the crux of archaeological enterprise appears to be how to achieve a balance between the expectation of ethical operations conducted according to the CRM principles and the need to be commercially viable.

6.7.2 Discussion of the Sussex case study

The analysis of this case study indicates that the archaeological significance of assembled material is a significant factor in the level of its conservation and usage. In Sussex, local museums have the final say as to whether or not to accept archive material. This is largely based on the availability of storage space but also on how important the material is considered to be. This might lead to a perception that material kept by contractors, as opposed to by a local museum, is regarded as less important, which might be interpreted to mean that it is less worthy of preservation and can therefore be discarded. Such interpretation could lead to a bias in the level of protection offered to different types of collected material within the archaeological record which could negate the notion that archaeological material is perpetually conserved in the public's interest.

In terms of the function and value of archaeological archives from Sussex, the *Sussex Archaeological Procedures* document requires that the archive will be deposited at an available museum within five years (if there is an available museum) (section 5.6). Supposing a utopian scenario whereby these procedures are followed to the letter, the use of, and legal issues relating to, archaeologically-recovered material in Sussex needs to be evaluated differently for the five-year period and after. During the five-year period, before the material has been deposited at a museum, it would be difficult to access and use. Furthermore, Sussex CC's CRM approach, albeit effective and balanced, creates a peculiar legal issue because it is unclear whether a local museum's decision as to whether or not to accept collected material affects the transfer of title to the material, because the museum is not a party to the agreement between the landowner/developer and the archaeology contractor (Pugh-Smith & Samuels 1996, 251; Palmer 2009, 122). To illustrate this conundrum we could ask, for example, what happens if the landowner signs the transfer of title document (i.e. donates the material) on the basis that

the material will be deposited at a museum, but there is no available museum which can accept the material due to lack of storage space – would this mean that the contractor has title to the material even though the landowner’s intention was to donate it to a museum?

The Sussex CRM approach is effective and robust. Certain points in the *Sussex Archaeological Standards* procedural documents, in particularly the terminology used, could perhaps be better phrased, but on the whole, archaeology in Sussex seems to be conducted in a balanced and effective manner. Therefore, in respect of the research question addressed here, the evidence from this case study suggests that when developers or landowners enter into an agreement for CRM-based archaeological work to take place in Sussex, the transfer of ownership of objects collected during the work is implied into the contract both by virtue of being well-known customary practice and as waiver by informed consent (discussed further in s7.9). The analysis of the data obtained in the course of conducting the research for this case study identified no further issues regarding possessory entitlement to archaeologically-recovered objects collected in Sussex.

6.8 Northamptonshire CC case study

This case study differs from those previously discussed in terms of research methodology and data gathering. In this case, research was primarily based on examining information available online and the review of relevant archaeological procedures and guideline documents applied in Northamptonshire. The decision to include this case study was primarily based on the fact that for the past 30 years Northamptonshire did not have a regional archaeological archives repository facility, a situation which has been repeatedly used as an example of an inadequate and inefficient county council CRM scheme (for example Brown 2015, 249). Conversely, Northamptonshire CC has been emphasising the promotion of

heritage, both tangible and intangible, as one of the county's best 'selling points' (Northamptonshire County Council 2016).

The situation regarding the accumulation rate of archaeological material and the consequent added financial costs on the regional LPAs in Northamptonshire can be illustrated by a table of increase in the volume of archaeologically-recovered and archived material (all types of material) between the years 2000 to 2004:

	Volume in 2000	Volume in 2004	Increase in 4 years
East Northampton	89.72 cu m	92.57 cu m	2.86 (3.18%)
South Northampton	26.49 cu m	31.15 cu m	4.66 (17.60%)
Wellingborough	14.69 cu m	18.17 cu m	3.48 (23.67%)
Corby	2.47 cu m	3.28 cu m	0.81 (32.98%)
Northampton CC	56.58 cu m	60.04 cu m	3.46 (6.11%)
Daventry	17.28 cu m	18.62 cu m	1.34 (7.76%)
Kettering	5.01 cu m	5.23 cu m	0.22 (4.42%)
Northampton Colls	3.93 cu m	3.93 cu m	0
Kettering Colls	6.72 cu m	6.72 cu m	0
TOTAL	222.88 cu m	239.71 cu m	Ave. 16.84 (7.55%)

Table 2: Increase in archaeological archived material accumulation accessioned by local authorities in Northamptonshire

Source: Shepherd 2015, 139

As well as an increase in the rate of material accumulation, a further interesting point indicated by this table is the varied rate of material accessioning between the different boroughs across Northamptonshire. Ignoring the area size in which the various regional authorities operate, the percentage increase in accessioned material indicates that, during the four years represented, these planning authorities had different criteria for placing planning consent conditions on applications and employed different CRM schemes. J. Shepherd has suggested that the variation in the regional rate of material accumulation can be used by the county council

to allocate proportional funding as per each borough's archive material accessioning scheme (Shepherd 2015, 137).

In 2011, Northamptonshire CC decided to close its archaeological service department and, after a competitive tendering process, the council's archaeology unit was incorporated into the Museum of London Archaeology (MoLA) unit – this took place in January 2014 (<https://www.mola.org.uk/blog/northamptonshire-archaeology-joins-mola> (accessed in July 2017)). In 2013, Northamptonshire CC was awarded a £4 million grant from the Heritage Lottery Fund for the renovation of Chester Farm, which includes specific funds allocated towards the construction of a countywide archaeological archive resource centre (<https://www.hlf.org.uk/about-us/media-centre/press-releases/funding-success-chester-farm> (accessed in April 2016)). The new Northamptonshire archive repository facility, shown here in Figure 15, at Chester Farm (<http://www.chesterfarm.co.uk/Pages/home.aspx> (accessed in June 2017)) is expected to be fully operational before mid-2021 (verified in a phone call with the facility curator in October 2020), the building's construction is finished but the facility has not yet been commissioned.



Figure 17: The Northamptonshire archaeological archive resource centre under construction

Source: Chester Farm Twitter account at <https://twitter.com/ChesterFarmNcc> (accessed July 2017)

Parallel to the construction of the county archaeological archive centre, Northamptonshire CC has also instigated a new CRM policy, as of April 2017 (the policy was updated in 2020, see below), of charging a fee for providing information relating to its Historic Environment Record (HER). Other counties in England, it should be mentioned, have already implemented similar schemes. This CRM approach is aimed at commercial planning application inquiries (<http://www3.northamptonshire.gov.uk/councilservices/archives-and-heritage/northamptonshire-archives/research-and-history/Pages/historic-environment-record.aspx> (accessed in July 2017)). Northamptonshire CC now charges a fee for the provision of archaeological information and advice involving public inquiries to the council's HER where a council worker does the research, whereas public visitors to the council's Record Office can research the information for free. These fees are aimed at enhancing the heritage sector within the county and will probably contribute towards the long-term funding of the county's archaeological services and the archive centre. The charges are authorised under

Section 93 of the Local Government Act 2003 and also 'The Reuse of Public Sector Information Regulations' 2005. The newly published (January 2020) procedures for depositing archaeological archives at the NARC (Northamptonshire Archaeological Archives Resource Centre) state:

There is a charge for the deposition of archives with NARC. This is in order to cover the administration costs and to ensure the long-term sustainability and future of NARC as an archaeological archive repository, and the safe preservation of the collections held. (NARC 2020, s5 at p6)

The current box charge for archives deriving from archaeological fieldwork starting from the 1st April 2020 onwards are:

Bulk Artefact Archives £120 plus VAT

Documentary Archives £120 plus VAT

Sensitive Archives (environmental, metallic and non-metallic) £120 plus VAT

Oversized metal artefacts are subject to negotiation.

(NARC 2020).

It should be noted that it is Northamptonshire CC which charges the HER consultation fees, not the eight regional LPAs in the county. This is relevant because it is the LPAs who impose planning conditions on the applications, requiring the information being obtained from the HER which is maintained by the CC. These charges are levied at commercial enterprises, therefore the council's fee charging scheme is a form of local tax imposed on development applications in order to sustain local museums and other archaeological services such as the county's archive centre. This is an interesting implementation of CRM policies, although it

remains to be seen whether or not the council’s spending on heritage per number of people living in the county will rise in correlation to this newly imposed tax.

If we take the Moorfield School and Hoo Road projects case studies (above in sections 6.3 and 6.4 respectively) as examples of the amount payable by potential developers as part of planning applications to Northamptonshire CC, then the fees which will be required prior to the deposition of recovered material in the county’s archive facility will be approximately £2,000 per project (calculated as Category 2 Major; Charges for Mitigation work; Northamptonshire CC, *Charging Policy for the Provision of Archaeological Information and Advice*).

<i>Northamptonshire County Council, Charging policy for the provision of archaeological information and advice; Charges for Mitigation Work,</i>	
This comprises production of a bespoke archaeological Brief covering, archaeological excavation, preservation in situ, scheme of archaeological resource management, archaeological management plans as appropriate, site visits, approval of post excavation assessment (if required) and the final report [as well as an HER search, written advice, two meetings at the Council’s offices and approval of a Written Scheme of Investigation].	
Category 4, Large	£800 + VAT
Category 3, Significant	£1,200 + VAT
Category 2, Major	£1,800 + VAT
Category 1, Strategic	£3,000 + VAT

Figure 18: Northamptonshire CC Charging policy

Source: <http://www3.northamptonshire.gov.uk/councilservices/environment-and-planning/planning/planning-policy/archaeology-biodiversity-and-landscape/Documents/Archaeology.Charging%20Schedule.%20Aug17.pdf> (obtained in November 2017).

This fee quote does not include the £78 per hour which the council charges for the HER search itself or the deposition charges for placing the collected material at the council’s archive centre. These costs could potentially add another £2,000 to the payable amount. In Northamptonshire, development planning applications incur fees before any type of

archaeological investigation, such as desk-based evaluation, has even been considered and certainly before a Brief or a WSI has been submitted.

Despite other positive aspects of Northamptonshire CC's CRM policy, a potential problem is raised by this fee structure in that it creates a clear incentive for archaeologists to discard material after it has been recorded. Furthermore, from a legal point of view, the recovery of archaeological objects from land in Northamptonshire is conducted under contract with Northamptonshire CC becoming a party to the contract by having a vested financial interest in the objects (i.e. the more material is collected the more the council can charge). Due to the fact that in Northamptonshire everyone involved has a financial interest in the collected material, there is a potential risk that the courts would consider the Contracts (Rights of Third Party) Act 1999 as applicable. The risk is that the council would thus (if a court rule so) become a third party to the contract (between the archaeology contractor and the developer) by virtue of having a financial interest in the provision of the contract (i.e. the recovery of objects and the deposition of the assembled material in the archive centre). The potential legal problem with this scenario is an apparent conflict of interest between the parties involved (see discussion in s7.5 under Bailment).

Developers and archaeology contractors operating in Northamptonshire have a financial interest to consult the council's HER as little as possible and to reduce the amount of collected material as much as possible in order to reduce the overall costs of the project. Northamptonshire CC, however, has the opposite financial incentive. This could suggest a conflict of interests between the two parties to the agreement (the developer and the archaeology contractor) and the interests of the third party (the council) (Contracts (Rights of Third Party) Act 1999 section 1.1(b)). It would be advisable for archaeology contractors operating in Northamptonshire to include a reference to the Contracts (Rights of Third Party) Act 1999, which may or may not preclude the council's enforceability of certain aspects of the

contract, for example, the length of time that the contractor is allowed to hold the recovered material prior to depositing it in the county archaeological archive centre. This example is currently something which the council can only influence, but if the Contracts (Rights of Third Party) Act 1999 applies then the council could potentially ask a court to impose fines on the developer and the contractor for not complying with their contractual requirements.

The fee charging scheme that Northamptonshire CC has devised is not inherently wrong, the issue is with the CRM strategy which the council has chosen to follow. As long as the archaeological material and data are conserved, the archives are protected and the information they contain is publicly accessible, then the council is acting lawfully, ethically and in the interests of its constituency. As a final note, it should be mentioned that Northamptonshire County Council has recently issued a 'section 114' notice and went into effective bankruptcy (Butler 2018), which means that the council will have to sell some of its assets in a bid to recoup some of its losses. This might impact the operation of its newly-opened archaeological archive centre.

Regarding the legal issues examined here, namely the legal status of archaeologically-recovered items, the analysis of the data collected for this case study indicates a potential issue with respect of the wording used in the archive deposition procedures:

NARC, as the final archive repository, must have ownership and title to any finds deposited with it. It is the responsibility of the archaeological unit undertaking the fieldwork to endeavour to obtain the consent of the landowner in writing for finds' donation and deposition with NARC. It is expected that the complete archive will be transferred as an unconditional gift. The principle of donating the finds from a project, in the interests of public accessibility of the heritage, should be explained to the landowner from the outset of a project (NARC 2020, s7.1). As discussed above and in the previous case studies, the use of the words 'donate' and

‘gift’ in relation to recovered material is unnecessary and could be a potential contradiction with charging a fee for the deposition of the same material at a facility owned by the council. Potentially, it could be argued that requiring the landowners to ‘donate’ items which, ostensibly, they own and leaving them no alternative course of action (because otherwise planning application may be refused) is perhaps not the best way of encouraging developers to comply with the ethos of achieving sustainable land development while protecting the historic environment (per NPPF 2020, chapter two). Furthermore, as discussed below in chapter seven, the use of such words and the relating documentation requirements are superfluous bureaucracy because (a) the landowners already agree to waive their title to the recovered items by virtue of entering an agreement for CRM-based work to take place, and (b) the transfer of title from landowners to archaeologists is an implied contractual term by virtue of being a well-known practice. These issues illustrate the value of the research presented here for the people working in archaeology services, museums and archive deposition facilities. It is hoped that the information discussed in the following chapter, namely the legal research, will help alleviate redundant paperwork and facilitate a change in procedures that can aid clarity and save time and resources.

6.9 Case studies data analysis

The purpose of using the case studies as an illustrative example and as a data source for this research, as discussed above in chapter two, was to identify and explicate patterns of archaeological practices and themes within the applicable policies that affect the contractual performance of the parties involved. Ultimately it is the contract that determines the transfer of ownership of collected objects from landowners to archaeologists, as discussed below in chapter seven. The policies and WSIs set the parameters of the agreement (the ‘promise’ aspect

of the contract in legal terms) and the practices imply terms into the contract that ascertain the conveyancing of property right (within stipulations, as discussed below in chapter seven). The analysis of the data from the case studies presented here has identified a number of recurring issues which can be summarised as:

- an apparent and consistent lack of stipulated specificities in the conditions which LPAs place on proposed development applications. Development application conditions, either restrictive or informative, Briefs and WSIs documents are not sufficiently precise on the definition of the expected ‘product’ of archaeological investigation work.
- a stipulated sampling strategy usually not being included in the documents but being discussed and agreed upon with the regional archaeologist during or after the commencement of fieldwork. In short-term practice this works well, but 50 years later it would be difficult to understand why a certain sampling strategy was chosen for a particular project and why a particular type of material was discarded, and to evaluate whether the agreed sampling strategy was adhered to.
- where the planning condition imposed by LPAs includes a stipulation that the deposition of recovered material should be in an archive facility, this is rarely adhered to within the required timeframe. This is especially the case regarding the length of time that the contractor is expected or allowed to hold the collected material. In projects where it is known beforehand that there is no facility which can accept the material, it is crucial that more attention is paid to the terms of the agreement, to avoid the contract (and therefore the WSI) appearing unprofessional.
- the fact that on the whole, LPAs seem to rely on the professional conduct of archaeologists in terms of which material is selected, collected and retained/discarded. The problem comes once the report has been submitted to the

LPA and used to discharge the planning condition, when there is no one whose job it is to ensure contractors' compliance with the terms stipulated in the WSI in respect of the long-term conservation of the collected material – there is no archaeology ombudsman.

- archaeology industry guidelines and policies, referred to in WSI documents, stipulating that landowners retain title to the objects collected from their land. The documents are insufficiently clear as to whose signature is required in order to affect the conveyance of title (current or previous landowners, and what happens when there are multiple landowners) and do not take time restrictions into account (the six-year stipulation in the Statute of Limitations Act 1980). Furthermore, the paperwork only refers to the sub-sample of material which is selected to be retained and not to the material which has been discarded (CBM, etc.). This is peculiar because as the archaeology industry guidelines state that 'landowners retain title to all material collected from their land' (Brown 2011, at s5.1) the Deed of Title Transfer and Due Diligence forms should apply to discarded bricks (this point is clarified in chapter seven).
- the use of the words 'donate' and 'gift' in councils' and museums' procedures for depositing boxes at archive facilities. The origin of this misunderstanding is discussed below at s7.2.1, but here it is worth stating that the use of the words 'donate' and 'gift' is inaccurate and that it is strongly recommended that policies are changed so as to exclude these words. As evident through the analysis of the data for the case studies, the landowner does not 'donate' the recovered objects; rather it is archaeologists who select, extract and collect discovered objects which thus imply property terms into the contract by practice. The use of the word 'donate' cements the misunderstanding that landowners retain title to items discovered in their land

and, as discussed below in the following chapter, as well as being inaccurate this could also invalidate the contract in CRM-based work.

In the Deyntes Cottage, Moorfield School and Hoo Road case studies no issues of lack of storage space or shortage of funding were identified. When the resolution of the case studies analysis remains at the operational level of archaeology contractors it seems that the practical aspect of long-term conservation of recovered material is dealt with in the budgetary planning of the companies. The situation in Wiltshire, Kent, Sussex and Northamptonshire, on the other hand, repeatedly highlights issues concerning insufficient allocation of resources for the long-term preservation of archaeologically-recovered material. This situation justifies placing a fee on depositing archives at a museum or regional facility, however, as discussed above, the wording of the relevant procedures must change so as not to include the words ‘donation’ and ‘gift’. It is not legally sound to both oblige landowners to ‘donate’ their ownership of recovered objects and to charge a fee from archaeologists for depositing the boxes containing these objects at an archive facility (see below at s7.2.2 regarding the origin of this misunderstanding).

Furthermore, the analysis of the case studies illustrates two primary issues with respect to the long-term conservation of archaeological material collected during pre-development work. The first is that LPAs and archaeology contractors operate under the assumption that the ultimate goal of archaeological enterprises is to deposit a ‘product’ in a museum or in the HER. This places an unsustainable financial and practical burden on museums – ‘For over three decades museum curators and collection managers have been expending considerable time, efforts and funds to solve the problem that is visited upon them in a process over which they have little control.’ (Shepherd 2015, 143). The second issue is an inconsistency in the paperwork requirements and enforceability of the archaeology sector procedures regarding the conveyancing of title to material collected during pre-development work. This creates a bizarre situation whereby the archaeology contractors who hold the vast majority of recovered material

do not consider themselves owners but custodians with the hope that one day someone will find something to do with it (see email correspondence in appendix C). As the next chapter elucidates, these suppositions, prevalent in the archaeology and museum sectors, are based on a misunderstanding of the legal status of archaeologically-recovered material collections.

Chapter 7: The legal status of archaeologically-recovered material

This chapter addresses and aims to answer the main research question of this thesis – the legal status of objects recovered by archaeologists during CRM-based fieldwork. In so doing, the research method and data analysis used here follow the principles of gathering evidence and scrutinising proof suppositions as proposed by Wigmore (1931). This means that the legal research presented here follows the development of suppositions that led to the prevailing syllogism concerning landowners' entitlement to archaeologically-recovered items. The chapter begins by looking at the factors that gave rise to the supposition that there are legal uncertainties regarding the ownership of archaeological material obtained during development-led field projects. After addressing this question, the potential implications of this syllogism are discussed from a legal viewpoint. The chapter then continues with an analysis of the contractual agreement between archaeology contractors and developers. These contracts determine the lawfulness, or otherwise, of selecting, extracting and removing archaeological material from the ground (Palmer 2002).

The chapter continues in the discussion of the *Tucker* court case which is particularly applicable to the issues addressed here and yet its relevance has only come to light as a result of this research. The *Tucker* court case (included here in appendix A) sets the precedent determining the transfer of property rights in respect of objects discovered in land by virtue of practice which implies terms in a contract and, as discussed in s7.7, supersede the wording of the agreement. The legal implications of considering recovered archaeological material as economically valueless (rubbish), and an elucidation of the legal status of material assembled during pre-development work concludes this chapter.

7.1 The advent of the legal uncertainties

The conjecture that archaeologists do not own the material that they collect was first raised in 1886 due to the decision made by Chitty J. in *Elwes*⁶⁸ at the Chancery Division Court. Justice Chitty affirmed that, by law, possession of land entails possession of everything within because objects that are discovered in the land constitute a part thereof (as distinct from objects found on land, see *Parker*⁶⁹, per Eveleigh LJ, at p.845; also Bennett 1998). Concomitantly, the decision in *Sharman*⁷⁰ states that when a chattel is discovered by a contracted employee, possession of it remains with the owner of the land:

the general principle seems to me to be that where a person has possession of a house or land, with a manifest intention to exercise control over it and the things which may be upon or in it, then, if something is found on that land, whether by an employee of the owner or by a stranger, the presumption is that the possession of that thing is in the owner of the *locus in quo* (*Sharman*⁷¹).

These precedential decisions burgeoned into an enduring belief, based on the syllogism that title to discovered objects remains with the owner of the land from whence the objects were recovered, irrespective of any contractual arrangements which may have preceded the transfer of possession (as discussed above in chapter two; see also Goodhart 1928, 202; Palmer 1996; Palmer 2002). As Palmer put it, ‘the law of finders remains a warren of obscurity and fine distinctions, it is inadequate as an instrument for the protection of the tangible past’ (Palmer 2009, 1444). The two tables below demonstrate the complexity of the legal issues discussed here, as consecutive courts’ decisions appear to support contradicting claims (the

⁶⁸ *Elwes v. Briggs Gas Co.* [1886] 33 Ch D 562

⁶⁹ *Parker v. British Airways Board* [1982] 1 All ER 834

⁷⁰ *South Staffordshire Water Co. v. Sharman* [1896] 2 QB 44 at p.47

⁷¹ *South Staffordshire Water Co. v. Sharman* [1896] 2 QB 44 at p.47, [1895–9] All ER Rep 259; per Lord Russell CLJ at p.261

tables contain a selected sample of cases which are particularly relevant here, but exclude issues concerning bailment, for a more extensive review, see Hickey 2010).

Case	Issue examined	Decision
Elwes v. Brigg Gas Co. (1886) 33 ChD 562	Boat discovered imbedded in land – lessor of land has possession and therefore title.	Property in the discovered chattel did not pass by virtue of a sub-lease. Lessor has superior right (as per possession) than the lessee, notwithstanding lessor not being aware of the object’s existence at the time of discovery. Also, the lease contract reserved rights to all discovered objects to the lessor.
South Staffordshire Water Co. v. Sharman [1896] 2 QB 44	Chattel discovered in mud that an employee was meant to clear, belongs to the landowner, all the more so when the object is found under contract and irrespective of the landowner not knowing of the object’s existence.	Owner of land has possession, and therefore title, of everything which is in that land. The act of discovery of a chattel by a person who is contracted to work at the place, does not supersede the landowner’s rights: ‘possession of that thing is in the owner of the <i>locus in quo</i> ’, per Lord Russell CLJ, at p.261).
Corp. of London v. Appleyard [1963] 2 All ER 835	A safe was discovered in a wall by a builder. Lessee of the site has superior right than sub-lessee (sub-contractor).	Leasing a building, or land, entails having possession of everything which is in it at the time that the lease agreement comes into effect. No need to demonstrate pre-existing knowledge of the chattel’s existence.
Waverley BC v. Fletcher [1995] 4 All ER 756; (and appeal); [1996] QB 334	Brooch discovered by use of metal detector, imbedded six inches into the ground, at a public park (council as landowner). (On appeal) the council has priority of entitlement to possess the chattel, per the principle that owner of land has possession of any item found in the land.	Quoted in the case deliberations, ‘the finder’s right starts from the absence of any <i>de facto</i> control at the moment of finding’ (Pollock & Wright 1888, 40). And ‘the owner of a fee simple interest in land is entitled to any chattel which may be in the land as against the finder of that chattel, even where the finder is excavating the land with the licence of the owner’ (Webb v. Ireland [1988] IR 372, per Finlay CJ, at p.377). The decision in this case was based on the assertion that digging and removing discovered items was, in this case, considered trespass (per Ward LJ, at p.768).

Table 3: Cases supporting landowners retaining title

Source: Author’s own

Case	Issue examined	Decision
Armory v. Delamirie (1772) 1 Stra 505	A finder of a lost jewel receives priority rights to it by virtue of having gained initial possession.	An important case which installs to the finder of a chattel property rights that are superior to all but the 'true owner'.
Bridges v. Hawksworth (1851) 15 Jur 1079	Banknotes found in a shop considered to belong to the finder.	The shop being open to the public (so no trespass), and the shopkeeper not knowing of the banknotes' existence led the judge to decide in favour of the finder (this decision has been criticised, see Goodhart 1928).
Tucker v. Linger (1882) 21 Ch D 18 (and appeal) (1883) 8 App.Cas. 508	Sell of chattels discovered by a tenant was considered lawful due to pre-existing custom.	Objects extracted from the land become chattels in their own right and are therefore to be treated as distinct from the possession of the land. A pre-existing custom supersedes the contract, so long as the contract does not expressly exclude the custom, and creates terms which are implied into the contract by custom. Precedential case giving a finder of chattels in land priority of property rights to the discovered object, superior to that of the landowner.
Parker v. British Airways Board [1982] 1 QB 1004	A finder of a bracelet in the passengers' lounge at Heathrow was considered to have superior right to it than the occupier of the land on which it was found.	The decision in this case rested upon the understanding that the finder acted in good faith, was allowed to be on the premises (no trespass), and that the occupier of the land did not 'manifest and exercised sufficient control over the land and everything which may be upon it' (per Donaldson LJ, at p.846).

Table 4: Cases supporting finders' rights to chattels

Source: Author's own

The *Elwes* case concerned a prehistoric boat discovered imbedded in land by Briggs Gas Co. employees. The company had permission from Mr Elwes to dig through land that he had leased for life, so that they could install a gas pipe. During the excavation work, the company employees discovered an Iron-age log boat imbedded some 15 inches beneath the ground. Elwes claimed ownership of the boat and won on the basis that he had possession of the land and despite the fact that he sub-leased the land where the boat was discovered to the company. Chitty J. ruled that Elwes had a superior title to the boat because he was a tenant for

life and therefore had possession of the land before the boat was discovered, and because the contract between Elwes and the company did not include, in any way, the removal of items discovered during the excavation work. It should be emphasised here that at the time Mr Elwes manifested his title (sued in court for custody of the object) the boat was still in the ground and therefore the judgment of Chitty J. is focused on establishing the possession *per se* of the object rather than on examining who has title to the chattel or the transfer of ownership. The judge ruled that Mr Elwes was:

in possession of the ground, not merely of the surface, but of everything that lay beneath the surface down to the centre of the earth, and consequently in possession of the boat (*Elwes*⁷² per Chitty J. at p.568).

Consequently, after lengthy and expensive court proceedings, Mr Elwes was deemed to be the owner of the boat. He went on to place the boat in a specially constructed museum, which he privately financed, where thousands of visitors were willing to pay sixpence to view it (Hull City Council n.d.). The boat, which remains the longest log boat ever discovered in Britain (recently dated to 900 BC), became very famous and was known as the Brigg Boat. In 1909, it was bought by Hull museum and was kept there until it was destroyed by German bombers in June 1943 (*ibid.*).

Apropos, Mr Elwes was a wealthy landowner whose decision to pursue his entitlement was probably driven more by the notion that archaeological remains are either a nuisance or an asset, similar to the ideas advocated by Lubbock as discussed above in the Historical Background (at section 3.1), rather than by an intention to protect heritage (Towers 1943, 320). In the course of this research it could not be ascertained whether Mr Elwes knew of Lubbock's

⁷² *Elwes v. Briggs Gas Co.* [1886] 33 Ch D 562

parliamentary manoeuvres, but it is remarkable that the discovery of the boat coincided with the enactment of the Ancient Monuments Protection Act 1882.

It seems probable that it was the conjoining of the Ancient Monuments Act with the decisions by Chitty J. in *Elwes* and the decision of Russel CJ. in *Sharman* which lent such an enduring legacy to the notion that landowners own everything which is discovered in their land – a hundred years later the same principle was applied in *Waverley*⁷³ by the Court of Appeal. It is also likely that because the *Elwes* case involved a rare and famous archaeological artefact, the decision taken by Chitty J. has been accepted and perpetuated within the archaeology sector as setting the precedent in respect of landowners' title to objects discovered in their land.

The decision in *Elwes*, however, was based on the fact that Brigg Gas Co. were neither hired to remove objects from the land, nor were they acting in the public's interest. This means that the initial agreement allowing entry onto the land and the collection of discovered objects is of paramount importance; archaeologists operate under agreement which states that they are allowed to enter a site and that they are allowed to excavate, discover and recover objects. This causes confusion with court cases in which the agreement relates to an entirely different type of work and the actions of digging and removing objects are therefore not explicitly governed by the contract. If the action of collecting objects discovered in the ground is not explicitly governed by the contract then doing so may constitute trespass (as was ruled in both *Elwes*⁷⁴ and in *Waverley*⁷⁵). Furthermore, Mr Elwes manifested and exercised his entitlement to the boat while it was still in the ground. During pre-development archaeological work, developers and landowners are free to do the same. The fact that they choose not to do so can be interpreted to mean that they relinquish their entitlement to the objects as 'Waiver by Consent' (discussed

⁷³ *Waverley Borough Council v. Fletcher* [1995] 4 All ER 756

⁷⁴ *Elwes v. Briggs Gas Co.* [1886] 33 Ch D 562

⁷⁵ *Waverley Borough Council v. Fletcher* [1995] 4 All ER 756

in *Parker*⁷⁶, per Donaldson LJ, concerning the legal requirement to manifest and exercise control over a property).

Prior to establishing property rights to archaeological objects, it is important to note that the far more complex issue of legal and ethical treatment of human remains, as per Historic England procedures (Historic England 2018b) is omitted from discussion in this thesis. The treatment of discovered human remains is beyond the scope of this thesis and it must clearly stated that nothing in the discussion here applies to the discovery, recovery, collection, curation or any other form of treating human remains. For court cases pertinent to human remains considered within property law in England, see the Human Tissue Act 2004; *R v. Kelly*⁷⁷; and *Yearworth*⁷⁸.

The notion that archaeologists unearth and ‘find’ objects buried in the ground leads to a further cause of confusion as to the appropriate legislation that should be applied in respect of archaeological material.

Notwithstanding that the actions of excavating and collecting discovered objects is part of the agreement, if the transfer of title to the objects that archaeologists recover is not expressly stated in the contract, then it could give the impression that archaeologists are to be considered as having discovered the objects in someone else’s land, similarly to the Briggs Gas Co. employees, and thus be regarded as mere ‘finders’.

⁷⁶ *Parker v. British Airways Board* [1982] 1 All ER 834

⁷⁷ *R v. Kelly and Lindsay* [1999] QB 621

⁷⁸ *Yearworth v. North Bristol NHS Trust* [2009] EWCA Civ 37, [2009] 3 WLR 118, [2009] 2 All ER 986

7.1.1 The myth of ‘finders keepers’

The notion of archaeologists being regarded as ‘finders’ is surprisingly difficult to discard – partly because in archaeologists’ jargon the objects unearthed and collected are often referred to as ‘finds’ (Brown 2011, s1.2.1). In law, the idea of ‘finders keepers’ is based on the principle that in the absence of any indication of title, then the person who has possession has a better title than the person without; ‘the rule that Possession is a root of Title is not only an actual but a necessary part of our system’ (Pollock & Wright 1888, 93). So, for example, if two people are walking down the street and come across an object that neither has seen before then the person who first identifies and intentionally takes possession of the object has a better title to it than the one who did not (*ibid*). The legal conundrums arising from the propriety rights of finders has been debated for centuries (see *Case of the Marshall*⁷⁹) with the law varying as to the point at which a finder obtains rights and whether these rights have priority over the occupier of the land (see Hickey 2010, 13; Goodhart 1928).

If the finder, from the circumstances of the case, must have known who was the owner, and instead of keeping the chattel for him, means from the first to appropriate it to his own use, he does not acquire it by rightful title, and the owner might maintain trespass. (*Hutton*⁸⁰, per Parke B, at p.153).

However, without entering into a lengthy discussion about the nature of possession under the common law, this is not the scenario pertaining in CRM-based archaeological work where there is an explicit contract and the selection, recovery and collection of the objects is part of the requirements and merit of the work. As Palmer explains, in *Emden’s Construction Law*, it all depends on the particular circumstances and the specific pertaining contract:

⁷⁹ Case of the Marshall of the King’s Bench [1455] YB 33 Hen VI, f 26 pl 12

⁸⁰ *Hutton v. Warren* [1835-42] All ER Rep 151, per Parke B at p.153

There are two steps to the process of identifying title to discovered portable objects. The first is to ascertain whether the find is treasure within the Treasure Act 1996. The second, to be taken only when the find is not treasure, is to apply the common law of finders, the results of which (unlike the ownership of treasure) can be varied by contract. Contractual allocation of title to finds is common in the construction industry though it has attracted very little case law. (Palmer 2002, 361 (my emphasis, note Palmer's use of the term 'finds' in referring to discovered objects)).

The confusion discussed here can be further illustrated by the argument put forward by Cookson in *Archaeological Heritage Law* (Cookson 2000). Cookson, wrongly, argues that although there is some debate as to whether archaeologists should be considered as 'finders' of chattels in someone else's land or as contractual employees, in both cases the landowner would have a better title to the objects (Cookson 2000, 206). The problem, according to Cookson, is that archaeological objects are not afforded any special protection under English law (in contrast to Scottish law under which title to archaeological objects vests in the Crown under the *bona vacantia* law, see *Halsbury's Laws* 2008, volume 35, section 1,240). This means that, according to Cookson, in England, when archaeologists unearth objects from the ground, the same property legislation applies as when any member of the public finds something in someone else's land (Cookson 2000, 226).

In general, the presumption which Cookson makes is correct because under the common law, finders of objects will have a weaker claim than that of the landowner, as asserted by Donaldson LJ:

If the finder is not a wrongdoer, he may have some rights, but the occupier of the land or building will have a better title. The rationale of this rule is probably either that the chattel is to be treated as an integral part of the realty as against all but the

true owner and so incapable of being lost or that the ‘finder’ has to do something to the realty in order to get at or detach the chattel and, if he is not thereby to become a trespasser, will have to justify his actions by reference to some form of licence from the occupier. In all likely circumstances that licence will give the occupier a superior right to that of the finder. (*Parker*⁸¹, per Donaldson LJ, p.837 (my emphasis)).

It is precisely this last sentence in the quote from Donaldson LJ. in *Parker* which has caused much misunderstanding in the archaeology sector and was probably misinterpreted by Cookson. The problem is that Donaldson LJ is specifically referring to a ‘finder’ and not to a contracted professional whose job entails the collection of discovered objects as part of a CRM approach undertaken consequent to a planning condition placed by an LPA. As discussed in the next sub-section, the *Parker* case concerned a person who discovered a bracelet in the British Airways lounge at Heathrow Airport. Notwithstanding that Mr Parker was in the lounge as a passenger by virtue of having purchased a ticket and not in a professional capacity, the court’s decision was that he was entitled to the bracelet, as against British Airways, because the ‘true’ owner could not be located and because Parker acted in good faith.

The notion that archaeologists should be considered as mere ‘finders’ of chattels in someone else’s land has been disputed by the late Professor Norman Palmer QC. Palmer was a leading authority on the law relating to cultural property and portable wealth (which archaeological object collections come under), and his views should be given significant weight. Palmer argued that:

The general law of finders is an unsatisfactory vehicle for determining title to antiquities within the employer/contractor relationship. Identifying the possessor of

⁸¹ *Parker v. British Airways Board* [1982] 1 All ER 834

the site can be a complex process, and the answer may vary according to the context in which the question is raised. The same is true of the relationship of employer and employee. The principle which equates a finding of goods in the course of employment with an assumption of possession on behalf of the employer is likely to appear simplistic when applied to the complicated but informal labour arrangements (including temporary transfers of service among contractors and sub-contractors, and notional self-employment) which obtain on building sites. (Palmer 2002, 384 (my emphasis)).

Thus, according to Palmer, the legal situation in respect of archaeological collections in England is bailment, a situation where the entity in possession of the items does not have ownership of them. In this case, archaeologists who collect and keep objects assembled during pre-development excavation projects, without directly obtaining title to the material by virtue of having acquired possession, enter into an intentional bailment situation (Palmer 2009, 565). Prior to discussing bailment, there are two court cases (*Parker* and *Fletcher*, presented below) that provide essential background to the legal discussion that follows.

7.1.2 *Parker v. British Airways Board*

This case is important and is related to the issues discussed here because the judges explicate precisely the rules in respect of the obligations and liabilities pertaining to possession of and title to items found on land (in a building but not where the object is imbedded in the land). The significance of this case lies in the explanation of Donaldson LJ that the responsibility of maintaining control over items which are found on land or in a building is upon the landowner (or a developer acting as the landowner's agent in the scenario discussed here). This is a crucial point in this discussion, there is a clear legal distinction between objects

that are still submerged in the ground where all legal rights and responsibilities are with the landowner, and discovered objects which are severed and extracted from the land where a new set of rules becomes pertinent:

An occupier of a building has rights superior to those of a finder over chattels on or in, but not attached to, that building if, but only if, before the chattel is found, he has manifested an intention to exercise control over the building and the things which may be on or in it. (*Parker*⁸² per Donaldson LJ, at p.843).

According to the judgement in *Parker*, if landowners or developers wish to retain possession of the objects discovered by archaeologists, then they must exercise and maintain control over the assembled material while it is on the premises under their control. Notwithstanding adequate control over construction sites, when archaeologists unearth chattels and place them in finds bags, developers could, if they so wished, exercise control over the assemblage before the bags are taken off site. Developers or landowners may approach the archaeologists before the discovered object collection is taken off site and ask for it to remain under their control. Their failure to do so, even simply because they are uninterested in it, could mean that their title in the collected items is severely diminished, if not extinguished. Intentional relinquishing of title can be considered as discard (rubbish in the bin) and an implied abandonment of property rights (Hudson 1998, chapter 23; *Ellerman*⁸³, per Goddard L. CJ), similar to waiver by informed consent (replacing car tyres with new ones and leaving the old ones at the garage, for example).

In regards to the rights and obligations of finders of chattels and rights and liabilities of occupiers of a land or a building where a chattel is found, Donaldson LJ lists nine stipulations

⁸² *Parker v. British Airways Board* [1982] 1 All ER 834

⁸³ *Ellerman Willison Line v. Webster* [1952] 1 Lloyd's LL Rep 179

that can have a detrimental effect on title to the object. The fourth point in Donaldson's LJ's list is most pertinent to the issues discussed here:

4. Unless otherwise agreed, any servant or agent who finds a chattel in the course of his employment or agency and not wholly incidentally or collaterally thereto and who takes it into his care and control does so on behalf of his employer or principal who acquires a finder's rights to the exclusion of those of the actual finder. (*Parker*⁸⁴ per Donaldson LJ, at p.844 (my emphasis)).

The *Parker* case concerned an object found on land, not imbedded in it, and this was a material consideration in the judges' decision to award damages of £850 to the plaintiff (Mr Parker) although he was only a visitor to the site. In contrast, the *Waverley* case concerns an item discovered imbedded in the ground and where digging in the land was necessary in order to retrieve it. Consequently, at first view, the decision in *Waverley* seems to contradict the decision in *Parker*.

7.1.3 *Waverley Borough Council v. Fletcher*

There are a number of court cases supporting the notion that landowners retain title to objects discovered in their land, particularly *Elwes*⁸⁵, *Appleyard*⁸⁶, *South Staffordshire*⁸⁷ and *Waverley*⁸⁸. Nonetheless, these court decisions were not concerned with a scenario in which the collection of objects was an intrinsic part of the required job. These cases explicitly concern instances where a person discovers an object in someone else's land in the course of conducting

⁸⁴ *Parker v. British Airways Board* [1982] 1 All ER 834

⁸⁵ *Elwes v. Briggs Gas Co.* [1886] 33 Ch D 562

⁸⁶ *Corp. of London v. Appleyard* [1963] 2 All ER 835

⁸⁷ *South Staffordshire Water Co. v. Sharman* [1896] 2 Q.B. 44

⁸⁸ *Waverley Borough Council v. Fletcher* [1995] 4 All ER 756

an activity where the retrieval of the object from the ground is not stipulated, required or intended by the agreement for the work to take place.

The act of taking possession of a chattel discovered imbedded in land and extracted by anyone but the landowner can amount to trespass. This is because in order to reach the object, one would have to modify the land in some way, i.e. to dig or excavate, and it is this initial action which has to be governed by the agreement in order to avoid a charge of trespass. As a result, firstly the act of coming onto the land; secondly, the act of digging in the land; and thirdly, the act of taking possession of the discovered object – all have to be governed by the contract, either expressly or as implied terms, in order for the act of taking possession to be lawful (Palmer & McKendrick 1998; Clarke & Kohler 2005, 285; and see *Parker*⁸⁹ per Donaldson LJ, at p.843; *Waverley*⁹⁰ per Ward LJ, at p.768).

Within the legal plethora of cases concerning these issues, *Waverley v. Fletcher* is one of the most significant because it is a case in which the Court of Appeal overturned a decision by the High Court of the Queen's Bench Division, illustrating the complexity of the issues discussed here. It is important, therefore, to provide a short synopsis of this court case, the decision taken, and its implications for CRM-based archaeological work.

Mr Fletcher used a metal detecting device at Farnham Park, Farnham, Surrey, which is owned and managed by Waverley Borough Council. While so doing, he discovered a medieval gold brooch submerged in the ground which he then dug up and took possession of. The council claimed that the brooch was its property, as owners of the land, and took Mr Fletcher to court in order to retrieve possession of the object. Fletcher argued that, as per the principle of 'finders keepers', considering that the park is a public place used for recreational activities, he was a

⁸⁹ *Parker v. British Airways Board* [1982] 1 All ER 834

⁹⁰ *Waverley Borough Council v. Fletcher* [1995] 4 All ER 756

lawful visitor and therefore entitled, as the person who discovered and recovered the object, to keep the brooch as long as the true owner could not be located. The House of Lords judges sitting as the Court of Appeal ruled that:

Mr Fletcher did not derive a superior right to the brooch simply because he was entitled as a member of the public to engage in recreational pursuits in the park. Metal detecting was not a recreation of the sort permitted under the terms under which the council held the land on behalf of the general public. In any event, digging and removal of property in the land were not such a permitted use, and were acts of trespass. And the council was entitled to exercise its civil remedy for protection of its property regardless of the absence of any applicable byelaw. (*Waverley*⁹¹, per Ward LJ at p.768 (my emphasis)).

In accordance with the decision in *Waverley*, it can be surmised that in relation to archaeological work, the determinative question is whether the actions of digging and removing objects from the land are authorised and governed by the agreement (the WSI intent for a ‘preservation by record’ method within CRM system, as discussed in chapters four and five above). For this reason, in order to ascertain the ownership of archaeological material, it is essential to establish whether the retrieval of an object recovered during archaeological work, taking place using a ‘preservation by record’ method within the CRM system, is a necessary and integral part of the job requirements (for this reason, this thesis had to begin by addressing the principles of planning policies, preservation by record method and the system of CRM). As the following section illustrates, there could potentially be significant legal ramifications if these issues were not adequately examined and addressed.

⁹¹ *Waverley Borough Council v. Fletcher* [1995] 4 All ER 756

7.2 Legal problems of establishing title to recovered archaeological material

Following from the possible inference presented above that archaeologists' act of collecting objects during pre-development work could amount to trespass, it can be said that the legal problems explored in this chapter can potentially have serious ramifications. If both Palmer (1996; 2002; 2009, 1,444) and the conclusion reached through this research are deemed wrong and ruled so by a court it could mean that archaeologists, museums and archive centres are committing the tort of conversion (Tort (Interference with Goods) Act 1977; and potentially also the Dealing in Cultural Objects Act 2003). Therefore, this section is dedicated to examining the legal difficulties arising from the supposition that archaeologists are taking someone else's property without explicit permission and without obtaining title to it.

Certain points briefly mentioned in the introduction to this thesis are of material importance and merit reiteration here –

1. The syllogism that under property law title to objects recovered during pre-development work remains with the owner of the land where the objects were discovered is today specifically mentioned in the *AAF Guide to Best Practice* (Brown 2011). The *AAF Guide to Best Practice* is one of the primary documents that sets the basis for the code of practice within the archaeology sector, the relevant paragraph within it states that: 'At present, landowners retain all rights of ownership to archaeological materials discovered on their land, with the exception of items classified as Treasure' (*ibid.* s5.4(1)).
2. As mentioned above (in the Introduction), the common law principle of *nemo dat* means that one cannot give what one does not have (Chambers 2008, 369).

Therefore, in bailment situations – that is, when someone has possession of a chattel without ownership of it, for example a book borrowed from a library – one cannot pass title to that chattel to someone else. Being merely a bailee, the possessor does not have title to the object himself (Palmer 2009, 565). Since it is assumed that archaeology contractors do not obtain title to the objects which they assemble purely by virtue of collecting them during excavation, ergo, they cannot transfer title to the material part of the archive to museums or other repositories. In reality the picture is more complex, as there can be numerous exceptions and limitations to the *nemo dat* rule, both under common law and by statute (Chambers 2008, 371). This, however, is the working assumption currently held by the archaeology and museum sectors in England (Brown 2011, s5.4(1); see further ref. in appendix C).

3. If the conjecture that the *nemo dat* rule is the determining factor, then archaeology contractors, museums and archive centres are potentially liable under the tort of conversion because the act of collecting such objects by archaeologists could be construed as trespass (Palmer 1978, 629; Pollock & Wright 1888, 57-60; Bridge 2002, 116; and specifically, the decision in *Waverley*⁹² discussed above). Such legal interpretation may also result in the nullification of the contract for CRM-based work undertaken in England because the contract would entail committing the tort of conversion (see McKendrick 2016, 6).

If archaeology contractors only have custody of but not title to the archaeological object collections that they are holding, then a potentially serious legal problem arises, especially given that they rarely intend to return them to the landowner (as per the NPPF's (2020, s199, footnote 64) requirement that the archive will be deposited at an archive centre

⁹² *Waverley Borough Council v. Fletcher* [1995] 4 All ER 756 at 757

or museum, discussed above). As the quote from Lawrence J above illustrates, the fact that archaeology contractors are not interested in holding the material and are only doing so as a ‘lesser of two evils’ option is immaterial at this point because they are intentionally holding material to which they, supposedly, do not have title. Furthermore, the *nemo dat* rule means that if archaeologists do not have title to the assembled material then they cannot give title to museums or archive centres. To put it bluntly, under the assumption outlined here, museums and archive centres should not be allowed to accept any object from archaeologists operating in England without a verifiable transfer of title (ACE Accreditation Policy 2014, section 9.2; and see further discussion below at s7.2.1). This is why, as discussed in the Deyntes Cottage case study above (at s6.2), the Museum of London introduced ‘Deed of Title Transfer’ and the ‘Due Diligence’ documents (in order to comply with the ACE and ICOM regulations). The argument put forward in this thesis, however, is that these documents are not necessary, as archaeologists *do* obtain title to the recovered objects by virtue of having obtained a lawful entitlement to possess the material consequent to implied contractual terms. These issues are discussed further, below in the next sub-section.

A further potential problem arising from the supposition discussed above is that the Torts (Interference with Goods) Act 1977 states that, if the court has deemed possession of goods as tortious, both the party now in possession and the party which transferred the goods could be liable to the bailor (i.e. the owner of the asset which, under the supposition discussed here, would be the landowner) (section 7(4) of the Tort Act 1977). To add insult to injury, the Dealing in Cultural Objects Act 2003 states that:

- s1(1) - A person is guilty of an offence if he dishonestly deals in a cultural object that is tainted, knowing or believing that the object is tainted.

s2(2b) - A cultural object is tainted if the removal or excavation constitute an offence.

s2(3a) - It is immaterial whether the removal or excavation was done in the United Kingdom or elsewhere.

s3(1) - A person deals in an object if (and only if) he acquires, disposes of, imports or exports it.

If the conjecture held within the archaeology sector, as exemplified by the quotes from Renfrew and Brown above, that archaeology contractors do not obtain title to objects recovered during CRM-based fieldwork is taken at face value then there is a problem. Such an interpretation could mean that archaeologists, museums, archive centres and even developers and landowners are all in breach of the Dealing in Cultural Objects Act 2003. Arguably, they could be seen as dealing in ‘tainted’ cultural property obtained consequent to trespass (as per the Dealing in Cultural Objects Act 2003, above).

A further demonstration of the legal conundrum that such interpretation can cause is the possibility that it would be difficult for a museum, an archive centre or an archaeology contractor to sue for stolen objects, because making such a claim would require proof of ownership (or evidence of possession or an immediate right to possess); i.e. under the supposition discussed here only the landowner can seek remedy for stolen items (see Palmer 2015, 11). This can give the rather surrealistic, and probably wrong (Palmer 2015, 15), notion that England is bound by law (the above-mentioned Dealing in Cultural Objects Act 2003) to return stolen archaeological objects to other countries, but does not have the authority to claim the return of such objects if they were stolen from within England (other parts of the UK have different arrangements). This unfathomable situation was acknowledged, in error according to Palmer, after much deliberation in Parliament, by the Return of Cultural Objects Regulations

1994. The problem with these regulations is particularly evident in section 6(4a) which requires the identification of the object as a registered ‘Cultural Object’ notwithstanding that in order to register archaeological material as a ‘Cultural Object’, there must be sufficient evidence of ownership.

In contrast to the perceived legal issues discussed above, in his last publication, Palmer has explained that as well as title, a further important legal aspect which has to be considered in respect of archaeological material is ‘the right to possess’:

a claimant must show that he/she has in law the necessary title to the object. The title on which he/she relies must be sufficient to enable the claimant to recover the object through the court system of the country where it is now. In England, for example, the claimant must show that he/she had either possession of the object, or the immediate right to the possession of it, at the time of the alleged wrong. (Palmer 2015, 11 (my emphasis)).

Following this assertion by Palmer, the legal status of archaeologically-recovered material does not concern ownership but ‘entitlement to possess’. It is this entitlement to possess which archaeologists obtain by virtue of working under a contract where the recovery of discovered objects is part of the work remit as an implied term (discussed further below) arising from the tenet of a CRM-based work conducted using a ‘preservation by record’ method with the aim of enhancing understanding, facilitating future research and protecting the archaeological record (after Thomas 2019).

The perceived legal uncertainties regarding the conveying of title to archaeologically-recovered objects from archaeology contractors to museums and archive facilities is one of the great peculiarities of archaeology in England. More often than not, these perceived difficulties hinder the use of recovered material for research purposes because they render the objects, data

and information less accessible (Merriman & Swain 1999, 252). For this reason, the following section examines the development of this legal uncertainty from the museums' perspective and the potential ramifications of leaving these legal questions unanswered. In addition, the next section also addresses the question of whether international regulations should be applied to recovered objects obtained and kept within the jurisdiction of England.

7.2.1 The museums' perspective

Once the work has been completed under contract, additional ethical and legal complications emerge. The most difficult aspect of the issues relating to the legal status of archaeological material is the point at which an archaeology contractor intends to deposit the material at a museum but the deposition is refused due to the assumption that the contractor cannot transfer title to the objects (the syllogism discussed above regarding the *nemo dat* rule). As highlighted by the quote below from the accreditation policy used by the Museums Association (MA), the Arts Council England (ACE) (formerly the Museums Libraries and Archives (MLA)) and the Society for Museum Archaeology (SMA), this legal quandary is well established and applies even between parent and subsidiary companies such as the Museum of London Archaeology and the Museum of London itself, as illustrated above in the Deyntes Cottage case study (at 6.2) by the quote from the MoL Acquisition Policy which uses similar wording to the ACE policy discussed below. Note that the applicable policies refer specifically to the issue of establishing the transfer of title, not ownership or possession.

The museum will undertake due diligence and make every effort not to acquire, whether by purchase, gift, bequest or exchange, any object or specimen unless the governing body or responsible officer is satisfied that the museum can acquire a

valid title to the item in question. (ACE Accreditation policy 2014, section 1.6 (my emphasis)).

While museums and archive centres in England are the expected recipients of the material assembled by archaeologists, the implementation of domestic policies based on international procedures can lead to undesirable ethical and administrative difficulties for archaeologists and museum curators. Museum accreditation is not a legal requirement, but the current discrepancies between national policies and international regulations for handling cultural and archaeological objects must be elucidated so as to prevent the perception of mistrust between the museum sector and development-driven archaeology. To clarify the matter by way of analogy, the difference between the archaeology sector's documentation requirements and those of the museum sector is similar to the difference between a birth certificate and a passport.

In order to understand why, today, there are such administrative differences in the level of paperwork required by museums for accession of objects versus the documents that archaeology contractors adhere to, we need to look back at social and ethical changes in recent years. During the past 40 years or so, as a result of London being for many years a global hub for the trade in illicit antiquities (Brodie, Doole & Watson 2000), there has been a growing emphasis, both internationally and within the UK, on stopping museums from accepting or having any dealings with unprovenanced or illicitly-obtained archaeological or other cultural objects (Select Committee on Culture, Media and Sport; Minutes of Evidence <https://publications.parliament.uk/pa/cm199900/cmselect/cmcmds/371/0032305.htm> (accessed in July 2014)). In respect of archaeological material and looted portable antiquities, this effort is epitomised in the policies of the International Council Of Museums (ICOM) Code of Ethics (CoE) which states that:

No object or specimen should be acquired by purchase, gift, loan, bequest, or exchange unless the acquiring museum is satisfied that a valid title is held. Evidence of lawful ownership in a country is not necessarily valid title. (ICOM 2013 (amended), section 2.2 (originally published in 1986) (my emphasis)).

This rule, established by ICOM in 1986, has resulted in much confusion regarding the transfer of title to archaeological material – in England today, there are over 40 different legislative requirements pertaining to archaeological material, some of which are in explicit contradiction with one another. As a specific example, we can highlight the contradiction between the Dealing in Cultural Objects Act 2003 and Part 6 of the Tribunals, Courts and Enforcement Act 2007. In this particular example, the Government, in what has been termed ‘a chaotic haste’ (Stephens 2008), passed legislation contradicting its own laws, specifically regarding the highlighted sentence in the ICOM CoE quoted above. As Stephens explains, Part 6 of the Tribunals, Courts and Enforcement Act 2007 allows certain objects to be temporarily exempt from being under UK property legislation so that they can be loaned from Russia to be exhibited in the UK without being confiscated under the Dealing in Cultural Objects Act 2003. This demonstrates the complex and perhaps deliberately opaque nature of English property legislation as it applies to objects considered to be ‘cultural property’ such as archaeologically-recovered material (Prott & O’Keefe 1992, 310). This example also further illustrates why the legal issues discussed here can be difficult to unentangle.

The ICOM 2013 CoE s2.2, is the basis for the code of ethics and accreditation policies of the three main bodies setting museums’ ethical standards and operational procedures, namely the MA, the ACE and the SMA. Albeit that accreditation is not a legal requirement, the influence of the ICOM ethical guidelines are particularly evident in section 1.6 of the ACE 2014 Accreditation policy, quoted above, section 9.2 of the ACE policy states that –

The museum will not acquire any object or specimen unless it is satisfied that the object or specimen has not been acquired in, or exported from, its country of origin (or any intermediate country in which it may have been legally owned) in violation of that country's laws. (For the purposes of this paragraph 'country of origin' includes the United Kingdom). (ACE Accreditation Policy 2014, s9.2).

This means that every archaeological object assembled in England by an archaeology contractor should have sufficient documentation to constitute a 'birth certificate' (i.e. the entire collection of documents, drawings, records and digital data relating to its provenance). Museums' accreditation policies, on the other hand, are guided by international policies (the ICOM CoE). As a result, accredited museums must require that any object which they are expected to receive would be issued a 'passport' (i.e. a documented transfer of title) before the museum can accession the object.

From an international procedural perspective, neither ICOM nor the ACE distinguish between an object recovered during a commercial excavation project in England and an object illicitly dug up in Egypt for example; as far as accredited museums are concerned, the documentation requirements for proving title to the object are the same (ACE Accreditation Policy 2014, s9.2; see also the Dealing in Cultural Objects Act 2003).

Consequently, the majority of museums and regional archive centres have in place regulations requiring a documented transfer of title. This means that until the paperwork relating to the transfer of title to objects recovered during pre-development work has been completed, archaeologists cannot deposit the assembled material in an accredited museum or an archive centre (as per the ACE Accreditation Policy 2014, s9.2). The Museum of London, for example, accredited by the ACE, cannot accept objects from the Museum of London Archaeology without a documented transfer of title – the MoL accreditation under the ACE

policies are in direct correlation to the ICOM CoE which require documented transfer of title (Museum of London ACE Accreditation Listings); this issue is also discussed in the case studies of Deyntes Cottage (6.2) and Moorfield School (6.3) above).

Thus, the organisations assembling archaeological material operate under different and contradictory ethical codes, regulations, policies and financial arrangements from those who are expected to accession and conserve the material. This creates a situation whereby archaeological objects collected by an archaeology contractor during investigative fieldwork in Sussex for example, cannot be deposited in a local museum in Sussex without the contractor first obtaining the relevant transfer of title documentation (the metaphoric passport) for these objects. This could jeopardise the logic behind collecting the objects in the first place because if the material is recovered for the purpose of providing some form of public benefit then restricting public access by keeping the objects in a contractor's archive limit their potential use (the difference between keeping material in a museum vs keeping it in a contractor's archive facility; as discussed in the case studies; see also Merriman & Swain 1999).

To summarise, there are two parallel legal/ethical issues here – the first is that museums are not allowed to accept any object without also receiving title to it from the object's rightful owner (as opposed to legal owner – in countries such as Russia, for example, where many cultural artefacts were confiscated and then nationalised, such objects are today legally owned by the Russian state even though rightful (moral/ethical) title to such objects may reside elsewhere (Stephens 2008)). The second issue is that within the English archaeology sector, there is a widely-held belief that title to archaeologically-recovered objects remains with the landowner whence the objects were obtained (as per Brown 2011). This then creates a problem whereby museums are working under the assumption that they are not allowed to accept such objects until a 'deed of title transfer' is signed by the landowner (or developer acting as the landowner's agent), which then means that the contractor has to keep the collected material in

a peculiar ostensible legal limbo (as per the purported syllogism discussed here, which is probably incorrect; see discussion in Northamptonshire (6.8) and Sussex (6.7) case studies above). Title to portable antiquities can be transferred by conveyance without documentation (as per the time restrictions of bailment, discussed further below in this chapter) and landowners' rights can be extinguished through loss of *de facto* control over a property (O'Keefe & Prott 1989, 308). It can be argued, therefore, that the ACE policies and ICOM CoE are not pertinent and should not be applied to archaeological material recovered during development-driven field investigation work undertaken in England. Archaeological material that is legally and ethically assembled and kept by archaeology contractors operating within the jurisdiction of England should not require a 'passport' in order to be deposited in a museum in England.

In respect of the issues discussed in this thesis, the problem is that the policies of a system that are meant to stop the unethical international trade in illicit antiquities have percolated into the workings of development-led archaeology where, albeit not explicitly relevant, these regulations have taken hold and are difficult to uproot. Today, accredited museums must adhere to national and international regulations and policies that require a level of documented pedigree for every object prior to accessioning it which is above the level of the legal requirements for establishing a transfer of title under English law (Palmer 2009, 565).

Under English law, the conveyancing of title to chattels can take place under contract without the wording of the contract stipulating that the transfer of title is part of the agreement. For example, during house renovations undertaken by a contractor, the builders can clear the rubbish without gaining ownership of the refuse building material (or any other item discovered, see Barber 1998; also the decision in *Appleyard*⁹³). Where work is carried out under

⁹³ Corporation of London v. Appleyard [1963] 2 All ER

contract, it is most likely that it is the contract which will determine the conveyancing of property rights in matters relating to the fulfilment of the agreement (Palmer 2002, 365).

7.3 Contract in pre-development archaeological projects

Having illustrated and explained the problem with establishing the ownership of archaeological material in England, and looking at why current policies are insufficient for ascertaining the transfer of title to the material, this section aims to provide some answers. As pointed out by Palmer above (at section 7.1), the contract which gives rise to property rights is the determining factor in ascertaining ownership of archaeologically-recovered material (Palmer 2009, 565). Therefore, the discussion in this section underpins the conclusion to the issues discussed in this chapter. To state this more clearly, the contract governing archaeological work is the legal framework for establishing the legal status of objects recovered during CRM-based fieldwork taking place in England.

The first point, which has to be emphasised, is that before archaeological material is selected, collected, sorted and put in a box, something has to happen which will help to establish the intended outcome of these actions. This then determines whether the action(s) of assembling the material was justified or tortious (McBride & Bagshaw 2005, 343). This section discusses what needs to take place, as in that ‘something which has to happen’, and the reasons why it matters in ascertaining who is entitled to hold and use archaeological material. This discussion is an imperative foundation for understanding how and why title to archaeologically-recovered material is conveyed from landowners to archaeology contractors, in most cases through the actions of an intermediary acting as an agent for the landowner, and through them to museums and archive centres (see discussion of the *chaîne opératoire* of development-driven archaeology, above at chapter one).

In order to elucidate essential legal concepts, it is necessary to begin the discussion here with general legal statements prior to bringing the discussion back in to focus on the specificities of legislation relating to possessory entitlement to archaeological material.

The first general rule of property law is that we are not born with property rights; property rights arise through specific sets of circumstances – action(s) that has to take place before property rights are established (Bridge 2002, 15). In development-driven archaeological work those circumstances involve an agreement between an archaeology contractor and a land developer, or an agent acting on the developer's behalf (consultant), that an archaeological investigation will take place and a report of the findings will be produced. The work will be conducted as per the policy guidelines set in the NPPF, the legal requirements set in the Town and Country Planning Act(s) 1990 (amended) and EU-based procedures and regulations set in the 'Precautionary Principle' discussed in previous chapters.

When a local planning authority (LPA) places a development application approval condition on a proposed project, legal wheels are set in motion. For the purpose of this thesis, it is assumed that the planning authority imposes the conditions in the public's interest and within the national guidelines and legislation (Drewett 2004, 79). It can be surmised that the LPA has certain reasonable expectations regarding the quality of the work and the details which should be included in the submitted report (Carver 2011, 85; in legal terms this is the measurement of performance of the contract). As discussed and illustrated in the case studies above, from the moment the Historical Environmental Records are consulted, through the 'Brief' and the fieldwork phases and ending with boxes of archived material on shelves, a certain product is expected at the end of the process (be it a report, a limited interference, or a full-scale excavation, see Cooper-Read 2015). These theoretical expectations, ingrained in the CRM philosophy, form the basis of the agreement for the expected work. The LPA tells the developer 'we will only accept work of a certain standard and the development application

approval condition will only be discharged if the report contains the required level of detail' (Fulford 2011, 37). To reiterate – contracts for pre-development CRM-based archaeological work are based on the expectation of LPAs that a product will be generated in order to discharge planning conditions (Carver 2011, 122).

The initial contract is therefore the crucial element in this process, it is aimed at ensuring the production of a report (the product). This relies on scientific research methods to gather and analyse data – where the collection of objects recovered from the ground is an integral part thereof (Drewett 2004, 79). The contract is critical because the agreement for investigation work to take place happens before archaeologists enter the site and excavate, select, collect, remove and retain or discard objects. It is therefore the contract that determines whether archaeologists' actions are justified or tortious (McBride & Bagshaw 2005, 347).

At its essence, a contract has a number of elements: an offer, acceptance, consideration and intent to create a legally binding contract (McKendrick 2016). In development-driven archaeology, a valid contract should always be in place (Brown 2011). Nevertheless, the parameters set by these types of contracts are focused on the production of a report which is aimed at satisfying a condition imposed by planning authorities and not on the specific method used to generate the product (Carver 2011, 122). The contract between developers and archaeology contractors is, by and large, silent on the selection, removal and retention of objects discovered during the project (where permission was obtained, email correspondence relating to the contracts examined for this research are included in appendix C in accordance with UCL data protection procedures). Contracts do state that 'preservation by record' actions should take place, in accordance with international conventions (particularly Valletta 1992), the acceptable industry standards (MAP2, MoRPHE and the AAF guidelines are regularly mentioned) and the NPPF, but without specifying precisely how this should be done (clearly contracts can vary and can be drafted per the required work, this statement refers to the

specificities of how the archaeological work should be carried out and whether or not discovered objects should be recovered – this has to rely on the professionalism of the archaeologist in the trench; as discussed in s2.2.1 above).

These actions, referred to as ‘sampling strategy’, are customarily agreed between the relevant parties during the course of the work, as discussed in the Deyntes Cottage, Moorfield School and Hoo Road case studies above at sections 6.2, 6.3 and 6.4 respectively. Notwithstanding that the contract does say that the work has to be carried out to a stipulated standard, it does not make specific reference as to the recovery and discard of discovered object (because it is unknown what will be discovered) – it is expected that the archaeologists, in the trench and in the lab, will make these decisions based on their professional expertise and agreed sampling strategies (Carver 2011, 127). This particularly applies to archaeologists working in the lab after the assembled material has been sorted and recorded. ‘Finds processing’ archaeologists are those who make the decision as to the nature and size of the sample which will be conserved in the archive, yet their job is rarely, if ever, mentioned in the initial contract (i.e. the ‘watching brief’ and WSIs can only refer to general sampling strategies, the specificities of which have to be agreed in verbal or in the written agreement, such as finds processing discussions with county archaeologists or a GLAAS officer, and need to be reassessed during excavation and again after the completion of the fieldwork, see appendix C).

Within the contract, after consulting the HER and carrying out a ‘Brief’, but prior to the commencement of any fieldwork, the archaeology contractor will submit the WSI for the consideration of the LPA and of their client, probably a development consultancy company acting as agents and advising developers (for example, CgMs as discussed in the case studies above) (see Southport Group 2011, at s2.2). The WSI specifies the method by which the archaeology contractor will carry out the work for a fee. In effect the WSI signifies the four elements of a contract (offer, acceptance, consideration and intent to create legal relations;

McKendrick 2016), and it provides the assurance that archaeologists will adhere to procedures and standards set forth by the leading professional bodies (namely CIfA; see Chartered Institute of Archaeologists 2014b, s3.1.7, which is based on the AAF Guide to Best Practice (Brown 2011)).

Herein lies the problem – the WSI documents currently used by archaeologists as the contractual terms in their agreement with their clients contain reference to guideline documents, specifically section 5.4(1) of the *Guide to Best Practice* (Brown 2011) and the CIfA *Standards and Guidance, Archives* document (2014b) which explicitly state that title to the objects collected during archaeological fieldwork resides with the landowner of the site. For example, CIfA (2014b) states that:

3.3.6 – Project designs, schedules of works etc. should state how the project team will achieve transfer of title and copyright from the original owners to the archive repository.

3.8.5 – Except in Scotland, in the event that the landowner is unwilling, for whatever reason, to donate the finds to the appropriate recipient museum, the archaeologist undertaking the fieldwork must endeavour to ensure all artefacts and ecofacts are recorded, safely packaged and conserved where appropriate before transfer [back] to the owner, and that their [the material] location and ownership are stated in the site archive and public record.

In another document, published also in 2014, CIfA complicates things further:

In England, Wales, Northern Ireland and the Isle of Man, ownership of objects rests with the landowner, except where other law overrides this (e.g. Treasure Act 1996, Burials Act 1857). The archaeologist undertaking the fieldwork or the planning archaeologist/conservation officer must make this clear at the inception of the

project (in the brief/project outline, specification or project design). (CifA 2014a s3.10.3).

The problem with these statements from CifA is that they are superfluous, because the onus of declaring ownership of a chattel is on the owner. The owner, and only the owner, is responsible for expressing, manifesting and exercising control over their own property (explicitly and clearly stated by Donaldson LJ in *Parker*⁹⁴). Therefore, the responsibility for expressing an interest in, manifesting title to, and exercising control over the objects discovered by archaeologists is on the landowners if they so wish. It may be that the origin of the legal assertions by CifA, the AAF and other archaeology sector representative bodies are based on taking the decisions from *Elwes*⁹⁵ and *South Staffordshire*⁹⁶ at face value, (discussed at section 7.1 above), nonetheless, these cases did not concern archaeology, planning regulations or CRM-based work conducted in a ‘preservation by record’ method aiming to benefit society through enhancing understanding of the past.

Although some WSI documents omit the CifA, Historic England and/or AAF procedures in favour of regional or county-specific procedures, such as the MoL or GLAAS policies (referred to for projects which take place in London), the deposition of the boxes of material at an archive repository facility or museum requires certain standards to be met and regulations adhered to (otherwise the recipient institute may refuse to accept the archive boxes. See Historic England guidelines for example: <https://historicengland.org.uk/services-skills/our-planning-services/greater-london-archaeology-advisory-service/heritage-standards/> (accessed in November 2017)). Therefore, prior to the transfer and deposition of boxes of collected material, the contractor company will need to comply with the requirements of the

⁹⁴ *Parker v. British Airways Board* [1982] 1 All ER 834

⁹⁵ *Elwes v. Briggs Gas Co.* [1886] 33 Ch D 562

⁹⁶ *South Staffordshire Water Co. v. Sharman* [1896] 2 QB 44

CifA, Historic England, AAF, archaeological centres or the MA, ACE, SMA or the MoL procedures for museums (documents listed in the bibliography). The policy documents published by all of these institutions assert that archaeology contractors do not obtain title to the objects they recover and collect during CRM-based fieldwork.

To emphasise, the issues discussed in this thesis regarding the legal status of archaeologically-recovered material arise primarily from WSI documents' reference to archaeology and museum sectors' Code of Practice policies and guidelines which explicitly state that title to objects discovered during fieldwork remains with the landowner – as per the quotes from CifA, Brown and Renfrew above. More specifically, the syllogism that title to the objects collected during development-led projects remains with the landowner is stated in the CifA *Standard and Guidance* 2014a s3.10.3; Lee 2008, 31; SMA (and ACE) Code of Ethics, s2.4; HE, AAF, *Guide to Best Practice* (Brown 2011) at s5.3.1; *Archaeological Archives*, an AAF document, in conjunction with the ICOM, Conservation Guidelines No.2, *Guidelines for the Preparation of Excavation Archives for Long Term Storage*, at s5.4.1; and MoL *Acquisition and Disposal Policy* 2011 (2015), s2.4(a).

This is the legal/ethical problem – that the contract for archaeological investigative fieldwork references documents, although strictly speaking not legally binding, specifically state that title to the objects discovered remains with the landowner (*ibid.*). After performing their contractual obligations, archaeologists have possession of boxes of recovered material that they are meant to deposit at an archive centre or museum (*ibid.*, see particularly CifA 2014a, at s.10; Brown 2011. *Archaeological Archives*, at s5). Going back to the ICOM CoE which states that 'No object or specimen should be acquired by purchase, gift, loan, bequest, or exchange unless the acquiring museum is satisfied that a valid title is held' (ICOM 2013 (amended), s2.2), it is clear why, if the archaeology and the museums sectors' main official

bodies argue that title to objects discovered during fieldwork remains with the landowner, then understandably museums cannot accession such objects into their collection.

This is a crucial point for this thesis; the understanding that archaeologists are operating under contract, despite the fact that the agreement does not explicitly entail the collection of specific objects from the ground. The acts of selecting, recovering and collecting certain objects during excavation work and of keeping a sample of the collected objects in an archive are carried out by archaeologists as part of professional scientific work. This takes place under the principle of ‘preservation by record’, despite the fact that these actions are not explicitly required or governed by the applicable legislation, policies or Code of Ethics procedures. The CIfA 2014b *Standard for Excavation*, for example, does not say that discovered objects should be collected, only that:

In many instances several techniques [of excavation] may be valid under the terms of the brief/project outline, and it will be necessary to explain the criteria for selection. The methods selected must be fit for the defined purpose and therefore related to the research objectives. (at s3.3.15).

An archaeological fieldwork investigation can be conducted without a single object being recovered – this would entirely depend on the ‘Finds Selection and Retention Strategy’ (per Museum of London 2006/07, *Finds Procedures Manual*, at s2.2), and the decisions made in the field according to what was discovered. In fact, the MoL and the MoLAS procedures, for example, emphasise certain types of discovered material which should not be collected, such as unstratified 20th century bricks (see also the discussion of this point at the Kent, Wiltshire and Sussex case studies at 6.5, 6.6 and 6.7 respectively).

Archaeologists gather data and objects as the evidence on which they base their inferences of past cultural activities (Drewett 2004, 121), however, the same procedures also

state that ownership of the material remains with the landowner of the site from whence the objects were obtained (CifA 2014a, s3.10.3; SMA (and ACE) Code of Ethics, s2.4; HE, AAF, *Guide to Best Practice* (Brown 2011) at s5.3.1). Figure 17 shows an archaeologist, working at the Moorfield School project, in the process of excavating and making an informed decision as to the discovered objects that should be recovered. The choice as to which objects should be collected during excavation is not part of the written contract. It was not specified in the WSI – the finds selection strategy was agreed with a GLAAS officer at the site during the work (see appendix C for references), and thus collection is at the professional discretion of the archaeologist in the trench. These important points are discussed further in this chapter, here it is important to emphasise that the archaeologist’s actions are carried out as a customary practice (an employee in the course of doing his job) and under the assumption that they are conducted in the public interest (he is not collecting objects for personal gain).



Figure 19: Archaeologist selecting and collecting objects during the excavation of the Moorfield School site

At trench 3, view looking North

Source: Author with permission of Archaeology South-East (this project is also discussed in the Moorfield School site case study above at section 6.3).

7.4 The conveyancing of title to material recovered during archaeological fieldwork

After establishing the importance of the WSI as a contractual reference to industry policies and regulations, and under the assumption that archaeologists operate under a valid contract, the obvious question is how to establish the transfer of title to objects recovered and retained by archaeologists during fieldwork – despite the fact that the contract states that title remains with the landowner (CIfA 2014a, s3.10.3; SMA (and ACE) Code of Ethics, s2.4; HE, AAF, *Guide to Best Practice* (Brown 2011) at s5.3.1). To be clear, archaeological pre-development contracts (WSI) only circumferentially refer to the legal status of collected material by referencing documents which do make explicit reference to it (as discussed above, when the WSI is agreed the type of material that may be discovered is not yet known, therefore the finds selection and retention strategy has to be decided upon in consultation with an appropriate agent such as a county archaeologist or a GLAAS officer).

In contract law there are things which prevail even over the explicit wording of the contract and the intentions of the parties, such as terms which are implied into, or imposed onto, the contract by statute or by custom (per decision in *The Moorcock*⁹⁷; see also McKendrick 2010, chapter 10; other examples include public safety, as was decided in *Sorrell*⁹⁸). In the scenario discussed in this thesis the relevant aspect of this are terms implied by custom. Such terms have to be: (a) well known (over 30 years); (b) not mere courtesy, but having a binding effect on the contract; and (c) ‘necessary to give efficacy to the contract’ (*Reigate*⁹⁹ per Scrutton LJ).

⁹⁷ *The Moorcock* [1889] 14 PD 64

⁹⁸ *Sorrell v. Paget* [1950] 1 KB 252, [1949] 2 All ER 609, 93 Sol Jo 631, 65 TLR 595

⁹⁹ *Reigate v. Union Manufacturing Co. (Rumsbottom) Ltd.* [1918] 1 KB 592, per Scrutton LJ at p.605

In pre-development archaeology, the aspects of contract law which prevail over the wording of the WSI and all other archaeology sector guidelines and policies, are that:

- there is a well-established practice of archaeologists recovering objects from the ground in the course of conducting ‘preservation by record’ work;
- this practice is sufficiently well-known so that anyone who hires archaeologists to carry out field investigation work can reasonably be expected to know that they will collect objects as evidence for the purpose of recording, analysing and preserving data;
- therefore, discovering and extracting selected objects during archaeological projects, and the conservation of a sample of the recovered material, can reasonably be regarded as an innate part of the expected product of archaeological work; and hence
- agreeing to pre-development archaeological investigative work entails intentionally and knowingly entering a situation of sub-bailment in which the bailor’s (landowner’s) title to discovered and extracted items may be reduced as per ‘waiver by informed consent’ derived from implied contractual terms – the reasonable expectation that certain objects will be unearthed, selected, recovered, collected and either discarded or retained (for reasonable contractual expectations pertaining in bailment situation see *The Winkfield*¹⁰⁰ regarding who can claim for property; and the decision in *Scipion*¹⁰¹; and *The Moorcock*¹⁰²);
- on the basis that the recovery of discovered objects during CRM-based archaeological work is a reasonable expectation, it can be stated that: ‘the grant of authority to use goods is itself to be construed as authority to do in relation to the goods all things that are reasonably incidental to their reasonable use. If the bailor desires to exclude the right of the bailee to do in relation to the goods some particular thing which is

¹⁰⁰ *The Winkfield* [1902] p.42; [1900-03] All ER Rep 346

¹⁰¹ *Scipion Active Trading Fund v. Vallis Group Ltd.* [2020] EWHC 795 (Comm.)

¹⁰² *The Moorcock* [1889] 14 PD 64

reasonably incidental to their reasonable use, he can, of course, do so, but he must do so expressly' (*Tappenden*¹⁰³). It can therefore be surmised that landowners who do not wish for archaeologists to study or conserve collected objects, or to deposit the archive in a museum or archive centre must expressly stipulate this in the contract (such a stipulation in the WSI would contravene the NPPF (2020, s199, footnote 64), and may result in a denial of the planning application, but it is the landowners' legal right to do so).

The implications of archaeological scientific conduct, aimed at providing 'preservation by record' under a CRM system, (discussed in the introductory chapters of this thesis) are the principles determining whether archaeologists' conduct is lawful and conducted in good faith for public benefit reasons, i.e. that enhancing understanding of the past through the study of recovered artefacts is a reasonable contractual expectation. Consequent to this research, it is understood that the archaeological practice of recovering objects and data, creates implied terms into all pre-development CRM-based archaeological work. These implied terms are created by adherence to the principles of CRM and 'preservation by record' and prevail over the wording of WSIs, Codes of Conduct and all other archaeology sector policies and regulations (see McKendrick 2016, chapter 10 for a thorough examination of this point).

Following from this understanding, we should now establish whether archaeologists' action of taking possession of collected objects is lawful and constitutes a reasonable expectation in a CRM-based contract, or whether it constitutes a trespass – whether the method of 'preservation by record' is lawful or tortious (because a practice which is based on trespass cannot convey title – a thief cannot gain lawful title (better than the original owner's title) regardless of how many times he steals a certain item or how well-known his practice is)

¹⁰³ *Tappenden v. Artus* [1964] 2 QB 185 (CA)

(Bridge 2002, 55). In order to answer this question, we need to examine the legal concept of bailment which is a situation in which the entity in possession of items does not have ownership of them – in this case, archaeology contractors keeping objects recovered during fieldwork without automatically obtaining title to the objects by virtue of having acquired possession (Palmer 2009, 565).

7.5 Bailment

Bailment is a complex term. In his title of that name, Palmer explains that most bailment situations are the result of contract (Palmer 2009, 12), the terms of which can either be specified or implied (*ibid.*, 79). Furthermore, and importantly for the issues discussed here, the line between lawful bailment situation and unlawful conversion (theft) could depend on the purpose and intention behind taking possession of the object (Palmer 2009, 1,463; Bridge 2002, 24; also as per the decision in *Waverley*¹⁰⁴). In addition, Palmer explains that, under the rules of bailment, the onus of taking care of an object which is held without title (a book borrowed from a library, for example) is on the bailee (that is, the one with custody of the object), which, in the scenario discussed here, would be the archaeology contractor or the recipient institution (Palmer 1991, 1,467). According to Palmer, recovering objects from someone else's land creates legal obligations (lawful possession without title connotes a duty of care toward someone else's property) and can result in implicit terms into contracts (the 'duty of care' can be implied, it does not have to be expressly stated; *ibid.*; McKendrick 2010, chapter 10; per decision in *The Moorcock*¹⁰⁵).

¹⁰⁴ *Waverley Borough Council v. Fletcher* [1995] 4 All ER 756

¹⁰⁵ *The Moorcock* [1889] 14 PD 64

For clarification, it should be noted that the court might not consider a landowner to be the bailee of un-discovered items (that is, before the archaeological work takes place) because the landowner cannot be expected to know of the objects' existence. Hence there is no requirement to look for the 'true owner' of every object discovered by archaeologists and landowners have no legal obligations towards the person who may have originally lost the item (the original owner of the object (bailor) from centuries or millennia ago). Eveleigh LJ asserted this notion by saying that possession of chattels requires *animus possidendi* (I cannot claim to own something which I do not know exists) as well as *de facto* control over the property (*Parker*¹⁰⁶, per Eveleigh LJ, at p.845). Thus, an absence of intention to possess weakens developers' and landowners' claims to title in chattels discovered during archaeological fieldwork, and also means that landowners are not liable to the true owner (irrespective of the archaeological assumption that the true owner has been gone for centuries) (see Palmer 2009, chapter 36). Nevertheless, however weakened landowners' title to discovered items may be, possession of land entails possession of everything which is in it and therefore, at the point of discovery, landowners have superior possessory entitlement to objects unearthed by archaeologists (per decision in *Elwes*¹⁰⁷; *Sharman*¹⁰⁸; *Waverley*¹⁰⁹; for an in-depth discussion of this see Pollock & Wright 1888).

In the event that a court will regard landowners as bailors, contractual terms and obligations arising from bailment can be transferred (along with the possession of the objects) to museums and archive centres, who would then become sub-bailees. The bailor (landowner) and sub-bailee (recipient museum or archive centre) can be bound by the terms of the contract which the bailee (archaeology contractor) has entered into (see below). So, if the contract

¹⁰⁶ *Parker v. British Airways Board* [1982] 1 All ER 834, per Eveleigh LJ, 845

¹⁰⁷ *Elwes v. Briggs Gas Co.* 1886 [1886] 33 Ch D 562

¹⁰⁸ *South Staffordshire Water Co. v. Sharman* [1896] 2 QB 44 at 47

¹⁰⁹ *Waverley Borough Council v. Fletcher* [1995] QB 334

between the archaeology contractor and the developer include terms (implied or otherwise), which convey or affect the ownership of items discovered in the course of the work, then the landowner and the museum or archive centre are bound by those terms. As clarified in *Halsbury's Laws*:

A sub-bailee is a person to whom the actual possession of goods is transferred by someone who is not himself the owner of goods, but who has a present right to possession of them as bailee of the owner¹¹⁰. When the sub-bailee accepts possession of the goods he thereby assumes the obligations of a bailee towards the original bailor (who is normally termed the head bailor)¹¹¹. The nature of these obligations will, as in the case of an ordinary bailment, vary according to the circumstances in which and the purposes for which the goods are delivered¹¹². The bailor has a right to make a claim against the sub-bailee for breach of any of his duties either if the bailor has the right to immediate possession of the goods or if they are permanently injured or lost¹¹³. The sub-bailee also owes, concurrently, the same duties to the original bailee (*Pollock & Wright* 1888, 169), whose obligations to the bailor are not extinguished by the sub-bailment¹¹⁴. The relationship between the head bailor and the sub-bailee exists independently of any contract between them, or of any attornment¹¹⁵ (*Halsbury's Laws* 2011, volume 4, section 110 (my emphasis); see also Palmer 2009 chapter 36 where an analysis of this subject is provided).

¹¹⁰ *Marcq v. Christie Manson & Woods Ltd (t/a Christie's)* [2003] EWCA Civ 731 at [44]-[55], [2004] QB 286 at [44]-[55], [2003] 3 All ER 561 at [44]-[55], per Tuckey LJ

¹¹¹ *Morris v. C.W. Martin & Sons Ltd* [1966] 1 QB 716, [1965] 2 All ER 725, CA

¹¹² *Morris v. C.W. Martin & Sons Ltd* [1966] 1 QB 716 at 731, [1965] 2 All ER 725 at 734, CA, per Diplock LJ

¹¹³ *Moukattaf v. British Overseas Airways Corpn* [1967] 1 Lloyd's Rep 396 at 415 per Browne J

¹¹⁴ *Gilchrist Watt and Sanderson Pty Ltd v. York Products Pty Ltd* [1970] 3 All ER 825 at 829, [1970] 1 WLR 1262 at 1267, PC

¹¹⁵ *Dresser UK Ltd v. Falcongate Freight Management Ltd* [1992] QB 502 at 511, [1992] 2 All ER 450 at p.457, CA, per Bingham LJ

Figure 18 aims to explain this state of affairs:

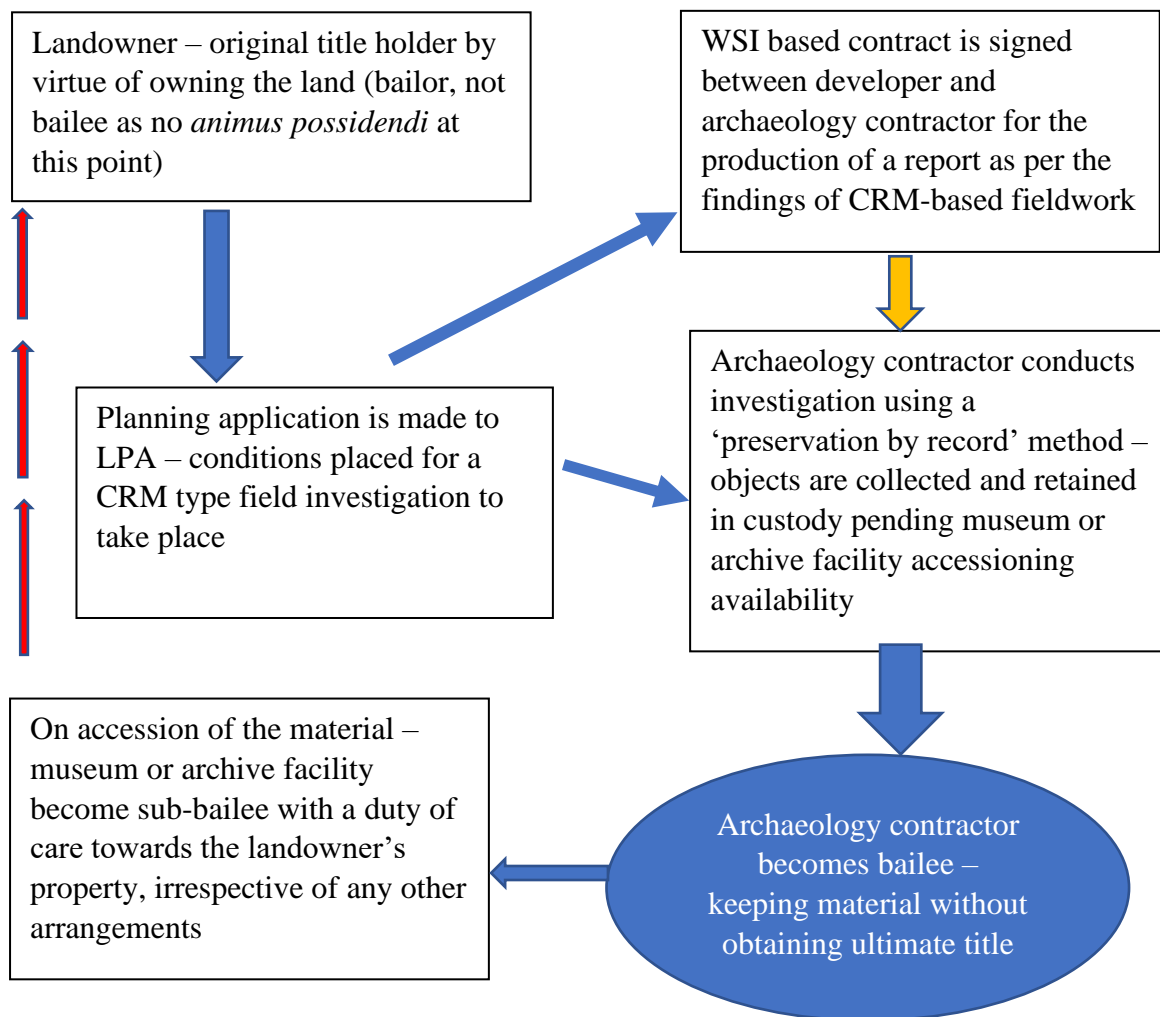


Figure 20: Legal bailment relations pertaining consequent to pre-development CRM-based archaeological fieldwork

Source: Author's own

The potential duty of care, which might arise as a result of bailment, is an additional reason for museums and archive facilities to be cautious about accepting material without obtaining title to it – because they may be liable to the original owner should the objects be damaged, discarded or destroyed (Hickey 2010, 76; Clarke & Kohler 2005, 281; see also the decision in *Newman*¹¹⁶). This is why the particular bailment situation discussed here is rather complex – archaeologists intentionally and lawfully take possession of items which they intend

¹¹⁶ *Newman v. Bourne and Hollingsworth* [1915] TLR 209

to hand over to someone else – yet they know that for reasons beyond their control this handover might not take place (Merriman & Swain 1999, 252). Furthermore, the landowner (bailor), the intermediary (developer), the agent (consultant), the archaeology contractor (bailee) and the recipient museum or archive centre (sub-bailee) are all fully aware of the consequences of entering an agreement for work to be carried out under the CRM system where ‘preservation by record’ method is applied (see CifA 2014a, s3.3.8). During archaeological fieldwork conducted according to the CRM approach in a ‘preservation by record’ method certain items may/will be discovered, selected, extracted from the land, collected and either retained or discarded (see discussion above at chapter two).

In addition to the contractual terms and legal obligations discussed above, on the basis that the contract pertaining in pre-development archaeological work is valid and that the possession of the objects recovered during the work is lawful, there are certain additional legal parameters, such as the presumed intentions of the parties or the length of time from when the action took place which should be taken into account (see Clarke & Kohler 2005, chapters 10 and 13; Tettenborn 1998; Redmond-Cooper 1998). Such parameters can become determining in establishing the transfer of title to property (Clarke & Kohler 2005, 416). This is the difference between borrowing an item on a temporary basis (a library book or a rental car) and paying for the item in instalments where at some point the ownership of the item is transferred as per the contract (mortgage or certain leasing arrangements, for example) (*ibid.*). These differences are relevant here because it has to be shown that there is no expectation that the archaeologists will return the objects that they recovered to the landowner or the planning authority, but transfer the collection to a third party – museums or archive centres, as per the NPPF (Ministry of Housing, Communities and Local Government 2012 footnote 30 to para.141; Ministry of Housing, Communities and Local Government 2018 footnote 56 to para.195; Ministry of Housing, Communities and Local Government 2020 footnote 64 to

para.199). These third parties then become sub-bailees, who may become the rightful owners of the collected objects – consequent to terms supposedly implied into the agreement between the original bailor (landowner), their agent (developer) and the bailee (the archaeology contractor) (as for third parties’ rights, see Clarke & Kohler 2005, 409). As per the quote from D. Brown above at s1.2: ‘museums found themselves having to take archives from projects, which often went ahead without their input, simply because archaeological contractors and planners assumed they would’ (Brown 2015, 248). It is worth noting that third parties who are not directly party to a contract have very limited, if any, statutory rights to protect their interests and to avert loss (see McKendrick 2016, part 5, 961; Contracts (Rights of Third Parties) Act 1999; also Clarke & Kohler 2005, 409). Despite this, there is potential for further legal research into the question of whether museums should be considered third parties to CRM-based contracts, per the NPPF’s requirement that the archive be deposited at a (ostensibly) third party. This point is not pursued further here, despite significant research time having been spent on the question, because the explicit issue of whether museums and archive centres, who charge a deposition fee which is acknowledged in the contract, become third parties to CRM-based contracts under the 1999 Act, has not been deliberated in court and therefore it remains, for the time being, speculative. It should be further noted here, however, that McKendrick’s discussion of exceptions to privity of contracts does include scope for museums and archive centres to be regarded as parties to such contracts and so this issue should be explored further in future research (see McKendrick 2016, 986-1,038). Such a claim (a third party suing to protect its interests), however, would entail a museum or an archive centre taking an archaeology contractor to court over the loss of expected profits from deposition charges as a result of the contractor failing to deposit archive boxes from a particular project (see Sussex and Northamptonshire case studies above at 6.7 and 6.8 respectively, for examples of potential

financial loss in such scenarios). It is difficult to imagine a scenario in which such a claim would actually take place.

When archaeologists, working under contract in pre-development projects, recover objects from the ground a bailment situation is created, this means that the act of taking possession of the objects is legal and does not constitute trespass (Palmer 2002). On the basis that this bailment is the result of a valid contract based on collecting data for the purpose of public benefit, then this particular bailment can lead to the conveyance of property rights in the objects thus recovered as part of the required work (Clarke & Kohler 2005, 444-446; Palmer 2009, 1,469). In addition, title to the recovered items can also be conveyed by virtue of time restrictions which stipulate that the landowner must manifest his possessory entitlement within a certain timeframe or his title may be relinquished or forfeit by law (see Tettenborn 1998; Redmond-Cooper 1998; and discussed by Donaldson LJ in *Parker*¹¹⁷).

7.5.1 The time limitations of bailment and the importance of lawful possession

In addition to the other aspects of bailment briefly mentioned above, time limit is an important factor which can determine the transfer of title to property within the parameters of lawful intentional bailment (Clarke & Kohler 2005, 444; Tettenborn 1998; Redmond-Cooper 1998). When we check-in a suitcase at the airport, for example, the airline becomes bailee of our property and we are the bailor, with the airline then legally responsible for protecting the suitcase and its contents – a reasonable expectation of the contractual obligations to imply a duty of care that is necessary for the efficacy of the contract (Palmer 2009, 55; also per the decision in *The Moorcock*¹¹⁸). However, in the event that we, for whatever reason, do not claim

¹¹⁷ *Parker v. British Airways* [1982] 1 All ER 834

¹¹⁸ *The Moorcock* [1889] 14 PD 64

the suitcase at the other end of our journey, the airline becomes involuntary bailee of the suitcase (Palmer 2009, 1,457). This means that, although the airline is still responsible for the suitcase, time considerations become pertinent because the airline cannot be expected to keep our suitcase safe indefinitely. As a synoptic summary of this complex legal matter, it would suffice to say here that at some point our entitlement to the unclaimed suitcase becomes sufficiently weakened so as to constitute forfeiture of our title and allow the airline to dispose of our property without ever obtaining title to it (note, however, that if this is the case, the airline must show that they acted in good faith, as per the decision in *Parker*¹¹⁹; see also Clarke & Kohler 2005, 445; UK airlines routinely sell abandoned property at auctions, see for example, <http://www.greasbys.co.uk/> (obtained in October 2017)).

In development-led archaeological work, based on the execution of a valid contract, the applicable timeframe after which no further claims can be pursued in respect of title to recovered archaeological material is set by the Statute of Limitations Act 1980 to six years (explicitly sections 2(b), 3(2) and s5, but the whole Act is relevant here; Redmond-Cooper 1998). Landowners' failure to manifest in any way their intention to maintain title to material which was recovered from their land within the six-year timeframe means that their title is relinquished (O'Keefe & Prott 1989, 419; Redmond-Cooper 1998; Pugh-Smith & Samuels 1996, 63). However, the relinquishment of A's title does not necessarily mean that the title has now transferred to B. Demonstrating lawful possession, good faith (within the parameters of bailment) and public benefit purpose are important stipulations and can be imperative in ascertaining the (undocumented) transfer of title (Bridge 2002, 116; Clarke & Kohler 2005, 444; Tettenborn 1998; Redmond-Cooper 1998).

¹¹⁹ *Parker v. British Airways* [1982] 1 All ER 834

Importantly, during such bailment situations (within the six-year timeframe), the person, or entity, who has possession of the object (bailee) is responsible for its safekeeping and might be liable to the owner (bailor) if the object were damaged (the duty of care, Palmer 2009, 1,458; the decision in *The Moorcock*¹²⁰; and the quote from *Halsbury's Laws* above). This means that, under the rules of bailment, an archaeology contractor holding recovered archaeological material, within the six-year period, could be legally responsible for safeguarding it because they have possession of it, irrespective of whether this possession is explicitly stated under the terms of the agreement with their client, i.e. it is a duty of care which is an implied term into the contract (Palmer 2009, 1,462; and the decision in *The Moorcock*¹²¹).

Holding property without having title to it requires the holder to safeguard it, otherwise the holder might be liable in negligence (as per the airline example above – having possession of someone else's property requires taking care of it but the owner has to act within a reasonable timeframe to assert his title or regain control) (Palmer 2015, 46; Redmond-Cooper 1998). This is one of the reasons why archaeology contractors, operating under the assumption that they do not have title to the objects in their custody, are cautious about allowing and promoting public access to the material in case it is damaged or destroyed (see Hickey 2010, 73 for a discussion of this issue; also see email correspondence in appendix C; note that not all companies mentioned this issue).

Archaeologists working under a valid contract, resulting in bailment, have lawful possession of the material which they recover during fieldwork, but without obtaining complete title to the objects. Ownership of the recovered material becomes fragmented and shared between landowners and archaeologists (Bridge 2002, 29; discussed further below).

¹²⁰ *The Moorcock* [1889] 14 PD 64

¹²¹ *The Moorcock* [1889] 14 PD 64

The main problem arising from this is that archaeologists often record and discard the majority of the items recovered during fieldwork. Particularly, but not only, material such as Ceramic Building Material (CBM) (bricks, tiles, etc.) or Fire Cracked Flint (FCF) is collected and recorded but routinely not archived at all (Museum of London 2006/07, s5.3 at p.48; that archaeology contractors discard the majority of objects assembled during fieldwork confirmed by email, see appendix C; see also Hickey 2010, at chapter four). This could potentially create a legal problem because archaeology contractors discard material, considered to be superfluous, prior to the Post Excavation Assessment (PXA) submission to the LPA, meaning that the landowner cannot know beforehand that the property was destroyed (see email correspondence with the archaeology contractors contacted for this research in appendix C; and discussion in the case studies above).

According to Palmer (2009, 78), it is necessary to establish whether archaeologists' initial taking possession of discovered objects is lawful in order to clarify who bears legal responsibility to protect the recovered objects (under the rules of bailment and within the six-year timeframe). Under the rules of bailment, the bailee's (archaeologist's) duty of care towards the bailor's (landowner's) property applies to all items recovered from the land (Clarke & Kohler 2005, 445). It is therefore important to establish archaeology contractors' legal right to destroy material within the six-year period so as to clarify that no trespass is taking place (under the Tort (Interference with Goods) Act 1977 destroying property held in bailment could constitute trespass; see Hickey 2010, chapter four for further analysis of this).

A solution to the problems discussed above, the lawfulness of taking possession of, and the discarding of, discovered objects, is to establish whether the recovery of objects during archaeological fieldwork is a term implied into the contract by virtue of being a well-established practice (McKendrick 2010, 348; Clarke & Kohler 2005, 445; Palmer 2009, 1,418). On the basis that policy requirements for pre-development archaeology have been in place for

almost 40 years now (at least since PPG16 in 1981, but, as discussed in chapter three, the practice itself goes back even further) – can we safely assume that the parties entering a contract for pre-development archaeological work intend to convey title, as well as possession, of all recovered objects from the landowner to the archaeology contractor? Is the recovery, analysis and retention or discard of objects discovered by archaeologists during CRM-based fieldwork sufficiently well-known as to constitute a reasonable expectation detrimental to the efficacy of the contract? (per *Tappenden*¹²²).

7.6 Terms implied into a contract – the determining factor

On the basis that pre-development archaeological fieldwork routinely includes the discovery, selection, extraction, collection, discard and archive of recovered objects, we must ascertain whether the contract for the work entails the transfer of title to such material. This section addresses this question by examining whether title to objects recovered during CRM-based fieldwork is conveyed by virtue of being an implied contractual term.

Title to recovered material can be transferred through a term implied into the contract between archaeology contractors and landowners/developers (O’Keefe & Prott 1989, 419). Such conveyancing of title can take place even against the parties’ intentions and despite the wording in the contract, the WSI’s and archaeology sector’s policies, which might overlook the issue or even state otherwise (McKendrick 2010, 347; and the decision in *Tucker*^{123, 124}). Plausibly, agreeing for pre-development archaeological investigation to be conducted as part of a CRM approach using a ‘preservation by record’ method, implies agreement to conveying

¹²² *Tappenden v. Artus* [1964] 2 QB 185 (CA)

¹²³ *Tucker v. Linger* [1882] 21 Ch D 18, 51 LJ Ch 713, 30 WR 425, 46 LT 198

¹²⁴ *Tucker v. Linger* [1883] 8 App Cas 508

title of the recovered material. Even explicit stipulations to prevent the transfer of title might not suffice, as customary practices may hold over contractual provisions (McKendrick 2010, 347; and see discussion of *Tucker*^{125, 126}).

In respect of the discussion regarding terms implied into a contract, the first rule is that only Parliament (terms implied by statute) or a Court can apply terms into a contract. Courts will only apply terms into a contract if doing so is necessary for the contract to work, i.e. that without applying such terms the contract cannot be lawfully executed (McKendrick 2016, 348). The second rule of terms implied into a contract by the Courts is that those terms have to create a legally-binding obligation and not simply be a repetitive practice or mere courtesy – good manners, such as saying please and thank you, cannot be an implied term – implied terms must have a measurable impact on the execution of the contract (Goode 1997, 8; see also the discussion in *Tappenden*¹²⁷). An additional pertinent stipulation is the principle that the practice creating the implied terms has to be lawful. An action based on trespass will not be applicable for creating implied contractual terms (Clarke & Kohler 2005, 413; see also Parke B, in *Hutton*¹²⁸). Hence the importance of elucidating the concept of bailment (which is why it had to be presented here before this discussion, chronologically speaking, bailment (should) occur after the contract has been agreed on (Palmer 2009, 54)). It is, therefore, necessary to establish whether archaeologists are, in fact, allowed to carry out fieldwork, only then to ascertain whether the transfer of title to objects recovered during the work is an implied contractual term (see discussion in *Tappenden*¹²⁹). For this reason, this thesis began with the discussion regarding planning regulations, CRM policies and ‘preservation by record’ methods – this is the justification for archaeologists’ actions of removing objects from someone else’s land

¹²⁵ *Tucker v. Linger* [1882] 21 Ch D 18, 51 LJ Ch 713, 30 WR 425, 46 LT 198

¹²⁶ *Tucker v. Linger* [1883] 8 App Cas 508

¹²⁷ *Tappenden v. Artus* [1964] 2 QB 185 (CA)

¹²⁸ *Hutton v. Warren* [1835-42] All ER Rep 151

¹²⁹ *Tappenden v. Artus* [1964] 2 QB 185 (CA)

without it being considered trespass, it is also the rationale for the structure of this thesis and the parameters of the data collection and research methodology used here

To clarify, in order for an action to imply terms into a contract, the action itself has to be lawful, be shown to have taken place for more than 30 years, be demonstrably well known and to create a legally-binding obligation (McKendrick 2016, 342-372). When these rules and stipulations apply, then terms do not have to be explicitly written into the contract in order for the court to consider those terms as legally binding (*ibid.*). Contractual terms can be implied into a contract without either of the parties to the contract ever mentioning those terms or even knowing that such terms exist. In fact, such terms may not exist before a court rules them to do so, as was the case in *The Moorcock*¹³⁰ in which the court imposed terms into the contract, and created the test for imposing such terms, thus setting the precedent to be followed henceforth. Furthermore, legally-binding terms can be implied into a contract by the court without either of the parties intending to include such terms in their agreement (McKendrick 2016, 350).

This aspect of contract law can be expressed as: (a) all law is implicit in contract unless it is explicitly excluded; and (b) terms can be implied into a contract either by law or by custom so as to give efficacy to the contract if ruled so by the Court. Examples illustrating the application of law into a contract, which are relevant to archaeological pre-development work, include the Burials Act 1857, the Treasure Act 1996, Health and Safety legislation and employment laws (see also Sale of Goods Act 1979, sections 12-15). Such laws and regulations are implicit in all pre-development archaeological fieldwork without ever being mentioned in the WSI or in any other part of the contract, and irrespective of whether or not the parties to the contract are aware that these laws apply. So, a lawful practice, such as selecting, extracting and collecting objects during archaeological investigative work, which has been taking place

¹³⁰ *The Moorcock* [1889] 14 PD 64

for over 30 years and is well documented, can affect the conveyancing of title in the recovered objects as an implied contractual term without being explicitly stipulated in the contract (Palmer 2002; McKendrick 2016, 348).

Additionally, and particularly important for the issue addressed here, there are circumstances in which practice supersedes the specific wording of the contract. For example, when the wording of the contract includes explicit reference to particular aspects of the arrangement, and yet there is a pre-existing and well-known practice contradicting the agreement (per *Belize*¹³¹; *Tappenden*¹³²). Pre-existing practice creates contractual terms that are implied into the contract by virtue of the customary practices (pursuant to certain stipulations mentioned above), as Parke B. explains:

extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters on which it is silent (*Hutton*¹³³; per Parke B. at p.154).

Notwithstanding that only a Court can decide whether title to objects, recovered by archaeologists, transfers as an implied contractual term, there are useful tests that have been applied in order to determine similar questions (the efficacy test was determined in *The Moorcock*¹³⁴). The test which is most pertinent to the issues addressed in this thesis is conveniently known as ‘The Officious Bystander’ test:

Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express

¹³¹ Attorney-General of Belize v. Belize Telecom Ltd. [2009] UKPC 10; [2009] 2 All ER 1127, Privy Council, per Lord Hoffmann, at s16

¹³² Tappenden v. Artus [1964] 2 QB 185 (CA)

¹³³ Hutton v. Warren [1835-42] All ER Rep 151. Per Parke B, at p.154

¹³⁴ The Moorcock [1889] 14 PD 64

provision for it in their agreement, they would testily suppress him with a common “Oh, of course!” (*Shirlaw*¹³⁵; per MacKinnon LJ at p.227).

The question here is whether archaeologists’ act of taking possession of discovered objects, as a prerequisite of the ‘preservation by record’ method, is so obvious and well known as to be considered an implied contractual term. Even if this can be the case, whether there is a *de facto* transfer of title is a question that only a Court can answer, although the tests discussed here provide useful guidelines. There can be little doubt that when archaeologists are working within the system of CRM where the purpose of the work is to achieve ‘preservation by record’, then the practice of collecting discovered objects can be seen as ‘goes without saying’ (per MacKinnon LJ quoted above). Therefore, it seems reasonable to say that if an officious bystander asked developers whether archaeologists usually collect discovered objects, the person asked would reply “oh, of course” (*ibid.*). The officious bystander rule does not in itself determine that title to recovered archaeological material is transferred. It means that archaeologists’ well-known practice of conducting their investigations using a ‘preservation by record’ method can indicate the transfer of possessory entitlement (title) to the objects recovered during the work as an implied contractual term. This is based on the practice of recovering discovered items during CRM-based archaeological work meeting the requirements set as tests by the courts of (a) being sufficiently well-known, (b) existing for more than 30 years, and (c) necessary for the efficacy of the contract.

Following from this extrapolation, it is argued here that archaeology contractors are entitled to keep and/or discard the material which they select, extract, recover and archive because they are entitled to possess it (after the decision in *Parker*¹³⁶, per LJ Donaldson at p.837). Archaeologists’ possession of recovered objects, within the rules of bailment, is an

¹³⁵ *Shirlaw v. Southern Foundries [1926] Ltd [1939] 2 KB*, per MacKinnon LJ, at p.227

¹³⁶ *Parker v. British Airways Board [1982] 1 All ER 834*

implied contractual term meeting the stipulations in the tests discussed above. Furthermore, it can be reasonably surmised that under the rules of bailment there is also no legal reason why archaeology contractors should not be allowed to transfer this possessory entitlement to museums or archive centres (bearing in mind the rules applicable to sub-bailment, as above; *Halsbury's Laws* 2011, volume 4, section 110; Palmer 1991, 1,444).

The act of recovering objects from the ground can, within certain stipulations, connote a conveyance of possessory entitlement to the objects as terms implied into the contract even in instances where the wording of the agreement stipulates otherwise (McKendrick 2016, 350). The research presented here suggests that terms implied by custom are a facet of contract law which are of paramount importance here. The research further indicates that terms implied by custom are probably the deciding factor pertaining to the transfer of title to archaeologically-recovered objects from landowners to archaeologists. Archaeologists' practice of conducting their investigations using a 'preservation by record' method is sufficient to create legally binding contractual terms for the conveyance of property rights to the objects recovered during the fieldwork (Palmer 2002; and per the tests discussed above). The following section discusses a precedential court case in which the exact circumstances in which possessory entitlement to objects discovered imbedded in the land can be transferred as a result of terms that are implied into the contract by virtue of pre-existing customary practices and in direct contrast to the wording of the agreement.

7.7 Precedent court case, *Tucker v. Linger* – customary practice prevails

Following the above explanation regarding terms implied into a contract as a mechanism to determine the conveyancing of possessory entitlement in property, the discussion in this section has to begin with a clarifying statement that:

The legal interpretations presented herein are my inference of the legislative framework for determining the legal status of discovered, recovered, discarded and/or archived archaeological material unearthed and obtained in England. The legal inference discussed here, in particular in this section, is solely based on the legal research conducted for this thesis. This statement, albeit perhaps rather obvious, is important because throughout the course of research into the legal questions addressed in this thesis, no reference to the *Tucker v. Linger*^{137, 138} court cases (initial and appeal) could be found in the entire corpus of literature concerning legislation pertinent to the legal status of archaeologically-recovered material.

The clue for finding this court case was the question of what constitutes ‘land’ (see s2.1 above regarding legal research method). When does something stop being part of the land and become a chattel in its own right? (see Pollock 1894, 319). Following the analysis of the data for the legal research presented here, it can be surmised that the *Tucker v. Linger* case sets the precedent affirming the circumstances under which possessory entitlement to material recovered during CRM-led work, in England, transfers from landowners to archaeologists. The conveyancing of title in objects recovered by archaeologists takes place by virtue of it being a term implied into the contract of pre-development archaeological fieldwork carried out in England (notwithstanding that the Courts have yet to rule on this matter, it is suggested here that *Tucker* would be the precedent and determining case).

The significance of the Court’s rulings in the *Tucker* case to the legal issues discussed here cannot be overstated. The *Tucker* case (initial and appeal) set specifically pertinent precedents for ascertaining the transfer of property rights to objects extracted from the ground under contract and, as a result of customary practices and despite the wording of the agreement stating otherwise, title to the objects is conveyed as an implied contractual term. This mirrors

¹³⁷ *Tucker v. Linger* [1882] 21 Ch D 18, 51 LJ Ch 713, 30 WR 425, 46 LT 198

¹³⁸ *Tucker v. Linger* [1883] 8 App Cas 508

the contradiction between archaeologists' practice conducted using a 'preservation by record' method versus the wording of WSI documents, archaeology guidelines and Government-issued regulations and policies (as discussed in chapters three, four and five).

The precedent decisions taken by the Chancery Division judges and later affirmed by the House of Lords judges, sitting as the Court of Appeal, in the *Tucker* case entail:

- establishing the precise circumstances under which objects that are extracted from land become chattels in their own right;
- establishing the conveyance of property rights to such chattels by virtue of customary practices as an implied contractual term (in this case actually imposed by the Courts);
- establishing that when a contract and a customary practice co-exist, but the wording of the agreement is too general so as to exclude the practice, then the practice, when proven, prevails.

The implications for development-led archaeology, in terms of ascertaining the transfer of title, follow the introduction of the case.

In 1883, House of Lords judges sitting as the Court of Appeal held a decision by a Chancery Division Court, taken in 1882, that entitlement to chattels discovered in land can be conveyed by virtue of pre-existing customary practices as implied contractual terms despite the wording of an agreement stating otherwise. The *Tucker* case is a rare instance in common law in which property rights in land are restricted due to pre-existing practice (another example is a public footpath through privately-owned land). It is interesting to note that this case was in court only three years prior to the *Elwes* case discussed above, and also concurrent with the parliamentary debate about the Ancient Monuments Protection Act 1882 (see chapter three above). This is an intriguing coincidence because in both the *Elwes* case and the Ancient Monuments Act 1882, policy-makers bestowed protection on the rights of wealthy landowners,

whilst in the *Tucker* case the opposite happened and the law sided with the rights of a fieldworker. The *Tucker* case was not considered in the *Elwes* case, presumably because *Elwes* was about ascertaining possession, not about the transfer of title as an implied contractual term. In the *Tucker* case, possession was not an issue.

The circumstances of the case are as follows:

Mr Linger leased 300 acres of farmland from Mr Tucker at a place called Portnalls Farm in Surrey, which the judges repeatedly referred to as ‘the flinty district’ (*Tucker*, per Kay J, 27) because land in Surrey was known to contain so much flint that the removal of the stones was a necessity during ploughing. Mr Linger was ploughing the field with a single-tooth (share) horse-drawn plough which meant that whenever the plough-tooth (the share part of the plough about 15 centimetres deep) hit a big flint nodule he had to unearth the flint and carry the rather heavy stone to outside the field boundary. Linger had to extract and carry the stones out of the field, otherwise it would have been difficult to furrow adequately.

In Surrey, this practice was required during field ploughing, meaning that Tucker must have been aware that this activity would be taking place prior to Linger ploughing the field. Over time, a large heap of flint arose at the boundary of the field and, in Surrey, there was a well-established custom whereby workmen would buy such flints from farmers to use as construction material. Linger sold the flint to workmen who happened to pass by, at threepenny and sixpence (3s. 6d.) per load, and kept the profits. Selling the flint was also a custom that was proven in court to have existed throughout Surrey for over 30 years. At this point Tucker sued Linger for the profit he made from selling the flint.

Crucially, the contract for the lease of the farmland expressly reserved to the landlord rights to ‘all mines and minerals, sand, quarries of stone, brick earth and gravel pits discovered in the land’ (*Tucker*, per Jessel MR, at p.1). Mr Tucker specifically included this clause in the

land lease agreement because he knew of the probability, as Surrey was known to have a lot of flint in the ground, that flint would be unearthed during ploughing and of the stones' expected financial value. Consequently, Tucker argued that, as expressly stated in the wording of the contract, title to the flint remained with him. He therefore promptly sued Linger over the profits from selling the flints. Tucker lost his claim, twice. A Chancery Division Court and the Court of Appeal both decided that Linger could keep the profits from selling the flints despite the wording of the contract and despite the fact that Linger did not own the land from whence the flints were extracted (the lease agreement specifically stated that Linger was entitled to the produce of the land and not to anything which happened to be on or in the land).

The Courts' decision was based on the fact that there was sufficient evidence to prove that such a custom had existed for some years prior (30 years at least), and that the custom was well known and was to be expected. Therefore, the Courts deemed that the right to sell the flint and keep the proceeds was an implied contractual term, in effect imposing the transfer of title from Tucker to Linger by virtue of a pre-existing and well-known practice, and in contrast to the wording of the contract. The caveat here is that Tucker was entitled to assert control over the flint prior to it being sold. He failed to do so and therefore the customary practice prevailed. In development-driven archaeological work, landowners are entitled to express their interest in discovered objects, although by and large, they tend not to do so. While conducting this research, however, there were a couple of examples in which landowners expressed interest in discovered objects; see appendix C, regarding Cambridgeshire.

A pivotal point, in respect of the issues discussed in this thesis, is that the Court of Appeal ruled that:

objects once removed from the land cease to be part of the land and become mere chattels (*Tucker*, per Fitzgerald LJ at p.516).

Furthermore, in respect of landowners' title to objects thus removed from the ground, the Court of Appeal judges affirmed the previous ruling by the Chancery Division Court that when the wording of an agreement is vague or does not explicitly exclude the custom, customary practice prevails over the contract:

The custom, when proved, is to be considered as part of the agreement; and if the agreement be in writing, though the custom is not written it is to be treated exactly as if that unwritten customary clause had been written out at length. (*Tucker*, per Blackburn LJ at p.512).

Plausibly, the decision in *Tucker* can therefore be applied to archaeological fieldwork because archaeologists have been and are known to collect objects from sites during excavation projects for many years now. The *Tucker* case, therefore, provides a strong argument for the notion that title to archaeologically-recovered objects can be regarded as having been conveyed to archaeologists by virtue of it being a term implied into the contract governing their work.

Notwithstanding the presumed transfer of title, a further important point to note here is that *Tucker* claimed the profits Linger made from selling the flints – not for the return of the flint nodules themselves. In contrast, archaeology contractors do not sell the recovered material to archive repositories (but see discussion of Deposition Charges in chapter eight). A further caveat, that has to be borne in mind here, is that if the argument put forward here is deemed incorrect then the *nemo dat* rule (mentioned in the beginning of this chapter) would be the deciding factor stipulating that title to discovered archaeological objects does not transfer as an implied term. In this case, archaeologists would be liable to landowners for the objects discarded prior to notification in the PXA report (liable in tort, not as damages per financial value. Bridge 2002, 55; see also quote from Kay, J. in *Tucker* in the next section; and Hickey 2010, 92). Unless the legal status of archaeologically-recovered objects is clarified,

archaeology contractors, museums and archive centres may be reluctant to promote the use of the material as they might be cautious of being liable under the duty of care (Merriman & Swain 1999; King 1979; the decision in *The Moorcock*¹³⁹; and as discussed in chapter one).

As briefly mentioned above, it should be clarified that, at the time when Mr Linger unearthed the flints, the landowner, Mr Tucker, had title to the discovered objects. It was Tucker's failure to exercise control over his property at that time that led the Court to rule in favour of Linger – Tucker's failure to manifest, exercise and maintain his interest in his property prior to the selling of the flints amounted to the relinquishing, or forfeiture, of his title to the property (*Parker*¹⁴⁰, per Donaldson LJ at p.844; Hudson 1998, chapter 23; *Ellerman*¹⁴¹). This is similar to the scenario discussed in this thesis, whereby landowners, or developers acting as their agents, have title to the objects discovered by archaeologists. If the landowners are interested in maintaining their title they must manifest and exercise such an intention to maintain control of their property, before the recovered objects are taken off site, and particularly before the material is sorted and superfluous objects discarded.

In accordance with the ruling in *Tucker*, it can be surmised that when landowners, or their agents, show no interest in maintaining title to the objects recovered during pre-development work, an inference can be drawn that their title is relinquished. Certain stipulations (such as theft) notwithstanding, failure to manifest control over property can be considered as an intentional forfeiture of title, i.e. abandonment of property (as per Donaldson LJ, in *Parker*¹⁴² at p.844; see also Hickey 2010, 67). Not expressing or exercising an intent to maintain control over certain items entails a deliberate relinquishing of title ('you cannot be

¹³⁹ *The Moorcock* [1889] 14 PD 64

¹⁴⁰ *Parker v. British Airways Board* [1982] 1 All ER 834 at 843

¹⁴¹ *Ellerman Willison Line v. Webster* [1952] 1 Lloyd's LL Rep 179

¹⁴² *Parker v. British Airways Board* [1982] 1 All ER 834 at 843

charged with stealing abandoned property’, *Ellerman*¹⁴³, per Goddard L. CJ at p.180; see also Hickey 2010, 69).

In respect of the transfer of title to archaeologically-recovered material as an implied contractual term, and on the basis that pre-development archaeological work takes place under contract and is conducted according to the principle of ‘preservation by record’, the following statements can be reasonably construed:

- a) all parties to such contracts are aware that archaeologists will most probably select, extract, collect, recover and retain or discard certain objects during the course of their work (see MOLAS 2006; CifA 2014a; Drewett 1999 for examples).

It can therefore be deduced that –

- b) the parties to the contract are intentionally entering a bailment situation whereby archaeologists take possession of discovered objects (for the purpose of studying and recording them in the lab) without obtaining title to these items by virtue of having recovered them (after Palmer 2002). Additionally;
- c) it can be safely postulated that all parties concerned are fully aware that this practice has been taking place for more than three decades now (as per Frere et al. 1975; Cunliffe 1982) and, in accordance with the ‘Officious Bystander’ test, it is common knowledge that archaeologists recover objects from the ground during excavation (publication of MAP1, 1989; MAP2, 1991; PPG16, 1990/1, for example).
- d) Accordingly, following the decision in *Tucker*, it can be surmised that title to recovered archaeological objects is transferred from landowners to archaeologists

¹⁴³ *Ellerman Willison Line v. Webster* [1952] 1 Lloyd’s LL Rep 179. Per; Goddard L. CJ, at p.180

by virtue of being an implied contractual term and through the legal mechanism of bailment (see Palmer 2009, 92; also per the decision in *The Moorcock*¹⁴⁴).

Following from this understanding, there are additional factors that should be taken into account in order to clarify the legal status of recovered archaeological material, namely, whether the recovered objects have any measurable value that can be used to determine damages or loss. Valueless chattels and rubbish are legal concepts that are implied into contracts concerning property as a matter of public policy, mostly so that the contract can be executed without the parties having to deal with every insignificant item (a train ticket, for example, has no value in itself, although caution should be taken here as there are instances where items can gain monetary value due to their history and specific circumstances such as postal stamps, for example. See Bridge 2002, 16). Stewart Mill explained this notion by pointing to employees' rights; for otherwise employers could deduct 'wear and tear' of machines from employees' salaries, or farmers leasing land could be expected to pay for changes in the soil composition (mud on their boots) (Mill, discussed in Macpherson 1978, 75-100; see also the decision in *Tappenden*¹⁴⁵). In legal terms, rubbish would be defined as an object with no exchange, use or wealth value, so that mud removed from people's shoes is not considered as land or property; after Honoré 1961, 5; or abandoned property, as per Goddard L. CJ in *Ellerman*¹⁴⁶).

¹⁴⁴ *The Moorcock* [1889] 14 PD 64

¹⁴⁵ *Tappenden v. Artus* [1964] 2 QB 185 (AC)

¹⁴⁶ *Ellerman Willison Line v. Webster* [1952] 1 Lloyd's LL Rep 179

7.8 Valueless chattels and rubbish

This section concerns archaeologists' practice of collecting such items as FCF and broken CBM that have an important part in inferring past activities, but which are routinely discarded after being measured and recorded. CBM and FCF were considered as refuse in the past, as well as in the present, as such items' only value is derived from the information they contain (there could be practical uses for a broken brick, such as filling holes in the ground, but this section concerns only its use within an archaeological context). Broadly speaking, rubbish can be defined as: 'anything considered of no further use in the living context' (Drewett 2004, 20). The archaeological record consists, to a large extent, of objects that people in the past have regarded as worthless and chose to discard (Addyman 1989, 244; Martin & Russell 2000, 57; for abandoned property in legal terms, see Goddard L. CJ, in *Ellerman*¹⁴⁷). Whether an object can be designated as having no value is important public policy and a legal question, as it can affect certain aspects of applicable property legislation (dumping rubbish illegally is a crime although the objects themselves have no monetary value, <https://www.gov.uk/government/news/new-penalties-to-crack-down-on-fly-tipping> (accessed in June 2018); Bridge 2002, 15). This notion presumably emerged with the aim of allowing everyday life to continue without a constant need to examine issues relating to property law (Hazeltine 1910, 609; Macpherson 1978). So, for example, landowners cannot prevent people from walking over public footpaths that run through their land by saying that the mud on people's boots constitutes part of their land and therefore property (Pollock & Wright 1888, 233-236; see also *Oliver*¹⁴⁸).

¹⁴⁷ *Ellerman Willison Line v. Webster* [1952] 1 Lloyd's LL Rep 179

¹⁴⁸ *Oliver and another v. Symonds and another* [2011] EWHC – 1250 (Ch.)

Archaeologists routinely recover, examine and record objects which others may consider as having no value, for the purpose of inferring past activities and as the material evidence of the narrative they compose of the past (Anderson & Twining 2015, 257). Plausibly, the majority of recovered archaeological material kept by museums, archive facilities or archaeology contractors consists of what the general public would regard as ‘rubbish’ (Holtorf 2013, 12). For archaeologists, an objects’ value is the result of its relevance to the study of social change, i.e. the context in which it was discovered, and therefore the information that can be gained through the study of refuse is irreplaceable (Chapman & Wylie 2015, 2). Estimating the value of archaeological material can, therefore, be extremely difficult, especially for objects designated as part of cultural heritage (Cookson 2000, 196-205; O’Keefe & Prott 1989, 418-433; see discussion in chapter four concerning cultural property). Particularly since the development of ‘processual archaeology’, which focused on the processes that shape the archaeological record, there has been a growing emphasis on refuse disposal practices, abandonment or discard, as the ‘last event in an object’s life history’ (Schiffer 1972, 156; although, perhaps, the rest of the sentence should say ‘until it is rediscovered by an archaeologist’). The formation of ancient rubbish has become a crucial element in inferring past cultures, Thompson called this ‘rubbish theory’: ‘There are rediscovered consequences to the realisation that rubbish is socially defined, and in order to study the social control of value, we have to study rubbish’ (Thompson 1979, 10-11). Thus, in archaeology, other people’s rubbish (abandoned chattels) is considered to be a collection of cultural artefacts, a sample of which is worthy of storing in an archive as per the premise of ‘preservation by record’, although, presumably, few if any such items would be of interest to the general public. This point directly relates to the question discussed above at chapters one and four concerning the necessity to ascertain the public benefit of storing ‘rubbish’ in

perpetuity and defining what exactly is the expected product of the archaeological oeuvre (Holtorf 2013, 12; Merriman & Swain 1999, 252).

At this point, it is important to tread carefully. Archaeologists' act of selecting an object to be extracted from the ground connotes assigning a certain contextual value to it (Lucas 2015, 311). An object, that until a moment ago did not exist (in legal terms at least, after Pollock 1894), can be discovered, extracted, collected, recorded and then either discarded or archived without ever having an exchange, use or wealth value assigned to it (a potsherd from an unstratified topsoil, for example, see Deyntes Cottage case study where the recovered potsherds, although stored in perpetuity, have no obvious value). An object, unearthed during pre-development fieldwork, can go through an entire economic or utilitarian life cycle (Schiffer 1972, 156; Garcia 2014, 303) only by virtue of the context of its discovery and the information that can be extracted from it – without property rights to it becoming a consideration, so long as no dispute regarding possession or title arise, and as distinctly separated from copyrights to extrapolated and recorded information. One can, for example, pick up an item discovered while walking in a park, examine it, decide that it is of no interest and discard it without property law becoming relevant (for further examination of these issues see Pollock & Wright 1888, 44). A further example clarifying this point, and relevant to archaeology, relates to documents on which information is recorded. Bridge has explained that: 'documentary intangibles can be owned but the ownership of them is valued, and the possession of them deemed significant, according to what they represent since the paper embodying them has no intrinsic value' (Bridge 2002, 15). Archaeology guidelines make a clear distinction between the transfer of copyrights relating to obtained information and the conveyancing of title to recovered objects (AAF Standard and Guidelines (Brown 2011), at s5). The sheets of paper on which the information obtained during the fieldwork was recorded (notes, drawings, etc.), however, have

no ‘intrinsic value’ in themselves (*ibid.* at section 5.1, only discuss ‘rights’ not the papers themselves).

Furthermore, even archaeologically-recovered objects, considered worthy of keeping at some point in the past, can be designated as rubbish in the present as circumstances change (Historic England 2016). The archiving of material which was not recorded properly, for example, is now considered a significant problem for museums and archive centres (*ibid.*; and further discussion in s8.5; Swain 2003; Brown 2015). Additionally, as previously mentioned, it is common practice for archaeologists to collect certain types of objects (FCF and CBM) with the specific intention of measuring, recording and discarding the material (Museum of London 2006/7, 48). Such items have no measurable value except in terms of providing information and contextual evidence to support archaeologists’ narrative (after the information was examined and recorded, a burnt flint would have no further exchange, use or wealth value; Museum of London, 2006/07, section 5.3; Ehrenberg 1990, 42). Or in the words of McNair LJ:

Many relics, for example pieces of Roman pottery, have no corporeal value, if I understand the expression correctly, in themselves, but have a value dependent on extraneous factors, for example, age and historical association. (*Appleyard*¹⁴⁹, per McNair LJ at p.838).

It can be surmised that most of the material generated in the process of pre-development fieldwork has no monetary value at any point during the process. Objects selected and recovered by archaeologists are collected purely for the contextual information they contain and are measured, recorded and discarded with only a sub-sample selected to be archived (see discussion of the ‘preservation by record’ method in chapters one and four). Clarifying the issue of determining the monetary value of archaeologically-recovered objects

¹⁴⁹ Corporation of London v. Appleyard [1963] 2 All ER, per McNair LJ

is particularly significant for archaeologists because of potential legal ramifications for the removal of ‘valueless’ chattels from someone else’s land. The only remedies a landowner (as per the scenario discussed here regarding pre-development archaeological fieldwork) might claim would be either the return of the removed objects, known as *restitutio in integrum*, or monetary damages for theoretical financial loss calculated per the value of the object while it is still in the ground (Kay J. in *Tucker*¹⁵⁰ at p.29). The calculation of (potential) compensation is based on a financial assessment of losses incurred or damage suffered – ‘the value of the chattel itself, which is the price the defendant has to pay to buy out the claimant’s interest’ (Bridge 2002, 72). It would be difficult to claim for the return of a ‘chattel of no intrinsic value’ (Bridge 2002, 72, 55), a broken 19th century rooftile for example, or for damages suffered as a result of its loss:

Where a man has been mining inappropriately and taking minerals which do not belong to him, if he has been a trespasser, then he is made to account for the value of the minerals taken; but if he has not been a trespasser, and if the act of severance has been a rightful act, then all that the person who comes to get damages from him can get, suppose he proves that he is entitled to any damages, is the value of the thing *in situ*, and what would be the *in situ* value of the flints?
Not a farthing. (*Tucker*¹⁵¹, per Kay, J. at p.29 (my emphasis)).

An important point that has to be made clear here is that if a claim were to arise for the return of an object recovered during fieldwork, after cleaning, restoration or conservation work was carried out on it, the removal of dirt or patina for example, then the claimant could only sue for the object itself and not for the removed dirt or patina (see Palmer & McKendrick 1998,

¹⁵⁰ *Tucker v. Linger* [1876] T. 41 – [1882] 2

¹⁵¹ *Tucker v. Linger* [1876] T. 41 – [1882] 2

part V; also *Kamidian*¹⁵²). However, the work carried out on the object installs property in it (even if it is human tissue), and the conservator or archaeologist who carried out the work may be liable for trespass or conversion, irrespective of whether the work was carried out in good faith (see *Hollins*¹⁵³; *Yearworth*¹⁵⁴; *R v. Kelly*¹⁵⁵).

The issues discussed here relate to the question addressed previously regarding whether the objects that archaeologists remove should be considered as contamination or assets (s4.2). Albeit that, as we saw above, it would not be possible to claim damages for the loss of ‘contamination’ or ‘rubbish’ from the land, a question remains as to whether designating archaeological material as ‘cultural property’ (Prott & O’Keefe 1992, 307) would change the courts’ view on this matter (see Palmer 2015 for further discussion of this issue).

This does not in itself resolve the issue of ownership of recovered archaeological material. Archaeologists’ investment of labour in extracting and recovering selected items connotes an instalment of property (value and rights) in the objects (as per the decision in *R v. Kelly*¹⁵⁶; see also Palmer & McKendrick 1998, part V). The discussion in this section suggests that, in respect of objects assembled during archaeological work, no claim for damages, financial loss or return of property seems feasible because, by and large, no monetary value is assigned to recovered items (so long as we are dealing with CRM-based work, and not to be confused with punitive damages or liability in conversion due to alteration; see Bridge 2002, 109; Palmer & McKendrick 1998, part V; or the transfer of ownership as nationalisation per Scotland, Treasure Trove Arrangements Scotland, <https://treasuretrovescotland.co.uk/> (accessed in July 2017)). The legal status of archaeologically-recovered objects in England is a kaleidoscope of amalgamated statutes, policies, regulations, case law and common practices

¹⁵² *Kamidian v. Holt and others* [2008] All ER (D) 394 (Jun), [2008] EWHC 1483 (Comm.)

¹⁵³ *Hollins v. Fowler* [1875] LR 7 HL 757

¹⁵⁴ *Yearworth v. North Bristol NHS Trust* [2009] EWCA Civ 37, [2009] 3 WLR 118, [2009] 2 All ER 986

¹⁵⁵ *R v. Kelly* [1998] EWCA Crim 1578, [1999] QB 621

¹⁵⁶ *R v. Kelly* [1998] EWCA Crim 1578, [1999] QB 621

(Schofield, Carman & Belford 2011, 84). This creates an apparent mosaic of applicable instruments for determining who has property rights, and to what level, in archaeologically-obtained material. The next section aims to address and clarify these issues.

7.9 Analysis of legal research into establishing title to archaeological material

The inference of the legal research presented here must begin with a clarifying statement that ‘title’, ‘possession’ and ‘ownership’ are not absolute terms (Bridge 2002, 12). The common law concept of ownership is a complex arrangement, resulting from agglomeration of circumstances and actions, that need to be measured and evaluated together in order to ascertain property rights and obligations (Chambers 2008, 11):

the English law of ownership and possession, unlike that of the Roman law, is not a system of identifying absolute entitlement, but of priority of entitlement (*Waverley*¹⁵⁷ per Auld LJ at p.345).

Thus, ownership of a chattel can be described as vesting in the person with the best entitlement (Bridge 2002, 29) instead of the person, or entity, with an ‘absolute’ right. English property law jurisprudence is based on identifying stratigraphic levels of circumstances, much like the diagnostic deposits identified during archaeological excavations (Thomas 2015, 256; Anderson & Twining 2015, 272). Both property law and archaeological investigations are aimed at ascertaining the processes which led to the end result while recognising that there can be more than one culprit (Thomas 2015, 256; Emmerich 2018, 161). This goes back to the discussion in chapter two regarding Wigmore’s *Apparatus for Charting and Listing Evidence* whereby ‘all presented evidence must be in probative relation to each and all others’ (Wigmore

¹⁵⁷ *Waverley Borough Council v. Fletcher* [1995] QB 334

1931, 48-71) as the legal research method used here. After gathering the evidence in previous chapters, this section aims to examine what inference can be extrapolated from it.

On the basis of understanding that ownership can be complex and fragmented (Clarke & Kohler 2005, chapter eight) we can also acknowledge that many people, or different legal entities such as companies or museums, can own, have entitlement to and be in possession of a single object simultaneously (cultural artefacts on loan to a museum, for example, or certain items in a house owned by many occupants at the same time (Bridge 2002, 28; Palmer 2015, 15; concerning the idea that possession, as well as title, can be fragmented, see Hickey 2010, 167; Rostill 2018, 424). Such shared ownership, title and/or possession can either be to the same degree or to various levels, and, most importantly, one's property rights do not necessarily determine or impact someone else's rights to the same thing (although there are obvious practical limitations to this, see Clarke & Kohler 2005, chapter eight; Palmer & McKendrick 1998, part V, for a thorough review of these issues). A person can buy or obtain partial ownership of a thing, shares in a company for example, without knowing who the other owners are and without their knowing about the new owner (Bridge 2002, 31; Hickey 2010). For this reason, Rostill (2018) has suggested referring to property rights arising from mere possession by using the term 'general property interest' (Rostill 2018, 425).

Bringing the focus of discussion back to pre-development archaeological work and bearing in mind the principles of property law discussed above, the following statements become palpable:

- CRM-based archaeological work takes place under contract with the aim of producing a report for a client in order to comply with a condition imposed by a planning authority (as discussed above regarding planning conditions and WSIs).

- Without a valid contract, archaeologists' actions of entering a site and collecting objects could/would be considered as trespass (as per the decision in *Waverley*¹⁵⁸). In the absence of clear legislation stating otherwise, the agreement, as written or implied, for conducting archaeological work determines whether the possession of the recovered material is lawful or tortious (Palmer 2002; Bridge 2002, 50; Hickey 2010, 34; and as per the decision in *Tucker*¹⁵⁹).
- Prior to the submission of a planning application, landowners have title and possession of everything in their land – notwithstanding that this ownership and possession can be shared, title and control of land means having possession of everything in it (as per the decision in *Elwes*¹⁶⁰ and in *Waverley*¹⁶¹; see also (Clarke & Kohler 2005, s7.2). Once consent is given for an archaeological investigation to take place, however, a process begins which fragments the landowner's possession of the land and of objects discovered in and recovered from that land (Pollock & Wright 1888, 43-44; see also discussion in Bridge 2002, chapter 2; Palmer 2009, chapter 36).
- Landowners' possessory entitlement to objects extracted from their land is reduced as 'waiver by informed consent' – as an implied contractual term which is consequent and pursuant to their consent for the investigation work to take place under the CRM principle of using a 'preservation by record' method (Pollock & Wright 1888, 43-44; see also Hickey 2015, discussion of *Armory*¹⁶²).
- Archaeologists' lawful action of extracting objects from the ground means that the parties enter an intentional bailment. This leads to a sequence of events culminating

¹⁵⁸ *Waverley Borough Council v. Fletcher* [1995] 4 All ER 756 at p.757

¹⁵⁹ *Tucker v. Linger* [1883] 8 App.Cas. 508, per LJ Blackburn at p.512

¹⁶⁰ *Elwes v. Briggs Gas Co.* [1886] 33 Ch D 562

¹⁶¹ *Waverley Borough Council v. Fletcher* [1995] 4 All ER 756 at p.757

¹⁶² *Armory v. Delamirie* [1722] 1 Stra 505

in a situation whereby a number of organisations have shared, but varied levels of, title to and ownership of archaeologically-recovered material (Bridge 2002, 50; Hickey 2010, 34; Palmer 2009, chapter 36; see also Rostill 2018 for discussion of rights arising from possession).

Following from the above, instead of establishing whether title to discovered objects transfers from landowners to archaeology contractors, we should examine whether title to the objects is shared, consequent to actions carried out under agreement, and what ‘general property rights’ (after Hickey 2010, 167; Rostill 2018, 424) the parties to the contract have. An archaeology contractor’s property rights to the material in their custody does not negate the landowners’ title to the material, it only means that ownership of the material is shared, but to various and varying degrees (Pollock & Wright 1888, 33; Palmer 2009, 1422; Hickey 2010, 167; Rostill 2018, 424). Figure 19 is an illustration of the agglomeration of property rights to recovered archaeological material. It is important to understand that the rights accumulated by one side of the scale do not negate the other side’s rights, they coexist and are shared to varying degrees.

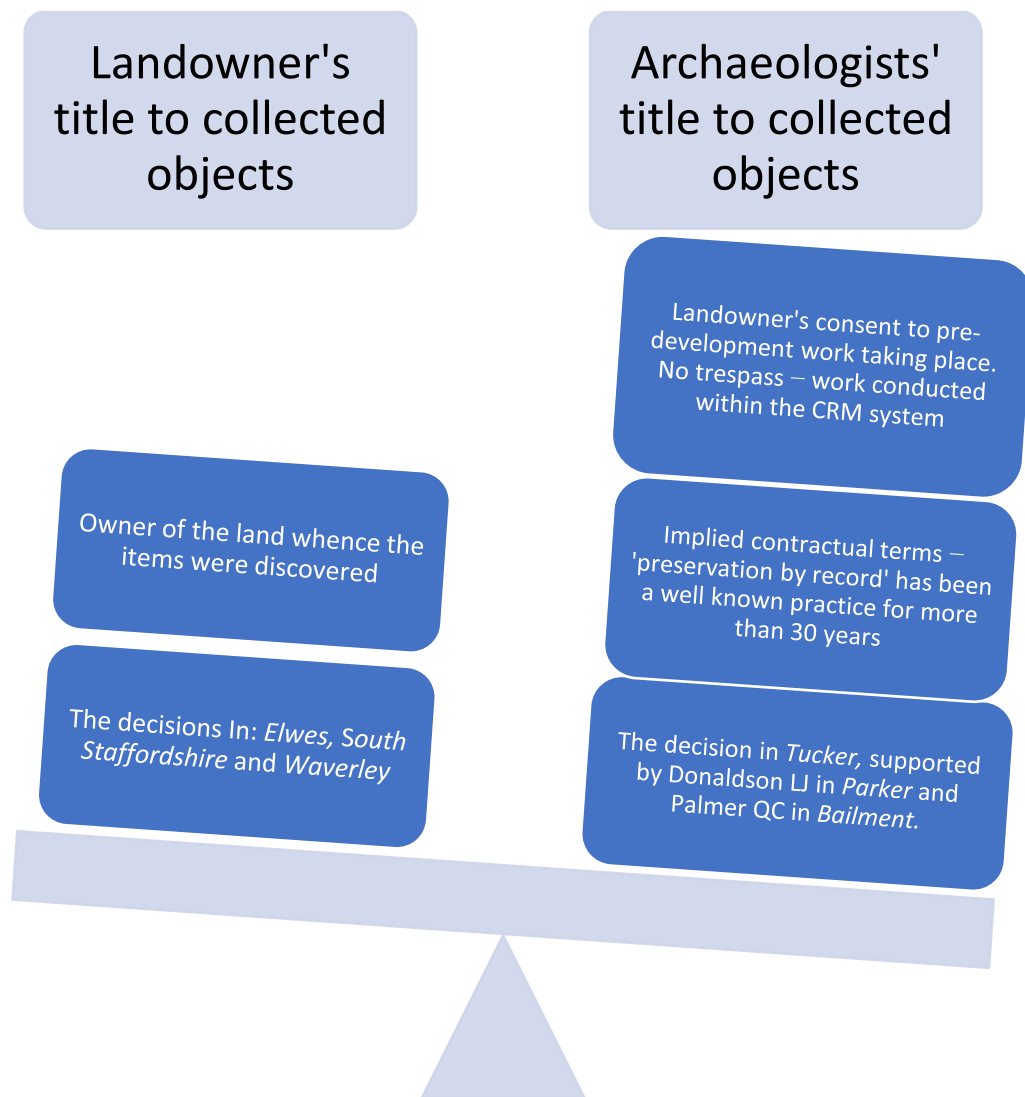


Figure 21: The balance of shared property rights to recovered archaeological material, with a slightly stronger claim on the side of archaeologists

Source: Author's own

When addressing these issues, it is also useful to establish precisely at which point during the process we aim to ascertain the level of property rights, as this might vary considerably over time as the boxes of material are gathering dust on a shelf (as per Limitation Act 1980; also see Redmond-Cooper 1998; Hickey 2010; Rostill 2018 for further discussion of this point). To reiterate a point made in chapter one, archaeologists' act of discovering an item creates a new entity, before its discovery the object constitutes an indistinguishable part

of the land (Pollock 1894, 318; Hickey 2010, 34-53; also *Tucker*¹⁶³; *Sharman*¹⁶⁴; *Parker*¹⁶⁵). It is these newly-created items, the subject of the scientific practice of collecting and analysing data in a ‘preservation by record’ method, that are deemed important enough for a sub-sample to be archived in perpetuity (Drewett 2004, 182). The extraction and recovery of this newly-created evidence causes a whole new set of laws to become pertinent (Hickey 2010, at chapter three; Bridge 2002, 47).

The recovery of the data metamorphoses the extracted objects from being part of the land into being legal entities with an acknowledged cultural value, thus changing the applicable legislative framework from planning and environmental laws to property and contract law (as discussed in *Waverley*¹⁶⁶, per Auld LJ at p.345). Archaeologists have an obligation to obtain permission prior to conducting any work on a premises, however, it should be emphasised that the onus of expressing, manifesting, exercising and maintaining landowners’ title to recovered objects is on the landowners not the archaeologists (*Parker*¹⁶⁷, per Donaldson LJ). To clarify the discussion here and to reiterate points made in chapter one, Figure 1 which illustrates the change of ownership of archaeologically-recovered objects is presented here again. The stages in the process of CRM-based archaeological fieldwork can now be reviewed through the lens of the legal research presented in this chapter. Note the transformation of applicable legislation from environmental protection policies through bailment to property determined by contractual terms implied by custom, and the corresponding metamorphoses of objects imbedded in the land and being considered part thereof, through their discovery, recovery and analysis and ending as collections of objects in boxes on shelves.

¹⁶³ *Tucker v. Linger* [1883] 8 App. Cas. 508, per LJ Blackburn at p.512

¹⁶⁴ *South Staffordshire Water Co. v. Sharman* [1896] 2 QB 44, per Lord Russell of Killowen CJ

¹⁶⁵ *Parker v. British Airways Board* [1982] QB 1004 at 1019, per Eveleigh LJ

¹⁶⁶ *Waverley Borough Council v. Fletcher* [1995] QB 334

¹⁶⁷ *Parker v. British Airways Board* [1982] QB 1004 at 1019

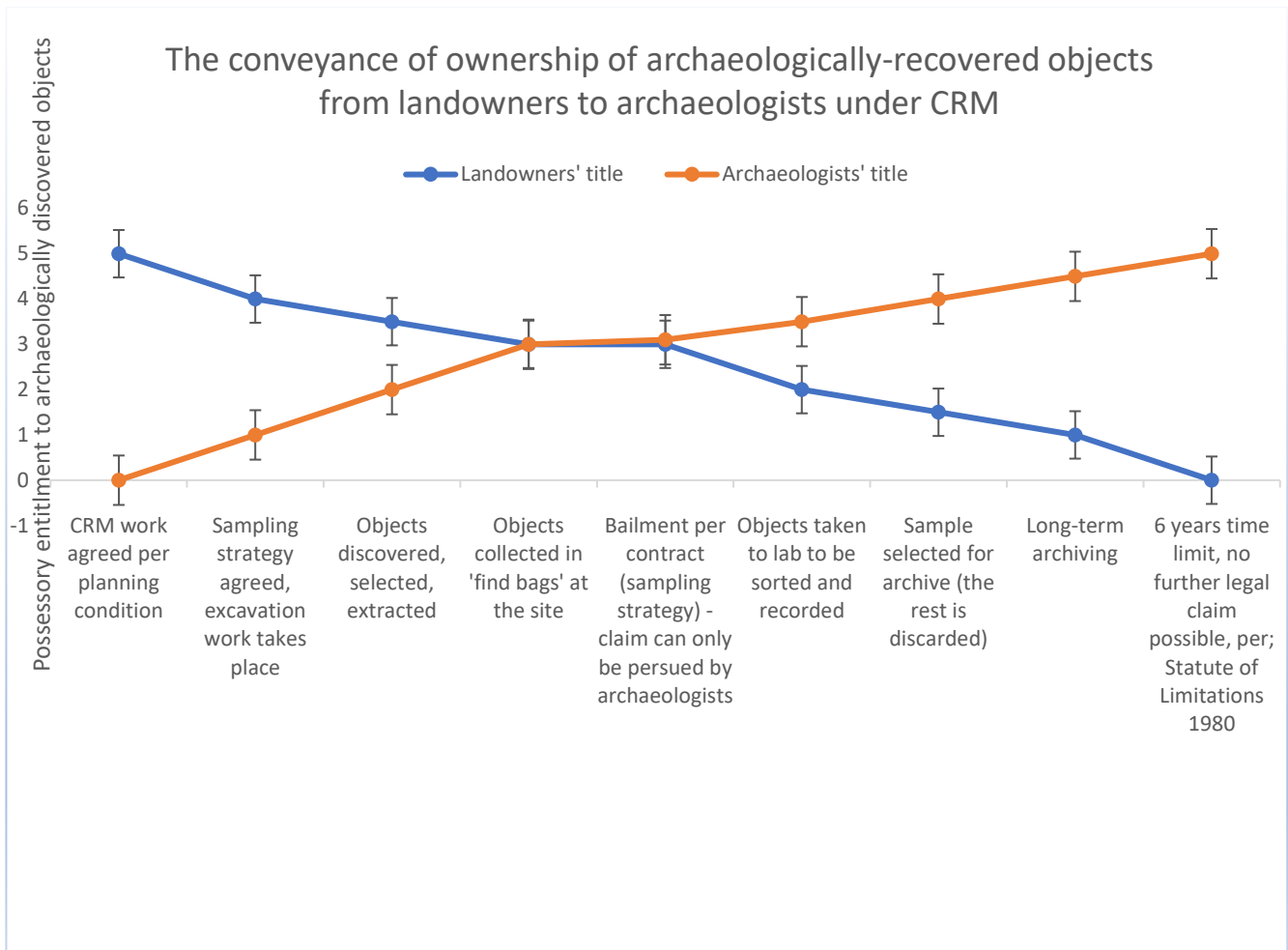


Figure 22 (reproduced): How ownership of archaeologically-discovered objects is transferred from landowners to archaeologists per the stages of pre-development CRM archaeological fieldwork

Source: Author's own

As stated above, landowners are entitled to say that they intend to maintain their property rights to any item discovered in their land but failure to express such intention before the collected items are removed from the site (the 'find bags' stage in the above diagram) can be inferred as an intentional relinquishing, or forfeiture, of their title as abandonment or 'waiver by informed consent' (see Pollock & Wright 1888, 33; Hudson 1998, chapter 23; also *Parker*¹⁶⁸; and *Tucker*¹⁶⁹).

¹⁶⁸ *Parker v. British Airways Board* [1982] QB 1004 at 1019, per Donaldson LJ

¹⁶⁹ *Tucker v. Linger* [1883] 8 App. Cas. 508, per Blackburn LJ at p.512

To summarise the findings of the legal analysis conducted for this research, notwithstanding landowners' rights, archaeologists obtain possessory title (see Rostill 2018) to the objects which they select, extract, recover and archive or discard during pre-development work by virtue of:

- the consent given for the work to take place (Pollock & Wright 1888, 33; Hudson 1998, chapter 23; also *Parker*¹⁷⁰) – planning application approval condition under planning and environmental law;
- contractual obligations and arrangements accepted by the parties (per *Tucker*¹⁷¹) – the WSI agreement made under the framework of the CRM approach;
- an intentional bailment situation being entered into under a valid contract when objects are discovered (Palmer 2002) – the ‘preservation by record’ method being based on the scientific principle of collecting data as evidence;
- lawful possession of the recovered objects under the rules of bailment – no trespass takes place (as per decision in *Waverley*¹⁷²), therefore the possession of the material is an expected and implied contractual term by virtue of customary practices (per decision in *Tucker*¹⁷³);
- landowners, or any agent acting on their behalf, opting not to manifest and exercise an intention to regain or maintain property rights to the assembled material (per the decision in *Parker*¹⁷⁴);
- time limits in actions to recover chattels (Redmond-Cooper 1998; Limitations Act 1980; and as per the decision in *Parker*¹⁷⁵).

¹⁷⁰ *Parker v. British Airways Board* [1982] QB 1004 at 1019, per Donaldson LJ

¹⁷¹ *Tucker v. Linger* [1883] 8 App. Cas. 508, per Blackburn LJ at p.512

¹⁷² *Waverley Borough Council v. Fletcher* [1995] QB 334

¹⁷³ *Tucker v. Linger* [1882] 21 Ch D 18, 51 LJ Ch 713, 30 WR 425, 46 LT 198

¹⁷⁴ *Parker v. British Airways Board* [1982] 1 All ER 834 at 843

¹⁷⁵ *Parker v. British Airways Board* [1982] 1 All ER 834 at 843

Therefore;

- the property rights (entitlement to have and maintain possession of the recovered objects) thus obtained by archaeology contractors can be maintained (by archiving the recovered material) or conveyed to museums and/or archive repository centres.

Ultimately, under the common law, ownership can be seen as vesting in the person or entity who has a superior right to possess an item (Hickey 2010; Rostill 2018). When archaeologists, working within the CRM system, lawfully obtain possession of archaeological material they receive property rights to the items, in bailment, superior to all but the ‘true owner’ (this being about archaeology it can usually be safely assumed that the ‘true’ or original owner is long gone, see Palmer 1996, 161). Therefore, archaeology contractors employed to conduct CRM-based work obtain superior property rights to the objects that they collect during the course of their work (Palmer 1996, 161; Pollock & Wright 1888, 43-44; see also Hickey 2015, discussion of *Armory*¹⁷⁶; but also see discussion in *Waverley*¹⁷⁷). This means that archaeology contractors have superior property rights to the material in their custody, and that these rights can be safely conveyed to archaeological archive repository centres and/or museums (superseding the *nemo dat* rule, as discussed above, see also Palmer 2009, 1,444). Ergo, archaeologists own recovered material, albeit that such ownership is shared rather than absolute, archaeology contractors are lawfully entitled to archive or discard any item obtained during CRM-based fieldwork (Palmer 2009, 1,444).

The analysis of the legal research conducted for this thesis suggests that the juxtaposition of property legislation onto the management of recovered archaeological material is unnecessary and might even exacerbate the use of archaeological archives as a resource. This redundant reliance on property legislation in the management of recovered material could even

¹⁷⁶ *Armory v. Delamirie* [1722] 1 Stra 505

¹⁷⁷ *Waverley Borough Council v. Fletcher* [1995] QB 334

undermine many of the proposed solutions for the issues of funding and storage space (see Mendoza 2017, 45). The legal research presented in this thesis shows that there is no need to invoke property legislation in order to manage the conservation and use of archaeologically-recovered material. The archaeology industry, or commercial archaeology, is sufficiently self-regulating (albeit rather reluctantly) to ensure that fieldwork is carried out to a very high standard and that the subsequent archive is protected (Nixon 2017).

Careful consideration of property legislation applicable to the extraction, recovery, collection and retention of archaeological material suggests that there is no particular legal issue in respect of possessory entitlement to recovered material (Palmer 1996, 161; Palmer 2009, 1,444). This suggests that perhaps the law should not be the mechanism to decide the fate of archaeological material recovered in England – as Prott & O’Keefe put it, ‘it is time for law and lawyers to recognise that the term ‘Cultural Heritage’ is rightfully superseding that of ‘Cultural Property’’ (Prott & O’Keefe 1992, 307).

The next section concerns certain solutions for the problems of storage space, before the conclusion of the research, including a reiteration of the answer to the research question presented above, are presented in the last chapter.

Chapter 8: Proposed and implemented solutions

It would be hubris to suggest that there could be a ‘silver-bullet’ solution to the problems discussed in this thesis. Archaeological data, knowledge and material would be best published and archived through a concerted collaboration between all interested organisations. This section is a look at some of the mechanisms that archaeology contractors, museums and other archive repositories have put in place to counter the issues of shortage of funding and lack of storage space for housing recovered material. Some of the solutions discussed here have been advocated by the archaeology sector but have not yet been implemented nationally, while others, namely deposition charges, are now widely practised with little centralised input.

8.1 Deposition charges (also referred to as ‘grants’)

The acute lack of storage space for housing archaeological material, particularly objects recovered during CRM-based fieldwork, has led museums to instigate a policy of ‘deposition charges’ originally known as ‘deposition grants’. Today about half of the local, regional and national museums in England are charging an archive deposition fee per box, which is reviewed and increased periodically, with current prices ranging between £20 and £100 per box (Boyle, Booth & Rawden 2016).

This practice started (D. Brown, via email, ref in appendix C) by the Department for the Environment (DoE, which later evolved into English Heritage) offering a ‘box grant’ to museums as a financial incentive so that the museums were willing to accession boxes of archaeologically-recovered objects. These grants were usually based on work carried out by the DoE inspectors at Ancient Monuments or Scheduled sites. The DoE would pay museums for finding a place to keep the boxes of material generated through such works and a fixed

price per box was set (today Historic England still offers a ‘box grant’ currently calculated as £18.50 per standard box of 0.017 cubic metres). During the early 1990s, museums started charging specifically for depositions of material generated consequent to pre-development work, with the calculation being based on the DoE ‘box grant’ (see below). The decision as to who should pay deposition fees generally depends on the museum expected to receive the boxes. This means that publicly-funded projects, such as those funded by Historic England or the Arts and Humanities Research Council, may also have to pay deposition charges similar to those expected from pre-development commercial projects.

Museum deposition charges pose a peculiar ethical and legal challenge because it could be perceived that archaeology contractors are expected to sell objects to a museum without necessarily obtaining title to these objects prior to the transaction taking place. In a form of reverse selling, the museums’ insistence on receiving title to the material means that, at the point of deposition, they are charging the archaeology contractor so that the museum can acquire the contractor’s property rights to the material – but it is the archaeology contractor who has to pay for this acquisition. Furthermore, the term most often used by museums to describe this transaction is ‘donate’ (for example, see Museums Association 2004) this means that archaeology contractors must pay to ‘donate’ objects to a registered charity or a publicly-funded institution.

In most cases it is the developers who pay the cost of deposition charges as part of their project budget calculations (D. Perring, supervisory meeting). Nonetheless, the developers pay for the project, including the deposition charges, irrespective of whether the boxes of recovered material are deposited at an archive repository facility or kept by the archaeology contractor. In very small projects, deposition charges could become a financial consideration that could result in developers putting pressure on the archaeologists to collect as few objects as possible in order to reduce the overall cost of the project (Welsh 2018, 5). The brief discussion of the

AOC Archaeology Group excavation project at Wainscott primary school, mentioned here under the Hoo Road case study at section 6.4, is an example of this.

A further complication could arise in the event that developers ask for their money back when archaeology contractors keep the recovered material without any option of depositing it at an archive facility or museum (discussed under the Hoo Road, Kent and Wiltshire case studies, at sections 6.4, 6.5 and 6.6). This may seem like a minor problem but considering that 75-80% of invoices for commercial projects are not paid on time and many contractors have to resort to the small claims court (Welsh 2018, 5), should developers start reclaiming unused deposition charge fees this could potentially become a significant problem.

Deposition charges can be viewed as similar to councils' refuse collection centres charging for the disposal of building waste material. However, refuse collection centres do not require a documented conveyancing of title to the material discarded with them – they accept it as rubbish and the transfer of title is assumed to be derived from the intentional relinquishing of possession (the act of discarding the waste, discussed in the previous chapter). A further example of the peculiarity of museums' deposition charge procedures is that deep-storage facilities (discussed at s8.3) accept archaeological material and apply deposition charges without expecting or requiring a documented transfer of title. This raises the question of why there is a discrepancy between the policies of deep-storage facilities and regulations pertaining to museums and archive centres. The answer is twofold. Firstly, deep-storage facilities are private companies which can set their own rules (within the applicable legislation) and are not accredited as museums, meaning that they do not have to comply with national or international procedures such as the ACE Accreditation policies or the ICOM CoE. Secondly, deep-storage facilities aim to make a profit through the provision of a service (the housing and protection of material deposited with them), while museums aim to provide a public benefit service and the charges are only supposed to cover their costs (see discussion in chapter five).

This distinction between museums and deep-storage facilities brings our attention to the position of archive repository facilities – are they museums or private companies?

8.2 Regional archive repository centres

Regional archaeological archive facilities are publicly funded, usually by county councils as mentioned above in the Northamptonshire case study (s6.8) or specifically allocated Government funding such as the London Archaeological Archive Resource Centre. This solution to the problem of housing accumulated archaeological material was proposed over a century ago by Flinders Petrie in his *Methods and Aims in Archaeology*, in which he advocated the construction of a regional archive repository facility ‘within an hour’s journey from London’ (Petrie 1904, 134). The downside of this is that taxpayers have to fund the potential cost of building and running such facilities. The benefit of regional archive centres is that the facilities themselves are owned by the council, meaning that they are neither museums nor private companies – regional archive repository facilities are a public service provided and paid for by the council for its constituency. This means that such facilities operate under the rules set by the council, which should be in accordance with the archaeology sector’s guidelines (see Brown 2015). As a result, the legal issues discussed above will not be relevant to county-run archive facilities (on the basis that the council would update its policies to indicate that such a facility exists. When planning conditions include a reference to the facility, the consent for the pre-development work to take place would entail ‘waiver by informed consent’ to the transfer of title to recovered items).

An important point that needs to be reiterated here is that the use of the words ‘donate’ and ‘gift’ in relation to the recovered material in archive deposition procedures is unnecessary and could be a potential contradiction with charging a fee for the deposition of the same

material at a facility owned by the council (as discussed above in the previous section and in the Northamptonshire and Sussex case studies). The requirement that landowners ‘donate’ archaeologically-recovered items is particularly problematic if it is correlated to the granting of the planning application when it is contractually implied that unless the ‘donation’ is agreed the planning application may be refused. Furthermore, as the analysis of the legal research presented here suggests, such requirements are redundant because (a) the landowners already agree to waive their title to recovered items by virtue of entering an agreement for CRM-based work to take place and (b) the transfer of title from the landowners to the archaeologists is an implied contractual term by virtue of being a well-known practice. The development of regional archaeological archive repository facilities enables the acceptance and curation of material from a collecting area (which does not have to correlate to a district, borough or county area). This appears to be the best solution for all the issues discussed here, however, the funding for the construction and long-term running of such facilities has to come from somewhere and the main source of funding is most probably county councils who might be already facing severe budgetary cuts (Brown 2015). In the case study of Northamptonshire CC discussed above (s6.8) the money for constructing the county archaeological archive facility has been secured through the National Lottery Fund despite, and concomitantly with, the council going bankrupt (Robinson & Manning 2020). Even if funding was available for an additional county facility to be commissioned every year, it would still take more than 40 years for such a scheme to be implemented across England (48 counties in England minus the five that already have such facilities and excluding the LAARC for Greater London). In the Wiltshire case study discussed above (s6.6), the cost of commissioning a county archaeological archive facility was estimated to be £200,000 (D. Dawson, Wiltshire Museum director, ref in appendix C) and although the council has recently purchased a building to be used for storing archaeological archives (<https://www.wiltshiremuseum.org.uk/archaeological-archives/>) (accessed in

September 2020)) funding will now need to be secured for the long-term running of the facility. In terms of measuring whether this solution is commensurate with potential public benefit, by way of evaluating access to and protection of the collected material versus the required funding, regional archive facilities prove to be the best value for money, however, they necessitate long-term financial commitment with little political return. In short, the commissioning and long-term running of county-based archaeological archive facilities is an excellent idea which, alas, does not seem feasible under the current political climate.

8.3 Deep-storage facilities

There are currently two deep-storage facilities which can accept and accommodate bulk archaeological material (in boxes). Restore/National Conservation Service, is a ‘not-for-profit’ organisation providing off-site storage facilities at Upper Heyford, Oxfordshire, in reused aircraft hangars. In Winsford, Cheshire, DeepStore company offers a material preservation service in an enormous (200 million m³) salt mine which is now owned by Compass Minerals. Compass Minerals provide a service through its daughter company DeepStore, keeping and protecting boxes of material for their clients for a fee (<http://www.deepstore.com/> (obtained in January 2018)). DeepStore is a good example for this discussion, primarily because Restore seems less adjusted towards keeping bulk material and because Restore charges double the fees of DeepStore per ten-year storage service (Tsang 2017, 4).

The DeepStore service is currently used by Cambridgeshire and Colchester councils’ archaeology services and the MoLA, among others, as repository for boxes of recovered material. DeepStore offers a next day delivery service of the boxes that they keep so this seems to be a good solution in terms of archive availability to the public and enabling researchers’ access to archaeological material. The facility also complies with the requirements of the PD

5454,2012 (British Standards Institute 2014) so the preservation of material deposited there should not be a significant concern in terms of maintained temperature and humidity levels.

In respect of the legal issues addressed in this thesis, the deposition of archaeological material at the DeepStore facility is conducted under the rules of bailment. At no point in the process does the DeepStore company obtain or intend to obtain title to the material that they keep. Upon accepting deposition of archaeological material, DeepStore becomes a sub-bailee to a sub-bailee (the council or archaeology contractor), so potentially DeepStore could be liable to the landowner (as bailor) if it was shown that the material was collected unlawfully (tort of trespass) (as discussed in s7.5 regarding bailment). Such a scenario would require a landowner to take legal action in court for a breach of contract (against the archaeology contractor) which could then invalidate the planning consent and mean that the recovery of the objects by the archaeologists was tortious. This is an extremely low probability scenario but it illustrates the incompatibility of the archaeology sector policies and guidelines. If, as the *AAF Guide to Best Practice* (Brown 2011), CIfA policy and Historic England guidelines assert, landowners have title to objects extracted from their land, then such material cannot be deposited at the DeepStore facility without a letter of consent from the landowners or a documented transfer of title. However, DeepStore does accept material without documentation relating to its ownership (Cambridgeshire county archaeologists, meeting ref in appendix C) on the basis that they house it under the rules of bailment without obtaining title. This points to the main difference between DeepStore and councils' archive repository facilities; DeepStore is a private company which aims to maximise its profits – it is not a registered charity or a public service provider. This means that the regulations pertaining to its operation differ from those of councils' archive facilities or accredited museums.

On the face of it, DeepStore seems a viable solution to the issue of lack of storage space in museums and archive repository facilities, however, there are a number of points of concern

with this scheme. Depositing material with DeepStore requires long-term funding through periodic charges per amount of material kept. This raises the possibility of an archaeology contractor or a county council going into insolvency (see discussion above at 6.7) going into insolvency whilst the material is kept at DeepStore and it is unclear what DeepStore would then do with such material. The costs of storage are calculated by a private company according to its own financial motivations, meaning that in the future the company may charge more for the same service. For example, if in 50 years' time Cambridgeshire CC decided that it was no longer willing to fund this particular scheme then the council could, potentially, face the prospect of finding a solution, and funding, for tons of accumulated archaeological material. A further important issue here, directly relating to the first, is that under the scheme of depositing archaeological material with DeepStore, the protection of the tangible manifestations of heritage is outsourced to a private company in perpetuity. This is perhaps practically viable but it raises ethical questions about who should be the custodian of, and have control over, people's tangible heritage.

In 2017, Tsang conducted a comparative survey for Historic England (HE) on the economic viability of long-term housing of archaeological archives in deep-storage facilities versus placing the material in museums (assuming the museum still has space to accept material). It is difficult to draw specific conclusions from Tsang's survey because museums charge a one-off deposition fee which varies tremendously between museums, while deep-storage facility charges are set on an annual basis. Here I present a summarised version of the tables in Tsang's publication as a comparison reference. The information is extracted from Tsang and calculated on the basis of the HE box grant (above in section 8.1). The calculation for the two deep-storage facilities are based on ten years of storing 59 boxes in a cubic metre based on a standard box size of 0.017m³, while for the museums the calculation only refers to the initial deposition charge.

Facility	Cost of storing 59 boxes = metre³
DeepStore (per 10 years storage)	£762.80
Restore (per 10 years storage)	£1,565.50
Museums (deposition charges)	
Norfolk	£6,335.29
Cambridge	£3,750.00
Museum of London	£1,750.00
Salisbury	£1,157.06
Winchester	£1,139.18

Table 5: Results of comparative survey of costs of storing archaeological material in selected museums and deep storage facilities

Source: Tsang 2017

Tsang concludes her report by saying that,

The costs of deep storage are significantly lower than the amount archaeological contractors are paying to store ‘undepositable’ archives, and thus it is they who will gain the most financially from using deep store facilities. There are risks that where a museum’s storage charges are significantly higher than those of a deep store facility, it will become financially beneficial for excavators to use those facilities.

(Tsang 2017, 8).

Following Tsang, in terms of measuring whether the solution of deep-storage facilities provides the required level of access to and protection of the collected material so as to be commensurate with a measurable public benefit, is currently difficult to ascertain. Evaluating the public benefit of this solution would vary too greatly between different councils and LPAs and requires additional research specifically into this scheme so meaningful observations can

be made through data analysis. The scheme of perpetually housing archaeological material in deep-storage facilities for a fee points to the next solution discussed here, which is to encourage archaeologists to select, recover and collect fewer objects and less material.

8.4 Implementation of rigorous selection and collection criteria

The strategy of exercising more rigorous artefact recovery criteria during fieldwork so as to reduce the amount of material being assembled and kept (Brown 2015, 249) is now advocated vigorously by most, if not all, county and professional archaeologists, and it would be difficult to find anyone in the sector who does not support this approach (principal archaeologist at Leicestershire CC, via email, ref in appendix C). The approach of collecting fewer objects during fieldwork and selecting less material to be conserved in the archive is applied during two phases of the project (in the trench and in the lab) using different criteria and within different parameters but with a similar crucial problem – the potential for data loss. This issue is well known to anyone involved in archaeology and has been amply discussed elsewhere (AAF, CifA, ACE, MoL and HE policies and guidelines to name but a few examples) so there is no need to elaborate here (see Sussex case study above at 6.7). Suffice to say that whatever the sampling strategy applied during and after fieldwork, there is always a risk of inconsistent standards of records made, data loss and information not properly obtained before material is discarded.

In respect of the legal issues discussed in this thesis, it is imperative for archaeologists to be able to clearly illustrate the sampling strategy for selecting, discarding and archiving recovered objects. This point relates to the discussion in s7.8 above regarding valueless chattels and rubbish. Once an object is selected for retention in the archive, it is assigned a value by virtue of the labour invested in it to make it worthy of preservation (discovery, extraction,

recovery, collection, analysis, recording and conservation work applied). If we examine material preservation costs over a hundred or a thousand years' time scale then the cost of conserving items, either in deep-store facilities, by archaeology contractors or in museums can be quantified down to a single object level. Thus, the investment of time, effort and skill can be translated into a monetary value which means that it could be more difficult to designate such a 'chosen' object as valueless rubbish. The way around this problem is to have a clear explanation as to the criteria and parameters employed in selecting this particular object as scientific evidence discovered in the course of an archaeological investigation and used for testing the plausibility of theoretical hypothesis through the potential information it contains, i.e. demonstrating that the value of archaeological material is derived from context and information rather than financial factors (see discussion above in chapters four and five).

The discussion of selection and collection criteria and object retention parameters leads us to question whether sampling strategies can be applied to archived material.

8.5 Critical assessment of archives' contents – 'rationalisation'

Sifting through material which has already been placed in museums and archive repositories and discarding objects which are considered superfluous (CBM, unstratified animal bones, unrecorded items etc.) is the solution advocated by the CIfA (Swain 1997, 122). The idea of this strategy is that it should be applied to archaeological collections already stored in an archive facility or museum (Swain 2003, 123; Brown 2015, 4). This approach is also referred to as a 'rationalisation' strategy. At its most rigorous application, 'rationalisation' can entail discarding entire obsolete archives which are of limited use, either because the project was not executed professionally, basic collection and deposition standards were not met or due to archive damage post-deposition. The main drawback of this strategy is that it necessitates

the allocation of human resources. Computers cannot be of assistance – a person has to physically sort through the archive and make a decision as to whether or not the contents can still be considered a resource. ‘Rationalisation’ is expensive; nonetheless it is becoming an increasingly necessary space-creating tactic, particularly for museums that are already full to capacity.

According to the conclusion of the legal research presented in chapter seven, there should not be legal issues in respect of ‘rationalisation’. This statement is based on the assumptions that the material concerned has been in the possession of the discarding organisation for many years and that the objects discarded have been examined and it has been decided that the collection contains no usable data or any other value whatsoever. For clarity, prior to any organisation conducting ‘rationalisation’ it is strongly recommended that the disposal procedures of the Museums Association and the Arts Council England are adhered to, as per <https://www.museumsassociation.org/download?id=1075416> (obtained in June 2017).

The solution discussed in the next section, that LPAs include a stipulation in planning consent conditions that the recovered material is to be sold for the sum of £1 to the contractor, would eliminate the uncertainty regarding the transfer of title from landowners to archaeologists of all recovered material. This is a straightforward legal solution for verifying the conveyancing of ownership of chattels by a bona fide purchase, and in this respect this solution has not been given the consideration it deserves.

8.6 Landowners sell the material to the archaeology contractors

The solution advocated in this section is that archaeology contractors buy the recovered material from the landowners/developers for a nominal amount (for example, £1). Pursuant to

the Sale of Goods Act 1979, property in chattels (or title, to use the term in the Act) transfers to buyer from seller under a contract for sale (Part II, section 2(4)). Although for the sake of clarity and certainty a written contract is preferable, the sale can also be agreed verbally (Part II, section 4(1)) so a clear note of this proposed sale during the discussion of sampling strategy would suffice but a clear statement in the WSI would be preferable.

Part II, section 5(1) of the Act states that:

The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by him after the making of the contract of sale, in this Act called future goods.

As a result, the agreement to purchase all or any items that may be discovered during archaeological excavation can be made before the commencement of the fieldwork and can be included in the WSI as a term of the contract, and alternatively prior to that, a sale agreement can be included in the development consent condition issued by LPAs.

This is a simple and straightforward solution to the perceived uncertainties regarding the legal status of archaeological material collected in England consequent to the application of CRM-based fieldwork. All that is needed for this solution to apply is for WSI documents or LPA's planning conditions to include a sentence to the effect that: *'Before the commencement of archaeological work at the site it is agreed that, pursuant to the Sale of Goods Act 1979, all or any objects discovered and recovered by archaeologists in the course of the fieldwork including any artefacts extracted from the land will be purchased by the archaeology contractor from the landowner for the sum of £1'*. If this solution was accepted there would no longer be legal issues in respect of the possession, title to and/or ownership of archaeological material.

If archaeology contractors purchased recovered material from the landowners, or developers as their agents, they would be legally allowed to discard superfluous material and to archive a selected sample in perpetuity. Albeit that this solution would not alleviate the issues of lack of storage space and insufficient funding, it would solve any remaining uncertainties concerning the ownership of archaeologically-recovered material assembled in England. Furthermore, in terms of evaluating the public benefit that could be attained by the implementation of this solution, the bona fide purchase of archaeologically-recovered material by the contractors from the landowner will facilitate access to and use of the material by clarifying its legal status, thus negating any concerns that may arise due to the *nemo dat* rule (as discussed in chapters one and seven above; see also Merriman & Swain 1999). The main potential issue that may arise from the implementation of this solution is a bureaucratic one in the sense that it would contravene current procedures applied in museums and regional archive deposition centres that require landowners to ‘donate’ or ‘gift’ the recovered material to the museum or archive centre. Either a purchase/sale or a ‘donation’ arrangement could be made, not both (see Clarke & Kohler 2005, Part III). To reiterate the recommendation discussed above (s8.2), the requirement that landowners ‘donate’ archaeologically-recovered items is particularly problematic when it is included as a stipulation prior to the granting of planning applications. It is therefore strongly recommended that the wording of such procedures, used by museums and archive deposition centres in England, would be amended to exclude the words ‘donation’ and ‘gift’ in relation to material assembled in England consequent to CRM-based work. A simple purchase/sale agreement is far preferable.

This brings us to the last solution addressed here, that archaeology contractors would be regarded and operate under the same policies and regulations as those applicable to regional archive repository facilities in terms of curating, protecting and providing access to the material that they assemble and keep. If archaeology contractors were to operate under the same rules

as those applicable to museums and regional archive centres, then this would facilitate realising the potential public benefit of storing archaeological material as it would enable further work on the material to take place and reduce public funding (although the cost will be transferred to the contractors).

8.7 Archaeology contractors as regional archive centres

This section is the discussion of an alternative view regarding the problems of lack of storage space and insufficient funding to accommodate recovered archaeological material. The current de facto status quo in respect of collecting and conserving archaeological material is that archaeology contractors are responsible for both of these actions yet they are not paid for either (archaeology contractors are not paid to collect objects or to keep the material, they are only paid to produce a report, as discussed in chapters three and four (see Cooper-Reade 2015 regarding the ‘product’ of archaeology)). To illustrate the financial burden incurred by archaeology contractors as a result of operating within the CRM system using a ‘preservation by record’ method, we can compare the data from the Edwards 2012 and Tsang 2017 reports.

The Edwards report entitled *Archaeological Archives and Museums 2012*, calculated that in England, there was an estimated total volume of 1,160m³ of archives equating to 9,000 of so-called ‘undeposited archives’ that are kept by archaeology contractors because no museum can or will accession the boxes of material.

The Edwards report estimated that, at the time, the total annual storage cost of undeposited archives kept by companies operating in England was £330,000 (based on information from respondents, the actual cost is probably much higher). This equates to £284.48 per metre³ per annum. According to the Tsang report, if the boxes of undeposited

material kept by archaeology contractors in 2012 were instead stored with DeepStore or Restore (discussed above in s8.3) the annual storage cost would have been £82,592 in DeepStore or £114,200 in Restore.

The combined data from the Edwards 2012 and the Tsang 2017 reports clearly indicate a potential, particularly for the larger contractors such as Oxford Archaeology and Wessex Archaeology, for a significant reduction of storage costs pertaining to material that cannot be deposited at another facility. In 2012, the approximate reduction of storage cost would have been more than £200,000 per year, today the cost would probably be much higher.

These calculations can be misleading, however. The missing parts are the reason for collecting the objects and the aim of preserving the material. Councils pay for deep-storage of archaeological material because their intention is to provide a public service while aiming to minimise costs. On the other hand, the aim of archaeology contractors is to gather material, analyse data and record information but their intention is not to keep the material forever – they aim to transfer the material, data and information to another repository facility (see email correspondence in appendix C). Perhaps this aspect of the operation of archaeology contractors could change.

If archaeology contractors would aim to keep hold of the material and data that they recover and collect, either by paying for storage or within their existing facilities, then they would budget for the cost of long-term conservation of archives in the tendering process and the WSI (D. Perring, supervisory meeting). This proposed scheme has three problems, however, namely:

- Contractors cannot be obliged to fund the conservation of the material (Brown, D. in meeting, ref in appendix C). Currently they are only doing so on an ethical basis because they believe it is the right thing to do.

- Storage would place an ever-increasing economic burden on contractors, and some companies might not be financially strong enough to support such a scheme (D. Perring, supervisory meeting).
- The financial situation of contractors may change in the future and some might be insolvent and cease to exist as a legal entity, or might decide that it is not in their financial interest to continue to pay for the conservation of the archives, this could lead to boxes of material being discarded so as to reduce costs. Notwithstanding that the same can be said about museums and other publicly-funded institutions, it can be cautiously pointed out that contractors are private companies which means that they might prioritise their budget in a different way from organisations that relay on tax payers' funding.

Nevertheless, all of these problems are equally applicable and pertinent today as things stand. The main difference between the current situation and the proposal discussed here is one of intentions and budget. It would clarify the financial situation and facilitate budgetary planning if archaeology contractors knew before they tendered for a job that they would be expected to house the entire archive generated in the course of the planned work. For example, small scale operators may choose not to tender for large scale projects so as to avoid the cost of storing the expected resulting archive, and vice versa large contractors may opt not to tender for small scale projects because the added cost of keeping the archive would negate their expected profit. Such a scheme would also facilitate access to archived material because it would be easier to locate as it would reduce the chain of archive deposition (in the Moorfield School case study for example the project took place in north London, then the material was transported to Brighton and is now expected to be carried back to north London (s6.3 above)). Furthermore, this would assist in defining the expected product of archaeological investigations because LPAs, developers, county archaeologists and all other interested parties would know

in advance precisely what the expected product of the fieldwork was and who would be funding and keeping it, which, as discussed above in chapter seven, would clarify the specificities of the contract performance.

8.8 Discussion of proposed and implemented solutions

The picture that emerges through analysis of the solutions discussed above is that assembled archaeological material is, by and large, viewed as a financial and practical burden that is at best removed and hidden, and at worst discarded (Shepherd 2015). It seems that there is little focus on making archaeological archives accessible and promoting the use of material as a cultural resource (see Southport report 2011). This was noted by John Shepherd, amongst others, who paraphrased Benjamin Franklin's famous adage, saying that:

in this world nothing can be said to be certain, except death, taxes and that the accumulated *ex situ* archaeological resource will be getting ever larger. All the adjustments to how we collect in the future, and what we keep in our present stores, do not really address the main issue; what are we going to do about the national archaeological archive that exists in numerous stores throughout the country, and how do we arrest the crisis by making sure we do not exhaust finite space too soon? (Shepherd 2015, 143-144).

The solution, according to Shepherd, has to include enhanced engagement with national policy-makers to increase awareness and help them understand the magnitude of the problem faced by the archaeology and museum sectors in England. To this, we can add the tactic taken by Dawson and Green, as discussed above in the Wiltshire case study (s6.6), of increasing

pressure on planning authorities to include an explicit reference to archaeologically-recovered material and to archives in the planning consent condition which they impose.

Indeed, if there is anyone today who has the authority and the means to change the system so that archaeological archives are better protected and regarded more as a resource than a burden, then it has to be Local Planning Authorities. Both by law and in practice, planning authorities hold one of the primary keys to ensuring the long-term preservation of the archaeological resource of England.

Archaeologists should not see these problems as a crisis, however. This is a rare opportunity to engage with the issues and overcome the problems by setting archaeology's own course. Archaeologists should promote and champion the value of archaeology as a social-scientific discipline enhancing our understanding of ourselves through the study of the past (Southport Group 2011, s3.2.8).

Chapter 9: Conclusion

The legal status of archaeologically-recovered material assembled in England is that it is owned by whomever is lawfully holding it, be that a museum, an archive deposition centre or an archaeology contractor. The conclusion of this research is that ownership of archaeological material is determined by implied contractual terms that come into force by virtue of archaeologists' well-known practices of extracting, selecting, studying and archiving a sample from the assemblage of objects discovered and recovered during archaeological fieldwork. This practice implies reasonable and necessary contractual terms which are imperative for the efficacy of all CRM-based archaeological work undertaken in England. The stipulations for this ownership to come into effect are that the work is carried out in good faith under a valid contract and that the owner of the land from which the chattels were extracted does not assert an intention to maintain or regain title to the chattels prior to the completion of the fieldwork.

The overarching purpose of this thesis has been to clarify and ascertain the legal status of archaeological material recovered during CRM-based fieldwork in England. To achieve this aim, the primary research objective has been to critically examine the supposition, that has become an axiom within the archaeology sector, that there are legal uncertainties regarding the ownership of archaeologically-recovered material. Addressing this aim necessitated focusing on the process by which title to recovered material is conveyed from landowners to archaeologists. This led to three chapters of the thesis being dedicated to the examination of different facets of the process, in terms of archaeological practice, pertinent policies, the expected product of CRM-based work and the assumed public benefit thereof (chapters three, four and five). The entire process (planning condition through to archive) relating to CRM-based archaeology had to be scrutinised before an elucidation of the legal status of material

recovered during fieldwork could be determined. Because the subjects examined for this thesis were from two very different disciplines, a hybrid of different analytical methods were used as an interdisciplinary research. This followed Wigmore's *Principles of Judicial Proof* (1931), as discussed in chapter two. The analysis of the operation of development-driven archaeology was based on field observations, literature review and information available online, as well as discussions and correspondence with professional and county archaeologists and archivists in order to record their views on the matters. This allowed me to extract deductions on broader issues pertinent to pre-development archaeological work across England. For the legal research of this thesis, I decided on the research method of 'taking nothing for granted' and examining every assumption to determine its origins. This means that every legal interpretation presented in this thesis is based on an identifiable source which is referenced in the text. This research method entailed the examination of pertinent common law by reference to court rulings and deliberations, extensive consultation of legal literature, consideration of Acts of Parliament and Government-issued regulations and policies, and an assessment of applicable international conventions and EEC directives and procedures.

The conclusion of the legal research indicates that archaeologists working within the CRM-based system using a 'preservation by record' method obtain superior possessory entitlement to the recovered objects by virtue of:

- a) planning application approval conditions, imposed under planning and environmental law, meaning that contractual obligations accepted by the parties include archaeologists' well-known practice of recovering discovered items as a customary term of the contract. Therefore, consenting to CRM-based fieldwork connotes relinquishing landowners' title to discovered and recovered items as 'waiver by informed consent';

- b) the WSI agreement made under the framework of the CRM approach meaning that an intentional bailment situation is entered into under a valid contract when objects are discovered, extracted and recovered – the ‘preservation by record’ method being based on the scientific principle of collecting data as evidence to be used for enhancing understanding;
- c) pursuant to the contractual obligations stipulated in the WSI and the planning application condition placed by the LPA, archaeologists obtain lawful possession of the objects that they collect and discard, under the rules of bailment. Ergo, no trespass or conversion take place; and
- d) that when archaeology contractors discard collected objects or retain a sub-sample of the recovered material, and landowners do not manifest an intention to maintain property rights to it – the archaeology contractor obtains superior title to all the material recovered during fieldwork. Thus, archaeology contractors may convey their title in the material to museums and archive facilities.

The legal research undertaken for this thesis asserts that the *nemo dat* rule does not apply in respect of objects recovered pursuant to CRM-based work. Therefore, archaeology contractors can either maintain their title to assembled material, by keeping archive boxes themselves, or they can convey their title to museums and/or archive repository centres.

Notwithstanding that archaeologists ‘find’ objects submerged in someone else’s land and that there are unequivocal common law rulings that owning land entails an ownership of everything within, this rule can be changed by contract. As Palmer explains in *Emden’s Construction Law* regarding the rights of parties to discovered chattels:

if the Crown cannot assert a title founded on treasure, the right to retain the goods will fall to be allocated according to the private law of finders, as modified by any contract between the relevant parties (Palmer 2002, 373 (my emphasis)).

To summarise, the results of the legal analysis conducted for this thesis ascertain that landowners' consent to CRM-based pre-development work to be carried out entails and connotes an agreement for archaeologists to collect objects from the ground, analyse the material, discard superfluous items and keep a selected sub-sample of the material. Landowners' title to objects extracted from their land is thus relinquished as 'waiver by informed consent' (pursuant to the landowner not manifesting an intention to maintain property rights). Therefore, the transfer of ownership of archaeological material is a term which, unless explicitly stipulated otherwise, is implied into the contract between developers and archaeology contractors. Archaeology contractors thus obtaining lawful possession of material can convey their title in the recovered objects to museums or archive repository facilities. In respect of the legal status of material collections assembled during pre-development fieldwork, it is my understanding that there are no particular legal issues concerning the possession of or the transfer of title to archaeologically-recovered objects.

With regard to the future of development-related archaeology and the management of archaeologically-recovered material, the United Kingdom is now facing the prospect of leaving the European Union. This will undoubtedly impact the operation of archaeology contractors, the application of CRM mechanisms by LPAs and the long-term protection of the archaeological record. Consequently, there has been an outcry in the archaeology sector, as well as the rest of the country, for the Government to clarify its position on which aspects of EU environmental protection regulations would apply after the UK leaves the EU. As mentioned in s3.2.1, in November 2017, the House of Commons rejected clause 67 of the EU Withdrawal Bill. This proposed amendment was aimed at ensuring that the 'Precautionary

Principle' for the protection of the environment, as set in EU regulations, would remain statutory in the UK after it leaves the EU. The rejection of this amendment and the absence of any different proposal for legislative environmental protection after the UK leaves the EU means that the legal basis of development-driven archaeology will have to change.

The precise practical and legislative effect that this process would have on environmental protection and planning policies is unclear at present. Considering the future of development-driven archaeology highlights the implication of certain aspects of this thesis on future research. Today, despite the plethora of academic publications regarding the operation of archaeology and notwithstanding the vast corpus of legal literature on the subjects of public and contract law and the various aspects of property legislation, there are very few publications which explicitly examine the legal status of archaeologically-recovered material in England. This is perhaps not surprising considering that, as mentioned in chapter seven, archaeological material collected during pre-development work is regarded as having no financial value attached to it. This thesis contributes to clarifying some of these issues by providing a comprehensive study of the particular practical, ethical and legal issues surrounding the transfer of title to archaeological material through a multidisciplinary research methodology.

At its essence, all archaeological endeavour is aimed towards providing a benefit for society. However, as discussed in s5.2, because archaeological material is continuously accumulated, the proportions of material being used to enhance understanding through research is becoming increasingly smaller. This situation might jeopardise the notion that archaeological material is recovered, collected and kept as a cultural resource for a specific public benefit, because it becomes harder to demonstrate this hypothetical purpose (per Merriman & Swain 1999). As Figure 20 illustrates, regardless of where and by whom archaeologically-recovered material is kept, the use of it for research purposes is evidently becoming proportionately smaller (also *ibid.*), although the precise quantities of material accumulated by archaeology

contractors should not be taken as definitive because this information is not available from all companies.

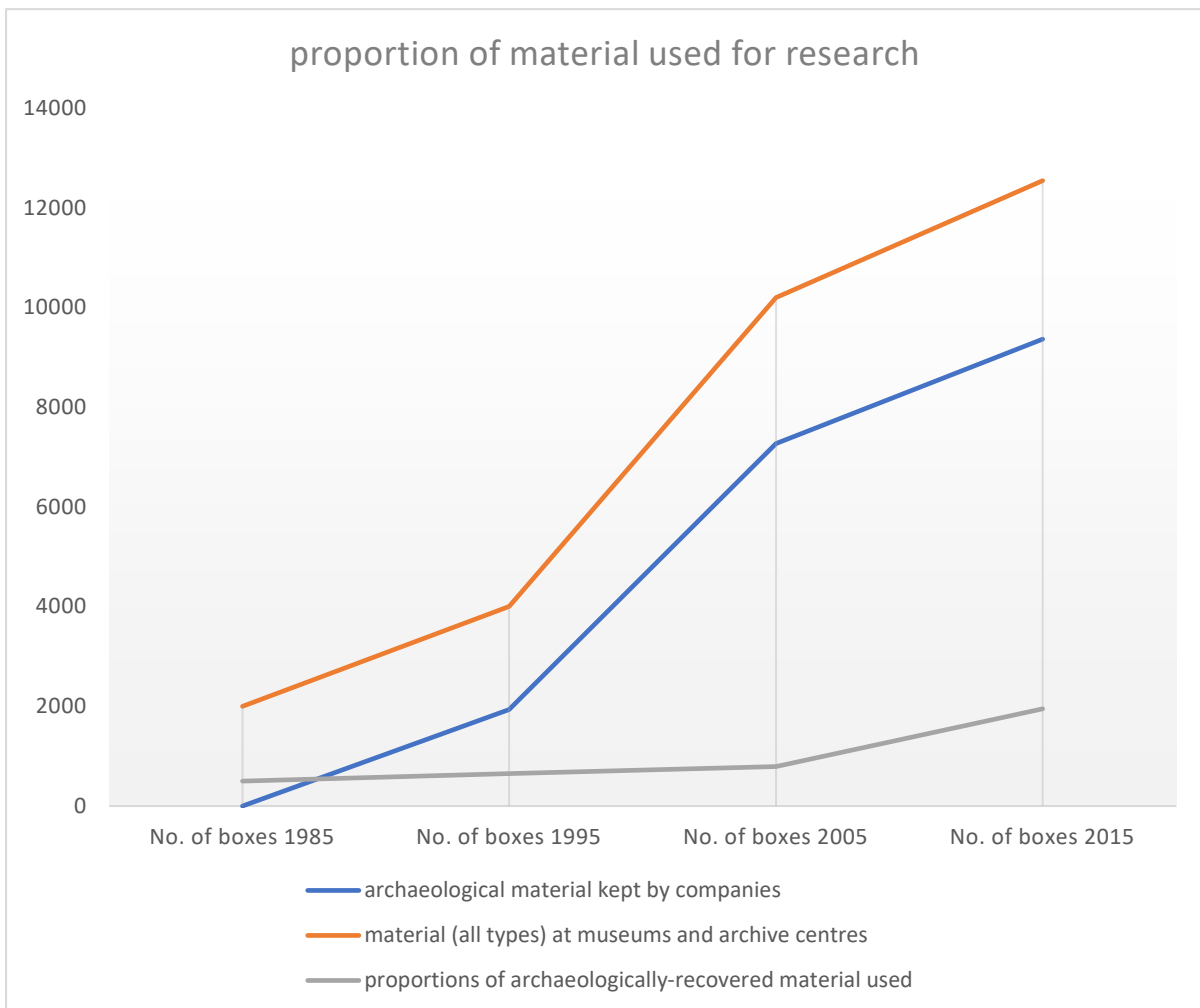


Figure 23: The approximate rate of archaeological material accumulation comparative to proportions of material used for research

Source: Author's own.

Note: the data is based on average calculation per available information for the last three decades. The data includes only companies which are registered charities and for which information regarding their operations is available. Note that for companies the material refers to 'archaeologically-recovered objects' while for museums and archive centres 'material' refers to all the objects in their collection including non-archaeological material. The graph contains data combined from Aitchison & Edwards 2008; Everill 2009; Edwards 2013; FAME 2012 report; Boyle, Booth & Rawden 2016; information available on the MLA and MA websites; correspondence with archaeologists and archivists and the thesis research to compile this graph.

An important issue that was identified during the research which is worth reiterating here is that the requirement that landowners 'donate' archaeologically-recovered items is particularly problematic when it is included as a stipulation prior to the granting of planning

applications as it can be construed that unless the ‘donation’ is made, the planning application will be refused. This could lead to a detrimental effect on the validity of the contract, it is not ethical and it reinforces the syllogism that landowners retain title to archaeologically-recovered material. It is therefore recommended that the wording of such procedures, used by all the museums and archive deposition centres examined in this research, would be amended to exclude the words ‘donation’ and ‘gift’ in relation to material assembled in England consequent to CRM-based work. An agreement whereby archaeology contractors would purchase the recovered material from the landowners would be much more straightforward and legally sound and therefore preferable (see Clarke & Kohler 2005, Part III).

The primary recommendation that can be deduced from this research is that CIfA withhold accreditation from archaeology contractors who fail to demonstrate that they have the intention and facilities for providing long-term conservation of material assembled during fieldwork which they are paid for. The Chartered Institute for Archaeologists and Historic England should perhaps be more assertive in putting pressure on archaeology contractors to budget for and facilitate the conservation of recovered material. Contractors who profit from planning-related work should also be responsible for mitigating and facilitating issues relating to the protection of recovered data and material. The product of CRM-based archaeological endeavours must incorporate the conservation and safeguarding of all the information and objects obtained through the work, not just the reporting thereof (after Cooper-Reade 2015).

In the words of A. Flexner,

the point of scientific exploration is not to acquire more power or to further the frontiers of humanity, the point of accumulating knowledge is so it can be studied in order to create a civilisation that is worth saving (Flexner 1939, 544).

End of thesis text.

Bibliography of references cited in the text

Adams, G. K. (2017). *Museums association statement*. Available at:

<https://www.museumsassociation.org/museums-journal/news/08032017-museum-archaeology-in-england-facing-storage-crisis> (Accessed July 2017).

Addyman, P. V. (1989). 'The archaeology of public health in York, England'. *World Archaeology*, 21(2), pp. 244–264.

Addyman, P. V. (1995). 'Treasure trove, treasure hunting and the quest for a portable antiquities act', in Tubb, K. W. (ed.) *Antiquities trade or betrayed legal, ethical & conservation issues*. London: Archetype Publications, pp. 163–171.

Addyman, P. V. (2009). 'Before the portable antiquities scheme', in Thomas, S. & Stone, P. G. (eds.) *Metal detecting & archaeology*. Woodbridge: Boydell Press.

Aitchison, K. & Edwards, R. (2008). *Archaeology labour market intelligence, profiling the profession*. Institute of Field Archaeologists Publishing. Reading: Reading University.

Anderson, T., Schum, D. & Twining, W. (2005). *Analysis of Evidence*. (2nd edition). Cambridge: Cambridge University Press.

Anderson, T. & Twining, W. (2015). 'Law and archaeology, modified Wigmorean analysis', in Chapman, R. & Wylie, A. (2015). *Material Evidence*. London: Routledge.

Andrews, G. & Barrett, J. C. (1998). 'Why cost-effective archaeology needs a new research agenda', in *The Institute of field archaeologists yearbook and directory of members 1998*, Cifa, UK, p.40.

Andrews, H. C. (1906). 'The six hills', *Transactions of the East Herts Archaeological Society*, 3, pp. 178–185.

- Andrews, J. (1991). *Management of Archaeological Projects 2. Historic Buildings and Monuments Commission for England, Historic England.*
- Archaeology Data Service (2013). *Archaeological collection areas and maps, (Kent).*
- Available at:
- http://archaeologydataservice.ac.uk/archives/view/sma_map/map.cfm?countyid=E10000016,E06000035&area=Kent (Accessed April 2017).
- Arts Council England. *Accreditation guidance, an introduction.* Available at:
- <https://www.artscouncil.org.uk/sites/> (Accessed May 2018).
- Atkinson, R. (1946). *Field archaeology.* London: Routledge.
- Bacon, Lord F. (1625). ‘Of Dispatch’, in *Essays* (reprinted in 1962). London: Oxford University Press, pp. 102–105.
- Banakar, R. & Travers, M. (2005). (eds) *Theory and method in socio-legal research.* Oxford: Hart Publishing.
- Barber, P. (1998). ‘Title to goods, material and plant under construction contracts’, in Palmer, N. & McKendrick, E. (eds.) *Interest in goods* (2nd edition). London: Lloyds of London Press.
- Barker, P. (1977). *Techniques of archaeological excavation.* London: B. T. Batsford Ltd.
- Barton, K. & Curley, D. (2018). ‘Archaeological remote sensing, some community engagement in Ireland’, in Ciolfi, L. et al. (eds.) *Cultural heritage communities technologies and challenges.* Abingdon: Routledge, pp. 23–31.
- Bayliss, A. & Whittle, A. (2015). ‘Uncertain on principle: combining lines of archaeological evidence to create chronologies’, in Chapman, R. & Wylie, A. (eds.) *Material evidence: Learning from archaeological practice.* London: Routledge, pp. 213–242.
- Bell, A. (1989). ‘Bona Vacantia’, in Palmer, N. & McKendrick, E. (eds.) *Interests in goods.* London: Lloyd’s Commercial Law, pp. 161-164.

- Bell, J. (1994). *Reconstructing prehistory. Scientific methods in archaeology*. Philadelphia: Temple University Press.
- Bennett, H. N. (1998). 'Attachment of chattels to land', in Palmer, N. & McKendrick, E. (eds.) *Interest in goods* (2nd edition). London: Lloyds of London Press.
- Bingham, T. (2011). *The rule of law*. London: Penguin Books.
- Bodansky, D. (1994). 'The precautionary principle in US environmental law', in O'Riordan, T. & Cameron, J. (eds.) *Interpreting the precautionary principle*. London, Earthscan Publications, pp. 203–228.
- Bogaard, A. (2015). 'Lessons from modelling Neolithic farming practice: methods of elimination', in Chapman, R. & Wylie, A. (eds.) *Material evidence: Learning from archaeological practice*. London: Routledge.
- Boyle, G., Booth, N. & Rawden, A. (2016). *Museums collecting archaeology (England) Report year 1. November 2016*. Historic England and Society for Museum Archaeologists. Available at: <http://socmusarch.org.uk/socmusarch/gailmark/wordpress/wp-content/uploads/2016/07/HE-SURVEY-2016-FINAL.pdf> (Accessed February 2018).
- Bradley, R. (2006). 'Bridging the two cultures – Commercial archaeology and the study of prehistoric Britain'. *The Antiquaries Journal*, 86, pp. 1–13. Available at: http://journals.cambridge.org/abstract_S0003581500000032 (Accessed September 2014).
- Bradley, R. (2015). 'Repeating the unrepeatable experiment', in Chapman, R. & Wylie, A. (eds.) *Material evidence: Learning from archaeological practice*. London: Routledge, pp. 23–41.
- Bridge, M. (1998). 'The title and obligations of the seller of goods', in Palmer, N. & McKendrick, E. (eds.) *Interest in goods* (2nd edition). London: Lloyd's Law Publications, pp. 461-489.

- Bridge, M. (2002). *Personal property law* (3rd edition). Oxford: Oxford University Press.
- British Standards Institute (2014). *The guide for the storage and exhibition of archival materials*. PD5454,2012. Available at: <https://www.bsigroup.com/en-GB/> (Accessed March 2018).
- Brodie, N. (2014). 'The antiquities market, it's all in a price', *Heritage & Society*, 7(1), May 2014, pp. 32–46.
- Brodie, N., Doole, J. & Watson, P. (2000). *The illicit trade in cultural material*. Cambridge, UK: the McDonalds Institute for Archaeological Research.
- Brown, D. (2011). *Archaeological archives. A guide to best practice in creation, compilation, transfer and curation*. London: joint publication by Archaeological Archives Forum and Historic England (English Heritage in the document).
- Brown, D. (2015). 'Selecting archaeological archives in England', *Archäologische Informations*, 38. Early View. Available at: <http://www.dguf.de/index.php?id=9> (Accessed November 2015).
- Brown, G. B. (1905). *The care of ancient monuments*. New York: Cambridge University Press.
- Bush, M. (1984). *The English aristocracy, a comparative synthesis*. Manchester: Manchester University Press.
- Butler, P. (2018). 'Northamptonshire council faces up to cost of effective bankruptcy', *The Guardian*. 11 February. Available at: <https://www.theguardian.com/uk-news/2018/feb/11/northamptonshire-county-council-effective-bankruptcy-tories-cuts> (Accessed July 2019).
- Carver, M. (ed.) (2005). *Sutton Hoo, A seventh-century princely burial ground and its context*. London: British Museum Press.

- Carver, M. (2011). *Making archaeology happen, design versus dogma*. Walnut Creek, CA: Left Coast Press.
- Chadwick, A. (2000). 'Taking English archaeology into the next millennium – a personal review of the state of the art', *Assemblage*, No. 5. Available at: <http://www.assemblage.group.shef.ac.uk/5/chad.html> (Accessed October 2015).
- Chambers, R. (2008). *An introduction to property law in Australia*. Sydney: Thomson Lawbook Co. Publishers.
- Chapman, R. & Wylie, A. (eds.) (2015). *Material evidence: Learning from archaeological practice*. Abingdon (Oxon): Routledge.
- Chartered Institute for Archaeologists (2014a). *CIfA regulations, standards and guidelines*. Available at: <http://www.archaeologists.net/codes/ifa> (Accessed January 2018).
- Chartered Institute for Archaeologists (2014b). *Standard and guidance for the collection, documentation, conservation and research of archaeological materials*. Available at: https://www.archaeologists.net/sites/default/files/CIfAS&GFinds_1.pdf (Accessed July 2018).
- Clark, P., Rady, J. & Sparey-Green, C. (2009). *Wainscott northern bypass, archaeological investigations 1992–1997*. Canterbury: Canterbury Archaeological Trust occasional papers.
- Clarke, A. & Kohler, P. (2005). *Property law, commentary and materials*. Cambridge: Cambridge University Press.
- Cleere, H. (1984). *Approaches to the archaeological heritage*. Cambridge: Cambridge University Press.
- Cleere, H. (1987). 'General discussion', in Wilson, R. (ed.) *Rescue archaeology, proceedings of the second new world conference on rescue archaeology*. Dallas, TX: Southern Methodist Church University Press, pp. 27-81.

- Cooke, N. & Seager-Smith, R. (2007). *Prehistoric and Romano-British activity and Saxon settlement at Hoo Road, Wainscott, Kent*. Project Site Report. Wessex Archaeology publications.
- Cookson, N. (2000). *Archaeological heritage law*. Chichester: Barry Rose Law Publishers.
- Cooper-Read, H. (2015). 'Commercial archaeology, looking backwards, looking forwards or just going round in circles', in Everill, P. & Irving, P. (eds.) *Rescue archaeology foundations for the future*. Herefordshire, Rescue Archaeological Trust, pp. 34–44.
- Cowell, B. (2008). *The heritage obsession*. Stroud: Tempus Publishing.
- Crickhowell, Lord N. E. (1994). 'Forward', in O'Riordan, T. & Cameron, J. (eds.) *Interpreting the precautionary principle*. London: Earthscan Publications, pp. 6–9.
- Cunliffe, B. (1982). *The publication of archaeological excavations*. London: Originally published by Department of the Environment (today the Department for Environment, Food & Rural Affairs).
- Cunliffe, B. (1990). 'Publishing in the city', *Antiquity*, 64, pp. 667–671.
- Cunliffe, B. (2011). 'Introduction', in Cunliffe, B. et al. (eds.) *History for the taking, perspectives on material heritage*. London: British Academy. pp. 7-12
- Curwen, E. C. (1937). *The archaeology of Sussex*. London: Methuen & Co. Ltd.
- Darvill, T. (2009). 'Linking fieldwork, theory and knowledge in teaching prehistoric archaeology', *RAE Journal*, 1(2), pp. 5–20. Available at: [https://www.researchgate.net/publication/254533608 linking fieldwork theory and knowledge in teaching prehistoric archaeology](https://www.researchgate.net/publication/254533608_linking_fieldwork_theory_and_knowledge_in_teaching_prehistoric_archaeology) (Accessed September 2018).
- Darvill, T. & Russell, B. (2002). *Archaeology after PPG16, Archaeological investigations in Britain 1990–1999*. Bournemouth University, School of Conservation Science Research Report 10. Poole: Bournemouth University.

- Dawson, D. & Green, A. (2013). 'Letter to Cllr Fleur de Rhé-Philippe Cabinet Member for Economic Development and Strategic Planning Wiltshire Council County Hall Trowbridge BA14 8JN', *Planning Consents and Development Archaeology*. Available at: <http://www.wiltshiremuseum.org.uk/uploads/library/27/192/Archaeoloical%20Archives.pdf> (Accessed February 2016).
- Dean, J. (2012). 'Report on the Former Moorfield School Saga', *Islington Gazette*, 31 July. Available at: <http://www.islingtongazette.co.uk/news/education/controversial-finsbury-school-site-saga-comes-to-a-close-1-1466472> (Accessed July 2016).
- Department for Communities and Local Government (1990). *Planning Policy Guidance 16, archaeology and planning*. Norwich: The Stationery Office. Available at: <https://webarchive.nationalarchives.gov.uk/20120906045433/http://www.communities.gov.uk/documents/planningandbuilding/pdf/156777.pdf> (Accessed June 2012).
- Department for Culture, Media and Sport (2005). *Combating illicit trade: due diligence guidelines for museums, libraries and archives on collecting and borrowing cultural material*. Cultural Property Unit publication. Available at: https://webarchive.nationalarchives.gov.uk/20121204133803/http://www.culture.gov.uk/images/publications/Combating_Illicit_Trade05.pdf (Accessed November 2011).
- Drewett, P. (2004). (4th edition). *Field archaeology, an introduction*. London: Routledge.
- Ealing Council (2000). *Details and samples of materials pursuant to condition 4 of planning consent given on appeal, dated 20/07/1999 for reconstruction and extension to house – Deyntes Cottage Ealing Road Northolt Middlesex UB5 6AA*. Available at: <https://pam.ealing.gov.uk/online-applications/searchResultsBack.do?action=back> (Accessed March 2016).
- Edwards, R. (2013). *Archaeological archives and museums 2012*. Society for Museum Archaeologists.

- Ehrenberg, M. (1990). 'Some aspects of the distribution of burnt mounds', in Hodder, M. A. & Barfield, L. H. (eds.) *Burnt mounds and hot stone technology*. Sandwell, Metropolitan Borough Council, pp. 41–59.
- Emmerich, Y. (2018). *Conceptualising property law*. Cheltenham, UK: Edward Elgar Publishing.
- Environmental Protection UK (2009). *Environmental damage (Prevention and remediation) Regulations 2009*. (No. 153). Available at: <http://www.legislation.gov.uk/ukxi/2009/153/contents/made> (Accessed July 2017).
- Everill, P. (2009). *The invisible diggers, a study of British commercial archaeology*. Oxford: Oxbow Books.
- Everill, P. & Irving, P. (eds.) (2015). *Rescue archaeology. Foundations for the future*. Herefordshire, UK: RESCUE the British Archaeological trust.
- Federation of Archaeological Managers and Employers statement. Available at: <http://www.famearchaeology.co.uk/2010/11/fame-highlights-storage-crisis/> (Accessed March 2015).
- Fernie, K. & McNulty, P. (2017). *Seeing the light of day: Exploring sustainable solutions to archaeological archives*. 14 November. Commissioned by Wiltshire Museum, Devizes, funded by Arts Council England. Available at: <https://seeingthelightofday.wordpress.com/> (Accessed March 2018).
- Fisher, E., Jones, J. & Schomberg, R. (2006). *Implementing the precautionary principle, perspectives and proposals*. Cheltenham: Edward Elgar Publishing.
- Flexner, A. (1939). 'The usefulness of useless knowledge', *Harpers*, 179, June/November, pp. 544–552. Available at: <https://library.ias.edu/files/UsefulnessHarpers.pdf> (Accessed April 2017).

- Fowler, D. (2018). 'The co-development of CRM and archaeological ethics, 1974 to 2015', in McManamon, F. (ed.) *New perspectives in cultural resource management*. New York: Routledge, pp. 85–98.
- Fowler, L. (2018). 'Mithras reborn, London Mithraeum', *British Archaeology*, January 2018, 158, pp. 30–37.
- Frere, S. et al. (1975). *Principles of publication in rescue archaeology*. London: Department of the Environment (today the Department for Environment, Food & Rural Affairs).
- Fulford, M. (2011). 'The impact of commercial archaeology on the UK heritage', in Cunliffe, B. et al. (eds.) *History for the taking, perspectives on material heritage*. London: British Academy. pp. 33-54.
- Fulford, M. & Holbrook, N. (2011). 'Assessing the contribution of commercial archaeology to the study of the Roman period in England, 1990–2004', *The Antiquaries Journal*, 91, pp. 323–345.
- Garcia, T. (2014). (Translated by Ohm, M.A. & Cogburn, J.). *Form and object, a treatise on things*. Edinburgh: Edinburgh University Press.
- Gathercole, P. (1975). 'Philip A. Rahtz (ed.): Rescue archaeology. London: Pelican Books,' *Antiquity*, 49(196), pp. 313–314.
- Georges-Stavros, K. (2005). 'The Aarhus convention and its implementation in the European community', in *Seventh international conference on environmental compliance and enforcement*. Proceedings No. 1. Marrakech, Morocco, pp. 141-143.
- Gerring, J. (2007). *Case study research principles and practices*. New York: Cambridge University Press.
- Gill, A. (1991). *Management of archaeological projects 2 (MAP2)*. London: English Heritage Publications.

- Goode, R. (1997). 'Usage and its reception in transnational commercial law', *International and Comparative Law Quarterly*, 46, pp. 1–36.
- Goodhart, A. L. (1928). 'Three cases on possession', *The Cambridge Law Journal*, 3(2), pp. 195–208.
- Gordon, R. (2000). 'The story of the Walbrook Mithraeum, London', *Journal of Roman Archaeology*, 13, pp. 736–742.
- Griffin, N. (2014). *Archaeological Watching Brief and Written Scheme of Investigation Addendum*. Lewes District Council Planning Ref. LW/3173/CC. ASE project No. 6432. Site Code, SIX13. East Sussex: Seaford Head Sixth Form Centre, Archaeology South-East. Available at:
<https://apps.eastsussex.gov.uk/environment/planning/applications/register/documents/datawright%20saved%20documents/scannedinfo/planning/lw-3173-cc/ase%206432%20seaford%20head%206th%20wsi%20addendum.pdf> (Accessed June 2017).
- Haigh, N. (1994). 'The introduction of the precautionary principle into the UK', in O'Riordan, T. & Cameron, J. (eds.) *Interpreting the precautionary principle*. London: Earthscan Publications, pp. 229–251.
- Halsbury's Laws of England*. (2008). London: Lexis Nexis.
- Halsbury's Laws of England*. (2011). Bailment and pledge. London: Lexis Nexis.
- Halsbury's Laws of England*. (2010). Planning (volume 81, paragraphs 1-618; volume 82, paragraphs 619-1,034, volume 83, paragraphs 1,035-1,656). London: Lexis Nexis.
- Harris, E. C. (1989). *Principles of archaeological stratigraphy* (2nd edition). London: Academic Press.
- Hart, D. (2012). *Archaeological Evaluation Report Former Moorfields School site Bunhill Row London, ECI*. East Sussex: Archaeology South-East. Available at:

<https://planning.islington.gov.uk/NorthgatePublicDocs/00007016.pdf> (Accessed October 2020)

Harwood, R. (2012). *Historic environment law, planning, listed buildings, monuments, conservation areas and objects*. Crickadarn: Institute of Art and Law Ltd.

Hazeltine, H. D. (1910). 'The formal contract of early English law', *Columbia Law Review*, 10(7) (Nov), pp. 608–617.

Heritage Counts (2017). *Heritage and the economy*. Historic England publication on behalf of the Historic Environment Forum. Available at:

<https://content.historicengland.org.uk/content/heritage-counts/pub/2017/heritage-and-the-economy-2017.pdf> (Accessed November 2017).

Hickey, R. (2010). *Property and the law of finders*. Oxford: Hart Publishing.

Hickey, R. (2015). 'Armory v Delamirie (1722), possession, obligation, and the evolution of relative title to goods', in Douglas, S., Hickey, R. & Waring, E. (eds.) *Landmark cases in property law*. Oxford: Hart Publishing.

Historic England (1996). *The Six Hills Roman barrows*, List entry Number, 1015579.

Available at: <https://historicengland.org.uk/listing/the-list/list-entry/1015579> (Accessed October 2020).

Historic England (2015). *Managing significance in the historic environment: Historic environment good practice advice in planning: 2*. Available at:

<https://historicengland.org.uk/images-books/publications/gpa2-managing-significance-in-decision-taking/> (Accessed October 2020).

Historic England (2016). *Archaeological archives rationalisation project*. Scoping Studies and Guidance for the Rationalisation of Museum Archaeology Collections. Available at:

<http://socmusarch.org.uk/socmusarch/gailmark/wordpress/wp->

content/uploads/2018/10/AARP_final-consolidated-report_final-002.pdf (Accessed November 2018).

Historic England (2018a). *Our Portable Past: Guidance for Good Practice*. Available at: <https://historicengland.org.uk/images-books/publications/ourportablepast/> (Accessed October 2020).

Historic England (2018b). *Treatment of Human Remains*. Available at: http://www.archaeologyuk.org/apabe/pdf/APABE_ToHREfCBG_FINAL_WEB.pdf (Accessed July 2018).

Hoad, S. (1999). *Deyntes Cottage, Northolt, Ealing, London*. An archaeological evaluation report. Site Code, EIN99. Museum of London Archaeology.

Holtorf, C. (2013). 'The need and potential for an archaeology orientated towards the present', *Archaeological Dialogues*, 20(1), pp. 12–99. Available at: http://journals.cambridge.org/abstract_S1380203813000068 (Accessed July 2015).

Holtorf, C. (2015). 'Averting loss aversion in cultural heritage', *International Journal of Heritage Studies*, 21(4), pp. 405–421. Available at: <http://dx.doi.org/10.1080/13527258.2014.938766> (Accessed December 2016).

Honoré, A. M. (1961). 'Ownership', in Guest, A. G. (ed.) *Oxford essays in jurisprudence*. Oxford: Oxford University Press, pp. 370–375.

Honoré, A. M. (1993). 'Ownership', in Smith, P. (ed.) *The nature and process of law: An introduction to legal philosophy*. Oxford: Oxford University Press, pp. 370–375.

Howard, A. (2014). *Land South of Western Way, Bowerhill, Melksham, Wiltshire: Archaeological Evaluation*. Project ref. 5119, report ref. 14542. Cotswold Archaeology. Available at: <http://reports.cotswoldarchaeology.co.uk/content/uploads/2015/04/CA5119-Land-at-Bowerhill-Evaluation-Report-final.pdf> (Accessed December 2017).

- Hudson, A. (1998). 'Abandonment', in Palmer, N. & McKendrick, E. *Interest in goods* (2nd edition). London: Lloyds of London Press.
- Hull City Council (n.d.). *Hull museums collections*. Hull Culture and Leisure. Available at: <http://www.hullcc.gov.uk/museumcollections/collections/storydetail.php?irn=403> (Accessed April 2017).
- Hutchings, R. M. & La Salle, M. (2016). 'Why archaeologists misrepresent their practice', *Journal of Contemporary Archaeology*, 2(2), S11–S17.
- Hutchings, R. M. & La Salle, M. (2018). 'Salvaging archaeology, why cultural resource management is not part of the "new public archaeology"', *Antiquity*, 92(365), e10, pp. 1–3.
- International Council of Museums (2013). *ICOM Code of Ethics for Museums*. Available at: http://icom.museum/fileadmin/user_upload/pdf/Codes/code_ethics2013_eng.pdf (Accessed February 2017).
- Johnson, M. (2000). *Archaeological theory, an introduction*. Oxford, UK: Blackwell.
- King, T. F. (1979). 'Preservation and rescue', *Journal of Field Archaeology*, 6(3), pp. 351–366.
- Lee, E. (2008). *Management of research projects in the historic environment, project planning notes 3*. Historic England.
- Lipe, W. D. (1996). 'In defence of digging: Archaeological preservation as a means, not an end', *Cultural Resource Management*, 19(7), pp. 23–27.
- Lucas, G. (2015). 'Evidence of what? On the possibilities of archaeological interpretation', in Chapman, R. & Wylie, A. (eds). *Material evidence*. London: Routledge, pp. 311–323.
- Macpherson, C. B. (ed.) (1978). *Property, mainstream and critical positions*. Toronto: University of Toronto Press.

- MacQuarrie, H. (2012). *Wainscott Primary School, Medway, Kent, An archaeological evaluation report*. AOC Project No. 32238. Available at:
<https://archaeologydataservice.ac.uk/library/browse/issue.xhtml?recordId=1121811&recordType=GreyLitSeries> (Accessed October 2020).
- Martin, L. & Russell, N. (2000). 'Trashing rubbish', in Hodder, I. & Members of the Çatalhöyük Teams (eds.) *Excavations at Çatalhöyük, Volume 2. Towards reflexive method in archaeology: the example at Çatalhöyük*, Cambridge and London: Monographs of the McDonald Institute for Archaeological Research, University of Cambridge; British Institute for Archaeology at Ankara, pp. 57–70.
- McBride, N. & Bagshaw, R. (2005). *Tort law*. (2nd edition). Harlow: Pearson.
- McCain, R. (1988). 'Information as property and as a public good: Perspectives from the economic theory of property rights', *The Library Quarterly: Information, Community, Policy*, 58(3), pp. 265–282.
- McCutcheon, B. (2004). *Wainscott Development Brief*. Regeneration and Environment Division Development and Environment Directorate Medway Council Compass Centre Chatham Kent ME4 4YH (DX56006 STROOD). Available at:
<http://www.medway.gov.uk/PDF/Wainscott%20development%20brief.pdf> (Accessed April 2017).
- McKendrick, E. (2016). *Contract law. texts, cases and materials* (7th edition). Oxford: Oxford University Press.
- McManamon, F. (ed.) (2018). *New perspectives in cultural resource management*. New York: Routledge.
- Meager, R. (2012). *Written scheme of investigation for an archaeological evaluation. Former Moorfield School site, London EC1*. Prepared by CgMs Consultants for submission to

- Islington LPA as part of development application consideration. Unpublished. Available from ASE on request.
- Medway Council (n.d.). *Acquisition and Disposal Policy. 2008–2012*. Pre-Cabinet approval report. Available at: <https://democracy.medway.gov.uk/mgConvert2PDF.aspx?ID=2729> (Accessed March 2017).
- Medway Council (2005). *Development control committee, minutes of meeting, 28 September 2005*. Available at: <https://democracy.medway.gov.uk/CeListDocuments.aspx?MID=778&RD=Minutes&DF=28%2F09%2F2005&A=0&R=0&nobdr=2> (Accessed March 2017).
- Mendoza, N. (2017). *The Mendoza Review, an independent review of museums in England*. Department for Digital, Culture, Media and Sport.
- Merriman, N. & Swain, H. (1999). ‘Archaeological archives, serving the public interest’, *European Journal of Archaeology*, 2, p. 249. Available at: <http://eja.sagepub.com> (Accessed March 2015).
- Methold, E. V. (1902). *Notes on Stevenage*. London: Gibbs & Bamforth.
- Ministry of Housing, Communities and Local Government (2012). *National planning policy framework, 2012*. Ministry of Housing, Communities and Local Government. Available at: <https://www.gov.uk/government/publications/national-planning-policy-framework--2> (Accessed March 2015).
- Ministry of Housing, Communities and Local Government (2018). *National planning policy framework*, (amended in 2019 and 2020). Available at: <https://www.gov.uk/government/collections/revised-national-planning-policy-framework> (Accessed in October 2020).
- Mithen, S. (2006). *After the ice, a global human history, 20,000–5000 BC*. Cambridge (Massachusetts): Harvard University Press.

- Mullan, B. (1980). *Stevenage LTD. Aspects of the planning and politics of Stevenage New Town 1945–1978*. London: Routledge & Kegan Paul.
- Murray, T. (1989). ‘The history, philosophy and sociology of archaeology, the case of the Ancient Monuments Act (1882)’, in Pinsky, V. & Wylie, A. (eds.) *Critical tradition in contemporary archaeology*. Cambridge: Cambridge University Press, pp. 59-66.
- Museum of London (1994). *Archaeological site manual*. (3rd edition). Available at: <https://achill-fieldschool.com/wp-content/uploads/2016/01/molasmanual942.pdf> (Accessed February 2012).
- Museum of London (2006/2007). *Finds procedures manual*. Available at: <https://www.museumoflondon.org.uk/application/files/4814/5622/7546/standards-contents.pdf> (Accessed August 2015).
- Museum of London (2011, amended 2015). *Acquisition and Disposal Policy*. Available at: <https://www.museumoflondon.org.uk/application/files/9714/5812/8419/AcquisitionDisposalPolicy2011amended2015.pdf> (Accessed September 2020).
- Museum of London. (2018). *Collections Development Policy*. Available at: https://www.museumoflondon.org.uk/application/files/7115/5240/9439/Collections_Development_Policy_2018_final_formatted_v1.0_EXTERNAL.pdf (Accessed September 2020).
- Museum of London Archaeological Archive (1999). *General standards for the preparation of archaeological archives deposited with the museum of London*. London: Museum of London. Available at: http://www.museumoflondon.org.uk/files/6713/7234/1664/legal_supplement.pdf (Accessed June 2011).
- Museum of London Archaeological Archive (2006). *General standards for the preparation of archaeological archives deposited with the Museum of London* (2nd edition). London:

Museum of London. Available at:

<https://www.museumoflondon.org.uk/application/files/4714/5622/7129/legal-suppl.pdf>

(Accessed March 2012).

Museum of London Archaeology Services (1999). *Environmental Impact Assessment – Deyntes Cottage, Northolt, Ealing, London UB5*. Report 12/99. Site code EIN99.

(Unpublished report, submitted to Ealing Borough Council). Documents include a Deed of Title Transfer from 2006, 2007 and 2009, entitled DOT/013.

Museums Association (n.d.) *Disposal toolkit: Guidelines for museums*. Arts Council

England. Available at: https://www.artscouncil.org.uk/sites/default/files/download-file/Disposal_Toolkit.pdf (Accessed June 2018).

Museums Association (2004). *Ethical guidelines, Acquisition guidance on the ethics and practicalities of acquisition* (2nd edition). Available at:

<https://fliphtml5.com/iio/mqjr> (Accessed June 2016).

Museums Association (2010). *Museums code of ethics*. Originally published by the International Council of Museums, accepted by the Society for Museum Archaeologists.

Available at: <https://www.museumsassociation.org/download?id=1155827> (Accessed February 2018).

Museums Association (2017). *Museums in the UK 2017 report*. Museums Association.

Available at: <https://www.museumsassociation.org/download?id=1219029> (Accessed November 2017).

Nicholas, G. P. & Bannister, K. P. (2004). 'Copyrighting the past? Emerging intellectual property rights issues in archaeology', *Current Anthropology*, 45(3) (June), pp. 327–350.

Nicholas, G. P. & Markey, N. (2015). 'Traditional knowledge, archaeological evidence, and other ways of knowing', in Chapman, R. & Wylie, A. (eds.) *Material Evidence*. London: Routledge.

Nixon, T. (2017). *What about Southport? A report to CIfA on progress against the vision and recommendations of the Southport Report (2011), undertaken as part of the 21st-century challenges in archaeology project*. Available at:

<http://www.archaeologists.net/sites/default/files/What%20about%20Southport%20A%20report%20to%20CIfA%20against%20the%20vision%20and%20recommendations%20of%20the%20Southport%20report%202017.pdf> (Accessed April 2017).

Northamptonshire Archaeological Archives Resource Centre (2020). *Archaeological Archives Standard*. Available at:

https://www.northamptonshire.gov.uk/councilservices/archives-and-heritage/northamptonshire-archives/Documents/NorthamptonshireArchivesStandardFinal_Jan2020.pdf (Accessed October 2020).

Northamptonshire County Council (2016). *Northamptonshire Heritage Strategy*. Available at: <https://www.northamptonshire.gov.uk/councilservices/council-and-democracy/have-your->

[say/Documents/Past%20consultation/2016/Details%20attachments/Northamptonshire%20Heritage%20Strategy%20-%20Final%20Draft%20August%202016.pdf](https://www.northamptonshire.gov.uk/councilservices/council-and-democracy/have-your-say/Documents/Past%20consultation/2016/Details%20attachments/Northamptonshire%20Heritage%20Strategy%20-%20Final%20Draft%20August%202016.pdf) (Accessed June 2017).

(Accessed June 2017).

O’Keefe, P. J. & Prott, L. V. (1989). *Law and the cultural heritage. Vol. 3. Movement*. London: Butterworth.

O’Keefe, P. J. & Prott, L. V. (2011). *Cultural heritage conventions and other instruments*. Crickadarn, UK: Institute of Art and Law Ltd.

O’Riordan, T. & Cameron, J. (eds.) (1994). *Interpreting the precautionary principle*. London: Earthscan Publications.

- Palmer, N. (1978). 'The application of the tort (interference with goods) act 1977 to actions in bailment', *The Modern Law Review*, 41(6), pp. 629–637.
- Palmer, N. (1981). 'Treasure trove and the protection of antiquities', *The Modern Law Review*, 44(2) (March), pp. 178–187.
- Palmer, N. (1991). *Bailment*. (2nd edition). Sydney: Law Book Co.
- Palmer, N. (1995). 'Recovering stolen art', in Tubb, K. W. (ed.) *Antiquities trade or betrayed legal, ethical & conservation issues*. London: Archetype Publications, pp. 256–263.
- Palmer, N. (1996). 'Title to antiquarian finds, perpetuating the impenetrable', *Art Antiquity and Law*, 1(2) (May), pp. 157–162.
- Palmer, N. (1998). 'Possessory title', in Palmer, N. & McKendrick, E. (eds.) *Interests in goods*. London: LLP Reference Publishing.
- Palmer, N. (2002). 'Antiquities and archaeological sites', in Bartlett, A. (ed.) *Emden's Construction Law; Part IV, Responsibilities of and Liabilities to Third Parties*. London: Butterworths Law Publishers, pp. 1,125-1,131.
- Palmer, N. (2009). *Palmer on bailment* (3rd edition). London: Sweet & Maxwell.
- Palmer, N. (2015). *Art, adventure and advocacy*. Crickadarn: UK Institute of Art and Law.
- Palmer, N. & McKendrick, E. (1998). *Interests in goods*. (2nd edition). London: LLP Reference Publishing.
- Parfitt, K. (2010). *Archaeological evaluation off Honeywood Parkway, Whitfield: Interim report*. Canterbury Archaeological Trust. Unpublished. Available online after researching through the company's website.
- <http://www.iadb.co.uk/i3/item.php?ID=CAT,HPW,META> (Accessed February 2018).
- Pendlebury, J. (2001). 'United Kingdom', in Pickard, R. (ed.) *Policy and law in heritage conservation*. London: Spoon Press, pp. 289–313.
- Perring, D. (1996). 'Trouble in store', *Rescue News*, 69, p. 1.

- Perring, D. (2016). *Working for commercial clients, the practice of development-led archaeology in the UK*. European Commission Occasional Papers 12. Available at: http://ec.europa.eu/economy_finance/publications/occasional_paper/index_en.htm (Accessed November 2017).
- Petrie, W. M. F. (1904). *Methods and aims in archaeology*. New York: Macmillan. Also available online at: <https://archive.org/details/cu31924029801192> (Accessed August 2019).
- Pey-Woan, L. (2009). 'Inducing breach of contract, conversion and contract as property'. *Oxford Journal of Legal Studies*, 29(3) (Autumn), pp. 511–533.
- Phillips, J. (1998). 'Equitable Liens – a search for a unifying principle', in Palmer, N. & McKendrick, E. (eds.) *Interests in goods*. London: Lloyd's Commercial Law.
- Pitt-Rivers, A. H. L. (1888). *Excavations in Cranborne Chase, near Rushmore, on the borders of Dorset and Wilts, Vol. 1*. [originally published by Harrison and Sons, London, printed privately]. Digitised version by University of Michigan.
- Pitts, M. (2013). 'Wiltshire museums will refuse new archives', *British Archaeology*, March–April 2013, No. 129, p. 6.
- Pitts, M. (2018). 'Stonehenge without borders', *British Archaeology*, May–June 2018, No. 160, pp. 20–34.
- Platt, R. H. (2004). (2nd edition). *Land use and society, geography, law, and public policy*. Washington: Island Press.
- Pollock, F. (1894). 'What is a thing?', *The Law Quarterly Review*, XL (October), pp. 318–322.
- Pollock, F. & Wright, R. (1888). *An essay on possession in the common law*. Oxford: Clarendon Press, reprinted in 2005 by Adamant Media Corp.

- Pound, R. (1922). *An introduction to the philosophy of law*. London: Yale University Press.
- Also available at: The Online Distributed Proofreading Team at <http://www.pgdp.net> (The Internet Archive, accessed July 2015).
- Powell, T. & Smith, S. (2017). 'Unexploded World War II bomb found in Brondesbury Park', *Evening Standard*. Available at: <http://www.standard.co.uk/news/london/pictured-unexploded-world-war-ii-bomb-discovered-in-brondesbury-park-a3480501.html>, (Accessed April 2017).
- Prott, L. & O'Keefe, P. (1992). "'Cultural heritage" or "Cultural property"?' *International Journal of Cultural Property*, 1, pp. 307–320.
- Pugh-Smith, J. & Samuels, J. (1996). *Archaeology in law*. London: Sweet & Maxwell.
- Rahmatian, A. (2015). *Lord Kames, legal and social theorist*. Edinburgh: Edinburgh University Press.
- Rahtz, P. (ed.) (1974). *Rescue archaeology*. Harmondsworth: Penguin Publications.
- Rahtz, P. (2001). 'A View from the old school'. *Antiquity*, 75, pp. 604–605.
- Rathje, B., Shanks, M. & Witmore, C. (2013). *Archaeology in the making, conversations through a discipline*. Oxfordshire: Routledge. Available at: https://www.academia.edu/4032641/Archaeology_in_the_Making_Conversations_through_a_Discipline_-_Editorial (Accessed November 2017).
- Redmond-Cooper, R. (1998). 'Time limits in actions to recover chattels', in Palmer, N. & McKendrick, E. *Interest in goods* (2nd edition). London: Lloyds of London Press.
- Renfrew, C. (2000). *Loot, legitimacy and ownership*. London: Duckworth.
- Rescue Planner (2019). 'The Archaeological Planning Condition – An Overview', *Rescue News*, 127 (Winter 2019), p. 7.
- Robinson, S. & Manning, J. (2020). 'Two years ago Northamptonshire County Council went bankrupt – here's how it happened and what comes next', *NorthantsLive*. Available at:

<https://www.northantslive.news/news/northamptonshire-news/two-years-after-northamptonshire-county-4209584?cmpredirect=> (Accessed October 2020).

- Rook, T. (1971), 'Lockleys Archaeological Society', *Hertfordshire Archaeological Review*, 4, pp. 63–64.
- Rostill, L. (2018). 'Terminology and title to chattels, a case against "possessory title"', *Law Quarterly Review*, 134 (July), pp. 407–425.
- Sax, J. (2001). *Playing darts with a Rembrandt*. Michigan, USA: Michigan University Press.
- Schiffer, M. (1972). 'Archaeological context and systemic context', *American Antiquity*, 37(2), pp. 156–165.
- Schofield, J., Carman, J. & Belford, P. (2011). *Archaeological practice in Great Britain*. London: Springer.
- Shanks, M. & Tilley, C. (1996). *Reconstructing archaeology, theory and practice*. (2nd edition). London: Routledge.
- Shepherd, J. (1998). *The temple of Mithras, London. Excavations by W. F. Grimes and A. Williams at the Walbrook*. Archaeological report 12. London: English Heritage Publication.
- Shepherd, J. (2015). 'Museums, archaeologists and archaeological archives', in Everill, P. & Irving, P. (eds.) *Rescue archaeology, foundations for the future*. Herefordshire: Rescue Archaeological Trust, pp. 132-146.
- Smith, R. (2011). 'Archaeological archives', *The Archaeologist*, 79, p. 9.
- Smith, R. & Tindall, A. (2012). *A survey of archaeological archives held by archaeological practices in England, Scotland and Wales*. UK: Federation of Archaeological Managers and Employers (FAME).

- Society for Museum Archaeology (1993). *Selection, retention and dispersal of archaeological collections guidelines*. Available at:
<http://www.socmusarch.org.uk/publica.htm> (Accessed March 2016).
- Southport Project (2011). *Realising the benefits of planning-led investigation in the historic environment, A framework for delivering the requirements of PPS5*. A report by the Southport Group Project, funded by English Heritage.
<https://www.archaeologists.net/sites/default/files/SouthportreportA4.pdf>
- Stephens, M. (2008). 'The actions of the British government and the Royal Academy are morally reprehensible', *The Arts Newspaper*, 188, p. 1.
- Sussex Archaeological Procedures April 2015. Available at:
<https://www.eastsussex.gov.uk/media/7602/ar-sussex-archaeological-standards-jan-2017.pdf> (Accessed January 2017).
- Sussex Museums Group (2015). *Selection, Retention and Disposal Guidelines*. Version 1, November 2015. Available at:
<http://www.archaeologists.net/sites/default/files/7b.%20Sussex%20Museums%20Selection%20%26%20Retention%20Guidelines.pdf> (Accessed January 2017).
- Swain, H. (1997). 'Archaeological archive transfer, theory and practice', in Denford, G. (ed.) *Representing archaeology in museums, the museum archaeologist* 22. Conference Proceedings, London 1995. Winchester: Society of Museum Archaeologists, pp. 122–144.
- Swain, H. (2003). 'Archaeological archives in Britain and the development of London archaeological archive and research centre', in Agnew, N. & Bridgland, J. (eds.) *Of the past, for the future, integrating archaeology and conservation. Proceedings of the conservation theme at the 5th world archaeological congress, Washington, D.C.* Los Angeles: The Getty Conservation Institute, pp. 211–215.

- Tay, A. E. S. (1964). “‘Bridges v. Hawksworth’ and the early history of finding’, *The American Journal of Legal History*, 8(3) (July), pp. 224–237.
- Tettenborn, A. (1998). ‘Conversion, tort and restitution’, in Palmer, N. & McKendrick, E. *Interest in goods* (2nd edition). London: Lloyds of London Press, pp. 810-817.
- Thomas, M. (2010). *Blackstone’s status on property law 2010–2011*. Oxford: Oxford University Press.
- Thomas, R. (2004). ‘Archaeology and authority in England’, in Merriman, N. (ed.) *Public archaeology*. London: Routledge, pp. 92–110.
- Thomas, R. (2015). ‘Evidence, archaeology and law: an initial exploration’, in Chapman, R. & Wylie, A. (eds.) *Material evidence*. London: Routledge, pp. 255-270.
- Thomas, R. (2019). ‘It’s Not Mitigation! Policy and Practice in Development-Led Archaeology in England.’ *The Historic Environment: Policy & Practice*, 10(3–4), pp. 328–344, <https://doi.org/10.1080/17567505.2019.1662999>
- Thompson, M. (1975). ‘Rescue archaeology, research or rubbish collection?’, *Antiquity*, 49(193), pp. 43–45.
- Thompson, M. (1979). *Rubbish theory; the creation and destruction of value*. Oxford: Oxford University Press.
- Thorby, C. (2012). *Appeal Decision Ref, APP/V5570/A/11/2162902*. Former Moorfield Primary School, Bunhill Row, London, EC1Y 8RX. Inspectorate for the Secretary of State for Communities and Local Government.
- Thurley, S. (2013). *The men from the ministry, how Britain saved its heritage*. London: Yale University Press.
- Tilley, C. (1989). ‘Excavation as theatre’, *Antiquity*, 63(239), pp. 275–280.

- Tindall, A. (2010). *Federation of Archaeological Managers and Employers statement*.
Available at: <https://famearchaeology.co.uk/fame-highlights-storage-crisis/> (Accessed March 2015).
- Towers, G. V. (1943). 'Gervase Elwes', *The Irish Monthly*, 71(842), pp. 320–328.
- Trigger, B. (2006). *A history of archaeological thought*. (2nd edition). Cambridge: Cambridge University Press.
- Tsang, C. (2017). *Gathering information on deep storage archive facilities in England*. ISSN 2059-4453. Research Report Series 40. Historic England.
- Turpin, C. & Tomkins, A. (2007). *British government and the constitution*. (6th edition). Cambridge: Cambridge University Press.
- Ucko, P. (2000). 'The biography of a collection, the Sir Flinders Petrie Palestinian collection and the role of university museums', *Museum Management and Curatorship* 17(4), pp. 351–399.
- Ulph, J. (2015). *The legal and ethical status of museum collections: Curatorially motivated disposals*. Supplementary to the Arts Council Code of Ethics (2015), Disposal Toolkit. *Art Antiquity and Law* (2016) Volume XX1 143–156. Available from ResearchGate at: https://www.researchgate.net/publication/282454055_Dealing_with_UK_Museum_Collections_Law_Ethics_and_the_PublicPrivate_Divide (Accessed June 2017).
- VanPool, T. L. & Leonard, R. D. (2011). *Quantitative Analysis in Archaeology*. Chichester: Wiley-Blackwell.
- Wacher, J. S. (1961). 'Royal Commission on Historical Monuments (England). A Matter of Time: An Archaeological Survey of the River Gravels of England. London: H.M.S.O., 1960, pp. 84, 13 plates, 10 text-figs. 10s. 6d.', *Journal of Roman Studies*, 51(1–2), pp. 282–282. doi: 10.2307/298911.
- Wainwright, G. (2000). 'Time please', *Antiquity*, 74, pp. 909–943.

- Warshaw, J., Beech, S. & Cartel, L. (2006/2007). *Northolt village green conservation area appraisal*. Conservation Architecture & Planning Ltd. and Ealing Borough Council.
- Available at:
https://www.ealing.gov.uk/download/.../id/2444/northolt_village_green_appraisal.pdf
(Accessed March 2016).
- Welsh, J. (2018). 'Problem developers refuse to pay archaeologists', *Rescue News*, 125 (Winter 2017), p. 5.
- Wessex Archaeology Summary Information Return 2011. Submitted to the Charities Commission. Available at: <https://find-and-update.company-information.service.gov.uk/company/01712772/filing-history?page=3> (Accessed June 2017).
- Wigmore, J. H. (1913). 'The problem of proof', *Illinois Law Review*, VIII (2), (June), pp. 73–103.
- Wigmore, J. H. (1931). *The principles of judicial proof as given by logic, psychology and general experience and illustrated in judicial trials*. (2nd edition). Boston: Little, Brown, & Company.
- Wiltshire Archaeological and Natural History Society Collection Trust (2019). *Guidelines and conditions for the preparation and deposition of archaeological archives to Wiltshire Heritage Museum and Library*. Available at: https://www.wiltshiremuseum.org.uk/wp-content/uploads/2019/09/Deposition-Guidelines_Wiltshire-Museum_Archaeology-Archives_2019-09-27-v1.1.pdf (Accessed October 2020).
- Wiltshire County Council (2015). *Wiltshire Core Strategy 2015*. Available at: <http://www.wiltshire.gov.uk/adopted-local-plan-jan16-low-res.pdf> (Accessed March 2017).

Wiltshire County Council (2016). *Wiltshire core strategy, infrastructure development plan, core policy 3*, s4.10, p. 29. Available at:

<http://www.wiltshire.gov.uk/wiltshireidp3december2016.pdf> (Accessed March 2017).

List of Acts of Parliament, national regulations and international policies

ACE Accreditation Policy 2014

Ancient Monuments Act 1913

Ancient Monuments and Archaeological Areas Act 1979

Ancient Monuments Protection Act 1882

Burials Act 1857

Civic Amenities Act 1967

Contracts (Rights of Third Parties) Act 1999

Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and

Transfer of Ownership of Cultural Property 1970

Data Protection Act 1998

Dealing in Cultural Objects Act 2003

EEC Directive 11/85 (Precautionary Principle)

EEC Directive 85/337

Environmental Damage (Prevention and Remediation) Regulations 2009

Environmental Liability Directive 2004/35/EC

Environmental Matters (Aarhus) Convention 1998

European Convention on the Protection of the Archaeological Heritage (revised) 1992

(Valletta) 2000

European Council Declaration of Dublin 1990 (Environmental Imperative)

European Union (Withdrawal) Bill

General Data Protection Regulation 2018

Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict

1954

Housing and Planning Act 2016

Housing and Town Planning Act 1909

Housing and Town Planning Act 1913

Human Rights Act 1998

Human Tissue Act 2004

Law of Property Act 1925

Local Government Act 2003

Localism Act 2011

Maastricht Treaty

Malvern Hills Act 1884/1909/1924/1930

Museum of London Acquisition and Disposal Policy 2006/2011/2016

Museum of London Act 1986

National Heritage Act 1983

National Planning Policy Framework 2012/2018/2019/2020

National Planning Policy Guidelines 2012

Northamptonshire County Council Charging Policy for the Revision of Archaeological
Information and Advice

Planning (Listed Buildings and Conservation Areas) Act 1990

Planning Policy Guidance 16 1990

Planning Policy Statement 5

Return of Cultural Objects Regulations 1994

Sale of Goods Act 1979

Scheduled National Monument Act 1882

Statute of Limitations Act 1980

The Reuse of Public Sector Information Regulations 2005

Tort (Interference with Goods) Act 1977

Town and Country Planning (Environmental Impact Assessment) Regulations 2011

Town and Country Planning Act 1919

Town and Country Planning Act 1923

Town and Country Planning Act 1932

Town and Country Planning Act 1990

Town and Country Planning Act 2017

Town and Country Planning (Permitted Development and Miscellaneous Amendments)
(England) (Coronavirus) Regulations 2020

Treasure (Designation) Order 2002

Treasure Act 1996

Treasure Trove Arrangements, Scotland

Tribunals, Courts and Enforcement Act 2007

List of court cases mentioned in the text

Armory v. Delamirie [1722] 1 Stra 505

Attorney-General of Belize v. Belize Telecom Ltd. [2009] UKPC 10; [2009] 2 All ER 1127, Privy Council, per Lord Hoffmann, at s16

Attorney General v. the Charity Commission (The Poverty Reference) [2012] WTLR. 977, 34

Attorney General of the Duchy of Lancaster v. G. E. Overton (Farms) Ltd [1981] EWCA Civ J1118-3

Bridges v. Hawksworth [1843-60] All ER Rep 122

Case of the Marshall of the King's Bench [1455] YB 33 Hen VI, f 26 pl 12

Corp. of London v. Appleyard [1963] 2 All ER 835

Dresser UK Ltd v. Falcongate Freight Management Ltd [1992] QB 502 at 511, [1992] 2 All ER 450 at p.457, CA, per Bingham LJ

Ellerman Willison Line v. Webster [1952] 1 Lloyd's LL Rep 179

Elwes v. Briggs Gas Co. 1886 [1886] 33 Ch D 562

Gilchrist Watt and Sanderson Pty Ltd v. York Products Pty Ltd [1970] 3 All ER 825 at 829, [1970] 1 WLR 1262 at 1267, PC

Hollins v. Fowler [1875] LR 7 HL 757

Hutton v. Warren [1835-42] All ER Rep 151, per Parke B at p.153

Kamidian v. Holt and others [2008] All ER (D) 394 (Jun), [2008] EWHC 1483 (Comm)

Lancashire & Yorkshire Rail Co. v. MacNicol [1918-1919] All ER Rep. 537

Marcq v. Christie Manson & Woods Ltd (t/a Christie's) [2003] EWCA Civ 731 at [44]-[55], [2004] QB 286 at [44]-[55], [2003] 3 All ER 561 at [44]-[55], per Tuckey LJ

Morris v. C. W. Martin & Sons [1966] 1 QB at 716

Moukataff v. British Overseas Airways Corpn [1967] 1 Lloyd's Rep 396 at 415 per Browne J

Newman v. Bourne and Hollingsworth [1915] TLR 209

Northern Counties of England Fire Insurance Co v. Whipp (1884) 26 Ch D 284

OBJ Ltd v. Allan [2008] 1 AC 1

Oliver and another v. Symonds and another [2011] EWHC – 1250 (Ch.)

Parker v. British Airways Board [1982] 1 All ER 834

Pyx Granite v. Ministry of Housing and Local Government [1960] A.C. 260

R v. Kelly [1998] EWCA Crim 1578, [1999] QB 621

R (on the application of Alconbury Developments Ltd) v. Secretary of State for the Environment, Transport and the Regions and other cases [2001] All ER (D) 116 (May)

Reigate v. Union Manufacturing Co. (Rumsbottom) Ltd. [1918] 1 KB 592, per Scrutton LJ at p.605

Scipion Active Trading Fund v. Vallis Group Ltd. [2020] EWHC 795 (Comm.)

Shirlaw v. Southern Foundries [1926] Ltd [1939] 2 KB, per MacKinnon LJ, at p.227

Sorrell v. Paget [1950] 1 KB 252, [1949] 2 All ER 609, 93 Sol Jo 631, 65 TLR 595

South Oxfordshire District Council v. Secretary of State for the Environment and another [1981] 1 WLR 1092

South Staffordshire Water Co. v. Sharman [1896] 2 QB 44 at p.47

Tappenden v. Artus [1964] 2 QB 185 (CA)

The Moorcock [1889] 14 PD 64

The Winkfield [1902] p.42; [1900-03] All ER Rep 346

Tucker v. Linger [1882] 21 Ch D 18, 51 LJ Ch 713, 30 WR 425, 46 LT 198

Tucker v. Linger [1883] 8 App. Cas. 508

Waverley Borough Council v. Fletcher [1995] QB 334

Yearworth v. North Bristol NHS Trust [2009] EWCA Civ 37, [2009] 3 WLR 118, [2009] 2 All ER 986