Landmark Chambers

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Current issues in listed building regulation: Dill, “building” and curtilage

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Your speakers today are -

David Elvin QC

Guy Williams

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Dill and "building"

David Elvin QC

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Chambers

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David Elvin QC & Guy Williams

26 May 2020

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Planning (Listed Buildings and Conservation Areas) Act 1990

LBCAA 1990 s. 1(1)

“1.— Listing of buildings of special architectural or historic interest

(1) For the purposes of this Act and with a view to the guidance of local planning authorities in the performance of their functions under this Act and the principal Act in relation to buildings of special architectural or historic interest, the Secretary of State shall compile lists of such buildings, or approve, with or without modifications, such lists compiled by the Historic Buildings and Monuments Commission for England (in this Act referred to as “the Commission”) or by other persons or bodies of persons, and may amend any list so compiled or approved”

LBCAA 1990 s. 1(3), (5)

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"(3) In considering whether to include a building in a list compiled or approved under this section, the Secretary of State may take into account not only the building itself but also—

(a) any respect in which its exterior contributes to the architectural or historic interest of any group of buildings of which it forms part; and

(b) the desirability of preserving, on the ground of its architectural or historic interest, any feature of the building consisting of a manmade object or structure fixed to the building or forming part of the land and comprised within the curtilage of the building."

"(5) In this Act "listed building" means a building which is for the time being included in a list compiled or approved by the Secretary of State under this section; and for the purposes of this Act—

(a) any object or structure fixed to the building;

(b) any object or structure within the curtilage of the building which, although not fixed to the building, forms part of the land and has done so since before 1st July 1948, shall, subject to subsection (5A)(a), be treated as part of the building."

Dill and “building”

LBCAA 1990 s. 91(2)

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- S. 91(2) provides that “building” shall have the same meaning as in s. 336(1) of the Town and Country Planning Act 1990
- S. 336(1) provides as follows:
  - “‘Building’ includes any structure or erection, and any part of a building, as so defined, but does not include plant or machinery comprised within a building”.
- Cases on “building” in the planning context prior to ***Dill*** include ***Cardiff Rating Authority v Guest Keen Baldwin’s Iron and Steel Co Ltd*** [1949] 1 KB 385 (a rating case) applied in ***Barvis Ltd. v Secretary of State for the Environment*** (1971) 22 P. & C.R. 710 at 715-7 (Bridge J.) and ***Skerritts of Nottingham Limited v Secretary of State*** (No 2) [2000] JPL 2015 at 1031-4 (Schiemann LJ).

Dill v Secretary of State

- Supreme Court judgment allowing the appeal [2020] UKSC 20, 20 May 2020
- Inspector refused to allow a challenge to the listing of a pair of large early 18th century ornamental lead urns (c.1700) on limestone piers (c. 1720) at Idlicote House, Warwickshire, as part of a LB enforcement appeal. The urns and the piers had been moved several times and at the time of listing in 1986 were not located on the property for which they had been made. The owner had removed and sold them at auction in 2009 for £55,000 without knowing they were listed. The listing decision and paperwork on which it was based could not be found.
- Mr Dill did not use either of the non statutory routes for seeking to have the items delisted but appealed a LBEN and refusal of LBC and argued that the items were not "buildings", lacked special interest and that in any event LBC should be granted. The inspector rejected his appeals, and Singh J. and Court of Appeal [2018] EWCA Civ 2619 agreed with the Inspector

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The Wrest Park Finials: A pair of extremely rare and fine lead lidded finials attributed to John van Nost

circa 1700

on later limestone pedestals

274cm.; 108ins high overall

The garden at Wrest Park, Bedfordshire begun in the 1680's by Antony Grey, 11th Earl of Kent and continued by his son, Henry, created 1st Duke of Kent was one of the grandest and most admired gardens established in England in the first part of the 18th Century. It's roots lay in the Anglo-Dutch gardens of the 1690's and were intended to convey the Grey family's political support of William and Mary and the Glorious Revolution.

Among contemporary documents that demonstrate Wrest's high reputation is the record of a garden tour in 1735, in which the gardens were described as "undoubtedly some of ye finest in England". Wrest had already been singled out for praise in 1781 in the *Ichnographica Rustica* of Stephen Switzer and John Mackay who included it in the fourth edition of his Journey through England in 1724 repeated what was probably the standard view of Wrest when he called it "A very magnificent, noble Seat, with large Parks, Avenues and fine Gardens".

Wrest was one of only four estates that appeared in multiple views in Kip and Knyff's *Britannia Illustrata*. A generation later in 1735 Wrest was one of the earliest great gardens to be published in a large garden plan by John

Rocque in which these finials can be seen flanking the entrance to the Duke's Square garden.

John van Nost who died in 1729 was from a family of sculptors of Flemish descent. He had his own yard in the Haymarket, London by about 1687 and soon established himself as the leading maker of "Marble and Leaden figures, Busto's and noble Vases, Marble chimneypieces and curious Marble tables".

John van Nost is recorded as having supplied the two large lead vases, still in the Wrest Bowling Green House and eight lead heads for the Duke of Kent in 1725, and it is generally accepted that he supplied the impressive lead statue of William III in 1710-20 which still stands in front of the Pavilion at Wrest.

Historic England

IDLICOTE HOUSE, PIER TO RIGHT SURMOUNTED BY LEAD URN APPROXIMATELY 51 METRES SOUTH EAST

Overview

Heritage Category:
Listed Building

Grade:
II

List Entry Number:
1186056

Date first listed:
30-Jun-1986

Statutory Address:

Location

Statutory Address:
IDLICOTE HOUSE, PIER TO RIGHT SURMOUNTED BY LEAD URN APPROXIMATELY 51 METRES SOUTH EAST

The building or site itself may lie within the boundary of more than one authority.
County:
Warwickshire

District:
Stratford-on-Avon (District Authority)

Parish:
Idlicote

National Grid Reference:
SP 28244 44136

Details

IDLICOTE SP2844 8/160 Idlicote House, pier to right surmounted by lead urn approx. 51m. SE

GV II

Pier surmounted by urn. C18. Limestone and lead. Square pier with panelled sides, moulded stone plinth and chamfered cornice. Urn is decorated with high-relief winged cherub's heads and flame finial.

Listing NGR: SP2824444136

Dill v Secretary of State

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- The two issues for the Supreme Court were:
  - Whether an inspector considering an appeal under section 20 or section 39 of the Listed Buildings Act can consider whether or not something on that list is a "building";
  - What criteria are relevant in determining whether an item appearing in its own right in the statutory list is a "building" for this purpose.
- Supreme Court disagreed with the courts below in a unanimous judgment given by Lord Carnwath
- That judgment has significant implications in terms of both procedure and the approach to determining whether an item is a "building" that may be listed under s. 1 LBCAA 1990

Dill: the ability to challenge listing (1)

- On a listed building enforcement notice appeal an applicant may challenge whether or not the item listed is a "building".
- The qualification of the item for listing as a "building" is an essential element of the definition of "listed building" in s. 1(5) LBA 1990.
- S. 7 LBA 1990 will only be contravened in relation to a "listed building" which necessarily requires the item to be a "building". Accordingly, the scope of an appeal under s. 39(1)(c), that is that the matters alleged to constitute a contravention of s. 9(1) do not constitute such a contravention, enables such an argument to be made (para. 25).

Dill: the ability to challenge listing (2)

- This also applies to a prosecution under s . 9 LBA 1990 (para. 24).
- Application to any context appears possible where a listed building may be in issue e.g. as part of a planning application or appeal (see s. 66 LBCAA).
- The NPPF guidance with regard to listed buildings especially at paras.193-196 (where the designated heritage asset is a listed building) is also predicated on the duty in s. 66 and the validity of the listing of a building, applying Lord Carnwath's logic (see Sales LJ in ***Jones v Mordue*** [2016] 1 WLE 2682 at [28]).

Dill: the ability to challenge listing (3)

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- Current procedures do not make any provision as to what should happen if listing is challenged e.g. on a LBEN appeal of a planning appeal or the consequences of a determination that the item in question is not a "building" (regardless of its historic or architectural significance).
- Is the decision prospective only?
- Does this impose a duty on the SoS under s. 1(1) immediately to review the list and to remove the item from it, or to undertake a separate assessment in the light of the decision? Will it require Historic England to participate in all such cases?
- What if a LPA purports to question the listing in the court of determining an application?

Current listing and de-listing guidance

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- See DCMS **Principles of Selection for Listed Buildings** (2018)
- Historic England's guidance **Removing a Building from the List** (2019) –
  - "If a building is considered by the Secretary of State for Digital, Culture, Media and Sport to be of special architectural or historic interest it will be included on a list of such buildings. The List is maintained by Historic England. This guidance provides an overview of the application process for removing a building from the List, also known as de-listing. It should be noted that an application for de-listing is a separate process from the review of listing decisions, which is a challenge to the validity of a recent listing decision…
  - … The statutory criteria for a building being included on the List are that it holds special architectural or historic interest. The Secretary of State will remove a building from the List only if it no longer meets these criteria."
- Unsurprisingly, the guidance does not take account of the new procedural landscape created by ***Dill***

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Dill: the meaning of "building"(1)

- Lord Carnwath appeared sceptical of the listing of what he described (as he did in argument) as "vases" but (contrary to some reports of the case) did not reach a concluded view which was a matter for later assessment
- These "vases" with their (listed) plinths were both 9 feet high (274 cms), lead and limestone, and dated from the early 18th century when they had been installed in Wrest Park, Bedfordshire
- Mr Dill noted in his evidence -
  - *When they were taken from Idlicote House the finials and the top of the piers were lifted together and then the remaining part of each pier lifted. The items were lifted onto a Hiab lorry by its crane…" (w/s of Mr Dill)*

Dill: the meaning of "building"(2)

- He held
  - As to the approach to "buildings", there is an important distinction between items which are listed in their own right as "listed buildings" and items which derive protection from the extended definition in section 1(5) LBA 1990 which catches fixtures and curtilage structures (paras 34-44).
  - In relation to items listed in their own right, the three tests from ***Skerritts of Nottingham Ltd (No. 2)*** [2000] JPL 1025, para. 39 are relevant. See also Bridge J. in ***Barvis*** (1971) 22 P & CR 710, 716-7
  - This involves considering size, permanence and degree of physical attachment. This requires an evaluative judgment in a reasonably flexible way reflecting the facts of the individual case (paras 45 – 56).

Dill: the meaning of "building"(3)

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"50. ***Skerritts*** itself is of importance, both because it was the first time that the issue was considered at Court of Appeal level, and also because the three-fold test derived from the ***Cardiff*** case was treated as of general application in the planning context. It is also useful as an illustration of how the planning inspector was able to treat those tests as workable guidance in a very different factual situation from that considered in the earlier cases. In the definition of "building", Parliament has used the general concepts of "erection" and "structure", rather than more precise and specific terms, and these are applicable across a very wide range of cases. Therefore, the application of the definition requires an evaluative judgment to be made. The Court of Appeal confirmed that where the relevant decision-maker, in that case the inspector, directs himself by reference to ***Barvis*** and the guidance in the ***Cardiff*** case and arrives at a rationally defensible conclusion, his decision on the application of the statutory definition will be upheld as lawful."

Dill: the meaning of "building"(4)

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"52. … It is notable that in both ***Barvis*** and ***Skerritts*** there was a clear move away from real property analogies*.* That seems to me correct. As has been seen, real property concepts are relevant to the extended definition, but there is nothing to import them into the basic definition of building. ***Skerritts*** provides clear authority at Court of Appeal level for the three-fold test, albeit imprecise, of size, permanence and degree of physical attachment. No preferable alternative has been suggested in this court. Given that the same definition of "building" is adopted in the Listed Building Act, it is difficult to see any reason in principle why the same test should not apply. On the other hand, notwithstanding the apparent width of the statutory definition, the mere fact that something had been "erected" on land was not sufficient to make it a building."

Dill: the meaning of "building"(5)

- "52… ***Skerritts*** is a good illustration of the practical application of the relevant tests, and in particular of the importance of the method of erection ("a sizable and protracted event … It is assembled on site, not delivered ready made"). In addition to the fact that installation occurred by erection, the degree of permanence of the location of the item on the site was significant.
- 53. In the listed building context that need for something akin to a building operation when the structure is installed can be seen as the counterpart to the reference to "works for the demolition" as the relevant contravening act under section 7 of the Listed Buildings Act, which clearly envisages some form of dismantling (ie "pulling down or taking to pieces" in the words of Jenkins J in the ***Cardiff*** case) when the item is removed from the site."

• These considerations have potentially wide implications for the ability to list items of a decorative or commemorative nature which have simply been placed on land as does what Lord Carnwath added at [54] -

Dill: the meaning of "building"(6)

"54. It is also important to keep in mind the purpose of listed building control, which is to identify and protect buildings of special architectural or historic interest. It is not enough that an object may be of special artistic or historic interest in itself; the **special interest must be linked to its status as a building**. That is implicit in the reference to "architectural" interest. But it is relevant in my view also to the concept of historic interest. The historic interest must be found not merely in the object as such, but **in its "erection" in a particular place**."

- These are not necessarily issues which take centre stage in the HE listing guidance e.g. for *Commemorative Structure (2017)* or *Garden and Park Structures (2017)*, or *Street Furniture (2017*), although many items considered in those documents will be likely to qualify under Lord Carnwath's application of the ***Skerritts*** test
- Implications for items (such as those in ***Dill***) moved from their original location prior to listing?

Guidance - Commemorative Structures

Commemorative Structures Listing Selection Guide (Dec 2017)

"This guide looks at outdoor commemorative monuments, here taken to include public statues and memorials, funerary monuments in churchyards and cemeteries, and war memorials. They include some of our finest works of public art and, taken together, they are our history made manifest. Monuments and memorials play a special part in the public realm and are always deserving of respect and care."

- Many examples of listed statuary, tombs, tombstones and pubic monuments (such as war memorials)

Commemorative Structures

Listing Selection Guide

Guidance - Garden and Park Structures

Garden and Park Structures Listing Selection Guide
(Dec 2017)

"This selection guide is devoted to individual built structures found in gardens and parks, rather than the designed landscapes themselves... All designed landscapes are likely to contain buildings and other hard landscaping features such as balustraded terraces that will often make a positive contribution to the overall character of the place. This selection guide helps identify which structures meet the test of special interest for listing.."

Garden and
Park Structures

Listing Selection Guide

Guidance – Street Furniture

Street Furniture

Listing Selection Guide

Street Furniture Listing Selection Guide (Dec 2017)

"Our streetscapes are greatly enriched by historic street furniture, which ranges from milestones to lamp posts, boundary walls to horse troughs, bollards to drinking fountains. But while roads are among the oldest features of the historic environment, their level of use makes their associated street furniture vulnerable to replacement, damaging change or removal. Its sheer ubiquity makes it sometimes overlooked and at risk of loss, especially items that are functionally redundant. Some features, such as drinking troughs, relics of horse-based transportation, or early gas lighting and overhead tram poles, which illustrate technology that once transformed everyday existence, can be quite modest. Others, such as the many drinking fountains erected from the 1860s onward, possess considerable intrinsic design quality. Humble as some structures might seem, their contribution to the public realm is often considerable ..."

Listed building examples (1)

Figure 7
Headstone and footstone of the former slave, Scipio Africanus (d.1720), Henbury, Bristol. Listed Grade II* for its historic interest.

Figure 8
The Whyatt chest tomb in Egham churchyard, Surrey: notable examples of outdoor Georgian monuments will warrant listing. Listed Grade II.

Figure 11
Public sculpture often enlivened post-war cityscapes: this relief (listed Grade II) of 1966 by William Mitchell graces the former Three Tuns pub in Coventry.

Listed building examples (2)

Figure 4
Wrest Park, Bedfordshire (landscape registered Grade I). The restored mid-nineteenth century parterre, with beyond Thomas Archer's Pavilion of 1709-11. Listed Grade I.

Figure 14
Walcot, Shropshire (landscape registered Grade II). The nineteenth-century game larder. Listed Grade II.

Listed building examples (3)

Figure 5

Dartington Hall, Devon (landscape registered Grade II*).
Henry Moore's Reclining Woman of 1947. Listed Grade II.

Listed building examples (4)

Figure 6
Boundary marker, Staple Hill, Bristol. This Grade II listed boundary marker, of pre-cast concrete, is thought to have been erected between 1951 and 1966. It marks the historic boundary between the City of Bristol and the ceremonial county of Gloucestershire.

Figure 7
Early twentieth-century finger post (listed Grade II) in St Newlyn, Cornwall. Cast iron, probably by the Basset foundry, indicating distances to Newquay, Cubert, Holywell, Zelah, Truro, Redruth, Crantock, Netlyn East and Mitchell. It is unusual for the number of fingers.

Figure 8
An early eighteenth-century house with attached Grade II listed street name plaque. The inscription reads 'Here is Sclater Street 1717'. The house itself has been extensively altered and is listed only for the sign attached to it.

Figure 12
A Grade II listed K6 type telephone kiosk on the Eskdale Hardknott Pass, Cumbria. This type was designed in 1935 by Sir Giles Gilbert Scott and made by various contractors out of cast iron. The dramatic setting adds to the interest of this example.

Listed building examples (5)

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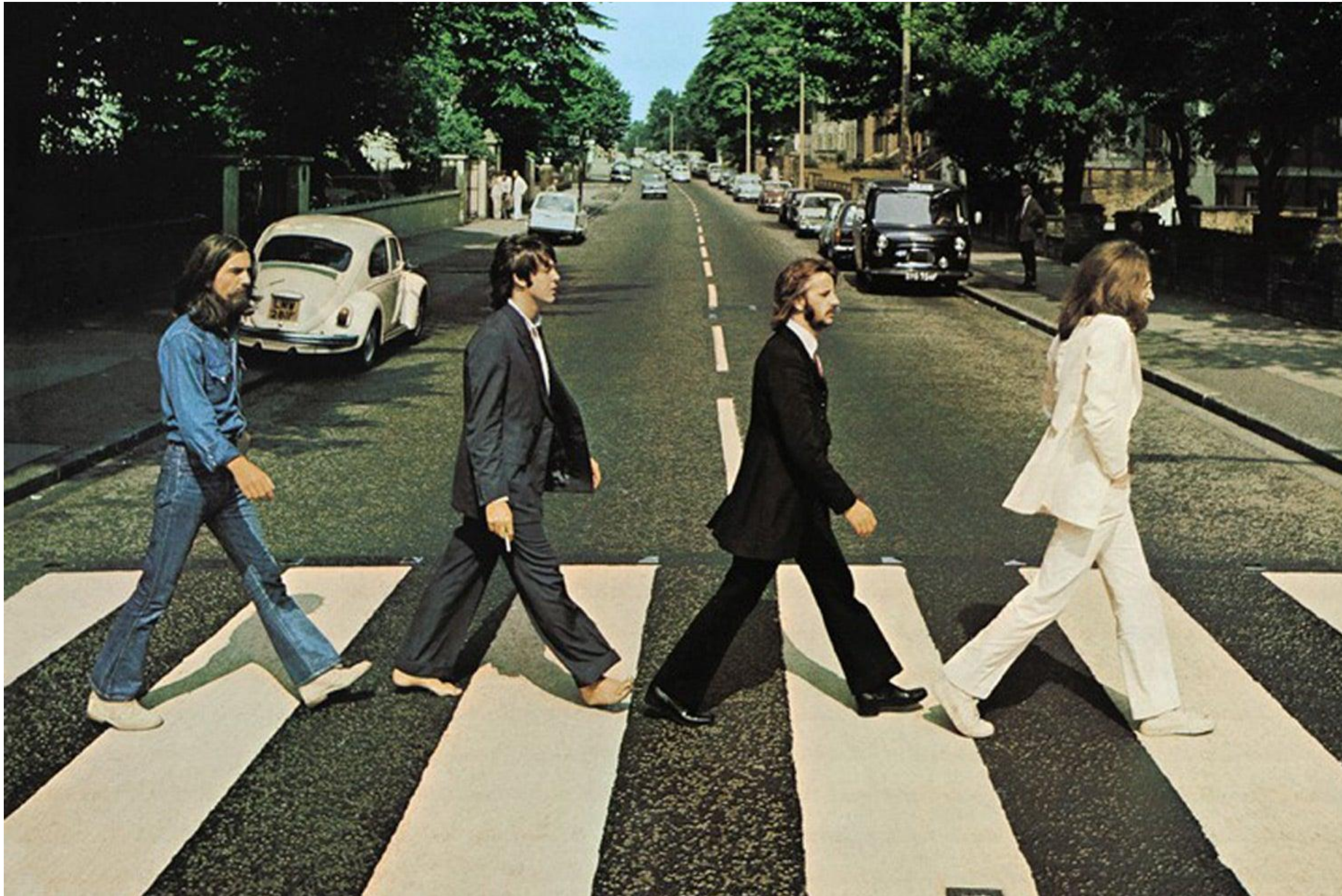

ZEBRA CROSSING NEAR ABBEY ROAD STUDIOS

Overview

Heritage Category:
Listed Building

Grade:
II

List Entry Number:
1396390

Date first listed:
21-Dec-2010

Statutory Address:
ZEBRA CROSSING NEAR ABBEY ROAD STUDIOS, ABBEY ROAD

Reasons for Designation

The Abbey Road Zebra Crossing, mid C20, is listed at Grade II for the following principal reasons:

* Historical interest: as the zebra crossing made internationally famous on the cover of The Beatles' 1969 Abbey Road album, and as a celebrated example of this important form of road safety crossing invented by Lord Hore-Belisha; * Group value: with the nearby Grade II Abbey Road Studios, a recording studio of huge renown used by many celebrated artists including The Beatles.

History

The pedestrian crossing in its modern form dates to 1934 and was introduced by Lord Hore-Belisha (1893-1957) who was the Liberal Minister for Transport. The first examples were in London but following the Road Traffic Act of 1934 were rolled out nationally in 1935. Originally the sides of the crossing were demarcated on the road by metal studs with diagonally opposing amber glass beacons on black and white poles to identify the crossing point. The beacons were not internally lit at this date. The crossings and the beacons were immediately referred to as Belisha Beacons after Lord Hore-Belisha. The black and white stripes, as well as flashing beacons, were added from March 1949 following public calls to increase their visibility and thus the safety of pedestrians. The distinctive stripes led to the crossings being known as 'Zebra Crossings', the start of a group of crossings named after fauna such as Pelican, Puffin and Toucan. The zebra crossing's dimensions and design details were formalised by the 'Zebra' Pedestrian Crossing Regulations 1971. Modern beacons are in plastic and a further modification has seen the insertion of zig-zag lines on the approaches to the crossings to alert drivers that they must not park in these areas. Zebra crossings can now be found all over the world.

The Abbey Road album was The Beatles' final album recording and was first released on 26 September 1969. The majority of the album was recorded at Abbey Road Studios, 3 Abbey Road and the album cover shot on the nearby zebra crossing to the SE. Brian Southall, author of the 1997 history of Abbey Road Studios, reports that the idea for the cover originated with a Paul McCartney sketch of four stick men on the crossing. The photographer was Iain Macmillan who knew the Beatles through working with Yoko Ono and the photograph was taken on 8 August 1969. The photographer was only given about fifteen minutes and used a stepladder to take photographs while a policeman stopped the traffic.

It is an unusual cover in that it does not include the name of the band or album, but rather lets the image speak for itself; a decision taken by John Kosh, the creative director for Apple who rightly believed that as the most famous band in the world, text was unnecessary. The album topped both the UK and US charts. Come Together, the opening track, is probably the best known.

The cover image is very famous in itself and spawned conspiracy theories about coded messages implicit in the image: the notion that Paul McCartney was in fact dead as, for example, he is the only Beatle shown without shoes and out of step. Paul parodied the cover himself and referred to the conspiracy theory when photographed on the crossing with an Old English Sheepdog for the cover of his 1993 album 'Paul is Live', and there have been many other parodies internationally which are a testament to the significance and fame of the image. Recent examples include: a nude parody by the Red Hot Chili Peppers on their The Abbey Road EP (1988); Kanye West's 'Live Orchestration' album (2006) and a somewhat dark parody by the Argentinean comedy group Longua de Trapo ('Vinte e Um Anos na Estrade' album of 2000) where the band appear to have been run over.

The date that the crossing was installed on Abbey Road and the date of the added zebra stripes is not known (although the latter is presumed to date to the 1950s.) There has long been a suggestion that the crossing was slightly moved to the SE in the 1970s, closer to the junction with Grove Road. However, comparison between the cover photograph, other historic photos and its present position indicates that it is in fact in essentially the same position as in 1969. The crossing remains a place of pilgrimage, with the studios, for Beatles fans from all over the world. Groups of tourists always gather to photograph the crossing and walk the walk and there is a live video streaming web-cam.

Details

This list entry was subject to a Minor Amendment on 01/02/2017 Zebra crossing with belisha beacons, mid C20, Abbey Road.

DESCRIPTION: the zebra crossing is located on Abbey Road to the SE of Abbey Road Studios, outside Abbey House, 1-121, Abbey Road. It has six wide 'zebra' stripes painted in white onto the Tarmac road surface, flanked by two lines of dashed marks either side of the crossing and zig-zag approach lines along the approach kerbs and down the centre of the road, signifying to drivers that there is no parking on the approaches. Both the dashed marks and zig-zag lines are later additions, added since The Beatles' Abbey Road album cover photograph was taken in 1969, and are not of special interest. Two belisha beacons, are located at the NE and SW corners of the crossing with amber globes, probably plastic, atop black and white painted metal poles with stepped bases. Their date is not known but they are not of the earliest phase of beacons of 1930s vintage when the poles were straight and the globes in glass. Graffiti and stickers have been applied to the poles in a manner mirroring the graffiti applied to the garden wall of the nearby Abbey Road Studios. The belisha beacons are not visible on the album cover image but would have been in place at that time as the beacons pre-dated the zebra stripes on this type of crossing (and such stripes are absent from the album cover).

Hampshire CC and curtilage

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Guy Williams

What's new

- The divergence within the meaning of "curtilage" as between its "ordinary" meaning and that specific to the listed building context (***Hampshire CC v Secretary of State*** [2020] EWHC 959 (Admin)).
- Clarification of the approach to be taken in planning v listed building cases, and the role of statutory context (***Challenge Fencing Ltd***; ***Hampshire***)
- The meaning in the listed building context will now sit alongside ***Dill*** in potentially conferring protection on items that should not be listed in their own right but may count as ancillary structures or objects forming part of the land within the curtilage of the listed building.

Broad or Narrow

- In ***Hampshire*** Holgate J. identifies two potential approaches to the identification of curtilage. At a high level of analysis:

- Narrower: whether the land (claimed as curtilage) is so intimately associated with a building that it forms part and parcel *of the building* [87];

- Broader: whether the land (claimed as curtilage) is associated with a building in such a way that the *land and building* comprise part and parcel *of the same entity*, a single unit, or an integral whole [15, 86].

Curtilage – Roadmap

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- General law
  - ***Methuen-Campbell v Walters*** [1979] QB 525
  - ***Dyer v Dorset CC*** [1989] QB 346
- S. 1(3) and (5) LBCAA
  - More flexible approach in listed building cases
    - ***Attorney General ex rel Sutcliffe v Calderdale MBC*** (1983) 46 P & CR 399
    - ***Debenhams Plc v Westminster City Council*** [1987] AC 396
    - ***Skerritts of Nottingham Ltd (No. 1) v Secretary of State*** [2001] QB 59
    - ***Edgerton v. Taunton Deane DC*** [2008] EWHC 2752 (Admin)
- Rationalisation in ***Hampshire CC v Secretary of State*** [2020] EWHC 959 (Admin)

Curtilage: Ordinary meaning.

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- Earlier cases such as ***Methuen-Campbell v Waters*** (1979) and ***Dyer v Dorset CC (1989)*** emphasised that "curtilage" was an essentially small area intimately associated with the building(s) with which it was associated although it turns to some degree on the scale of the buildings in question.
- Lord Donaldson MR in ***Dyer*** at p. 357 –
  - ""Curtilage" seems always to involve some small and necessary extension to that to which the word is attached."
- Robert Walker LJ in ***Skerritts (No. 1)*** moved away from the notion of "smallness" – although physical layout is relevant as is relative size of the building and the land (see **Challenge** at 18).
- Robert Walker also saw the interpretation as being in a dispropriatory context (though see Holgate J. in ***Hampshire CC*** – effectively he considers this the neutral interpretation)

Basis for the narrow approach

- Buckley LJ in ***Methuen-Campbell*** pp. 543-544 –
  - "In my judgment, for one corporeal hereditament to fall within the curtilage of another, the former must be so intimately associated with the latter as to lead to the conclusion that the former in truth forms part and parcel of the latter. …. This may extend to ancillary buildings, structures or areas such as outhouses, a garage, a driveway, a garden and so forth. How far it is appropriate to regard this identity as parts of one messuage or parcel of land as extending must depend on the character and the circumstances of the items under consideration. … they constitute an integral whole. ..."
- Nourse LJ In ***Dyer*** p. 358
  - "The authorities which were cited to us demonstrate that an area of land cannot properly be described as a curtilage unless it forms part and parcel of the house or building which it contains or to which it is attached. … While making every allowance for the fact that the size of a curtilage may vary somewhat with the size of the house or building, I am in no doubt that the 100 acre park on the edge of which Mr. Dyer's house now stands cannot possibly be said to form part and parcel of Kingston Maurward House…"

Curtilage: LB authorities

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- A particular approach was taken to LB curtilages in 3 key cases:
  - ***A-G ex rel Sutcliffe v Calderdale MBC*** (1983) 46 P & CR 399 (not cited in ***Dyer***)
  - ***Debenhams Plc v Westminster City Council*** [1987] AC 396
  - ***Skerritts of Nottingham Ltd v Secretary of State*** [2001] QB 59.
- ***Calderdale*** – there was a terrace of cottages, a mill and a "bridge" linking those two structures. A conveyance transferred the terrace to D's predecessors but retained the mill and bridge. Following the listing of the mill, issue whether LBC required to demolish the terrace. Stephenson LJ set out the approach to curtilage in context of LB legislation agreeing that there were essentially 3 factors to consider
  - (1) the physical "layout" of the listed building and the structure
  - (2) their ownership, past and present
  - (3) their use or function, past and present.

Curtilage: *Calderdale*

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- The context of the LB provisions was critical to Stephenson LJ's analysis (p. 405):
  - "…I would approach section 54(9) [s. 1(5)], its construction and application, and both its limbs with the obvious reflection that the preservation of a building of architectural or historic interest cannot be considered or decided, either by the Secretary of State or by those specialists he is required by section 54(3) to consult, in isolation. The building has to be considered in its setting, … as well as with any features of special architectural or historic interest which it possesses. The setting of a building may consist of much more than man-made objects or structures, but there may be objects or structures which would not naturally or certainly be regarded as part of a building or features of it, but which nevertheless are so closely related to it that they enhance it aesthetically and their removal would adversely affect it. Such objects or structures may or may not be intrinsically of architectural or historic interest, or worth preserving but for their effect on a building which is of such interest.

Curtilage: *Calderdale*

- Skinner J. (at first instance) had asked himself: "from a planning rather than a strict conveyancing viewpoint, whether the buildings within the alleged curtilage form a single residential or industrial unit and, in this instance, whether the mill and terrace form part of the integral whole".
- The Court of Appeal effectively endorsed that test – to be addressed considering the three factors identified. Stephenson LJ referred to Buckley LJ's test, noting:
  - "Buckley LJ does not refer to Skinner J's "single unit" but he does refer to his "integral whole".
  - And he is of course dealing with a house and premises in common ownership.
- Stephenson LJ concluded:

  "I have found this question difficult to answer, but I have ultimately come to the conclusion, not without doubt, that the terrace has not been taken out of the curtilage by the changes which have taken place and remains so closely related physically or geographically to the mill as to constitute with it a single unit and to be comprised within its curtilage in the sense that those words are used in this subsection."

Curtilage: *Debenhams & Skerritts*

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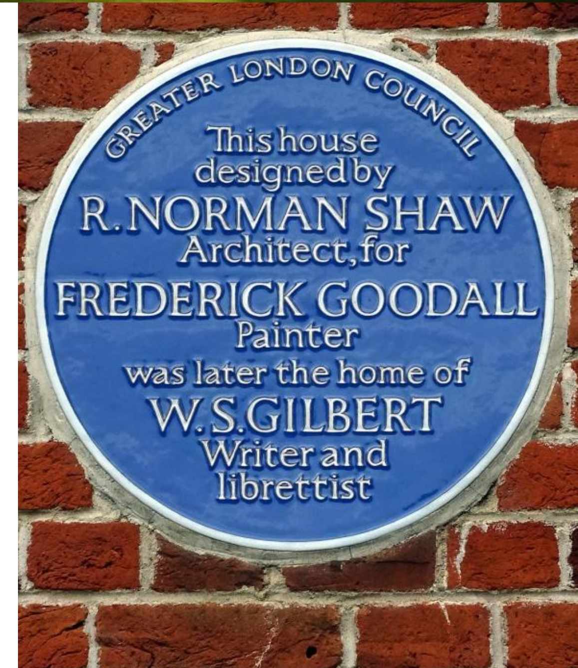
- In ***Debenhams Plc*** Lord Keith at p. 403 held that s. 1(5) implied an *ancillary relationship* to the listed building –
  - ”All these considerations, and the general tenor of the second sentence of [s. 1(5)] satisfy me that the word 'structure' is intended to convey a limitation to such structures as are ancillary to the listed building itself, for example the stable block of a mansion house, or the steading of a farmhouse, either fixed to the main building or within its curtilage. In my opinion the concept envisaged is that of principal and accessory. It does not follow that I would overrule the decision in the *Calderdale* case, though I would not accept the width of the reasoning of Stephenson LJ. There was, in my opinion, room for the view that the terrace of cottages was ancillary to the mill.”
- Criticisms of ***Calderdale*** were also directed at the question of structures fixed to a building – see ***Debenhams*** pp. 402-3. See Holgate J in ***Hampshire CC*** at [104]

Curtilage: *Skerritts*

In ***Skerritts (No. 1)*** the CA applied the 3 factor approach in ***Calderdale*** to find a stable block some 200m from the GII* hotel "Grimsdyke" but which had been designed by the same architect to fall within the hotel's curtilage. Robert Walker LJ distinguished Dyer (and to an extent ***Methuen-Campbell***) on the basis it was dealing with "dispropriatory" legislation. He did not put forward an alternative formulation.

In addition he did not find the "notion of smallness" helpful. However, he did consider physical layout to be relevant:

- …. the curtilage of a substantial listed building is likely to extend to what are or have been, in terms of ownership and function, ancillary buildings. … physical "layout" comes into the matter as well. In the nature of things the curtilage within which a mansion's satellite buildings are found is bound to be relatively limited. But the concept of smallness is in this context so completely relative as to be almost meaningless, and unhelpful as a criterion"



Curtilage: *recent cases*

- ***Challenge Fencing Ltd v Secretary of State*** [2019] EWHC 553 (Admin)
- ***Hampshire CC v Secretary of State*** which drew some clear distinction between LB and other cases
- In ***Challenge*** (which was an industrial pd case – ie planning legislation =ordinary meaning) Lieven J summarised at [18] six principles applicable from both the ***Dyer*** line of authorities and the LB line of cases having first noted at [10] –
  - "There is extensive caselaw on the legal approach to the decision as to what is the curtilage of a building. Most if not all of this caselaw concerns the curtilage of listed buildings, and to the degree that slightly varied considerations may be in play when considering the curtilage of an industrial building for the purposes of the GPDO.."
- Need to read ***Challenge Fencing*** at [18] in the light of ***Hampshire CC***

Curtilage: *recent cases (2)*

- In ***Hampshire***, Holgate J. took a careful analytical approach to an application to deregister c. 46 ha of common land which an Inspector had found to fall within the curtilage of an airport terminal building given their functional relationship, drawing a clear distinction between LB cases and the general approach in ***Dyer/MC***.
- The real value of **Hampshire** is in analysing the caselaw by statutory purpose and whether that supported a broader or an ordinary meaning.
- Holgate J. did not agree wholly with Robert Walker LJ in ***Skerritts*** in that he held
  - the earlier cases did not treat the dispropriatory nature of the legislation as significant in their consideration of curtilage - [90]-[91], [97] – ie those case give ordinary meaning
- Considered the specific statutory context of para. 6 of Sched. 2 to the Commons Act 2006 at [71] – which also warranted an ordinary meaning

Curtilage: *recent cases (3)*

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- Note, though obiter, Holgate J.'s observation at [107] –
  - "… the extended definition of "listed building" only brings "structures" or "objects" within the scope of the listing, not, for example, a garden or open land. In other words, s. 1(5) does not treat every aspect of the curtilage of a listed building as falling within that definition. Consequently, the controls in ss. 7 to 9 do not apply to any item of work carried out anywhere within the curtilage of a listed building (notwithstanding s. 66(1)). Those controls are specifically targeted at works to a listed building, or other qualifying structures or objects, because of their effect on the special architectural or historic interest of that building."
- Similar comments are made in **Dill** at para. 33.
- He considered at [121]-[123] that ***Challenge*** should be read "as a whole", though Lieven J. referred to the LB cases, and this should be done consistently with ***Methuen-Campbell*** and ***Dyer*** including in planning cases and noted at [121] that Lieven J at [14] specifically applied the "part and parcel" approach in ***M-C***

Curtilage: *recent cases* (4)

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- Grouping the authorities in this way identifies:
  - The ordinary meaning is the narrower one explained in Methuen-Campbell;
  - The “ancillary” requirement referred to in ***Debenhams*** concerned “structures” and was specific to LB legislation and not relevant to “curtilage” generally, although the ancillary nature of the land to the building may be relevant - [103]
  - The broader meaning derives solely from **Calderdale** – where it was justified by the purpose of the legislation (106-108, and 125):

    > “125: The wider approach to curtilage in **Calderdale** is justified for listed building control, which is concerned to bring within its ambit structures or objects which are closely related to the building which has been listed such that their removal or alteration could adversely affect its interest."

Curtilage: *recent cases (5)*

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- Holgate J concluded that the Inspector had erred, essentially:
  - (1) In applying the broad approach rather than the ordinary/narrower approach outside the listed building context (138);
  - (2) The Inspector applied the "relative size" criterion by considering the purpose to which the land and the building were both put. The true question is whether the land qualified as the "curtilage of the building" and thus the focus should have been on the size of the land relative to that of the building (145);
  - (3)Taking the broad approach, and so asking whether the building and claimed curtilage land formed a single unit with "functional equivalence", or in effect were used for the same overall purpose, other factors which have until now been treated as relevant considerations would have a much reduced, or even possibly no, significance. It would not matter whether the land serves any ancillary function. Equivalence of function, or being "mutually supportive", would suffice.
  - ***Calderdale*** does not apply to development control under planning legislation, for example the exemption from development control of the use of the curtilage of a dwelling-house for incidental purposes (s. 55(2)(e) of TCPA 1990) or the ambit of permitted development rights.

Future?

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- Holgate J. granted permission to appeal in ***Hampshire CC***
- On basis of current law:
  - (a) **Dill** has enabled greater scope for challenge of listed building protection, and firmer criteria for assessment of whether a "building";
  - (b) This may cause greater focus on whether garden objects and statuary are protected under the extended definition as objects or structures;
  - (c) **Hampshire** confirms that the broader approach to the definition of curtilage in LB legislation should apply;
  - (d) **But** it has highlighted a divergence in meaning of the same term as used in the related LB legislation and planning legislation based largely on **Calderdale** which has already come in for judicial criticism.

Q&A

We will now answer as many questions as possible.

Please feel free to continue sending any questions you may have via the chat function which can be found along the top or bottom of your screen.

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Thank you for listening

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London
180 Fleet Street
London, EC4A 2HG
+44 (0)20 7430 1221

Birmingham
4th Floor, 2 Cornwall Street
Birmingham, B3 2DL
+44 (0)121 752 0800

Contact us
clerks@landmarkchambers.co.uk
www.landmarkchambers.co.uk

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