



Francis Taylor Building

## Historic Building Enforcement

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## Enforcement – Recent Developments

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## Islington LBC v SSHCLG [2019] EWHC 2691 (Admin)

- Basement flat created without permission April 2013 rented out
- Nov 2013 to Feb 2014 renovation of basement – completely gutted and uninhabitable
- Would not have been possible to enforce during renovation as nothing to identify it as residential unit
- EN Jan 2018 – Jan 2014 cut-off

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## Islington (2)

- C argued that period of renovation should be included in 4 years – needed it to make 4 year immunity
- C argued no abandonment of residential use and always intention to resume residential use after renovation
- Argued for “presumption of continuance”
- Insp agreed and granted Certificate

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### Islington (3)

- Held – Insp had erred in law
- Correct approach as set out in *Thurrock* [2002] EWCA (Civ) 226 and *Swale* [2005] EWCA (Civ) 1568
- Had to establish required period as continuous use during which enforcement action could be taken
- Enf action could not be taken during renovations – But why - Did not have to be practical to take enf action
- Difference of abandonment of lawful use and halting unauthorised use

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### *Miles v National Assembly Wales* [2007] JPL 1235

- Farm owner sought LDC for use of land for motorcycling racing and practice activities based on long-standing breach of 28 day temporary uses limit
- Issues of whether race days and practice days could be aggregated
- BUT 18 month period when no activity due to foot and mouth outbreak
- Inspector concluded that that broke period to establish immunity

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## Miles (2)

- Claimant argued that period of foot and mouth should be included
- C argued possible to take enforcement action
- Court disagreed – applying *Thurrock* – said no enf action possible when activity suspended
- Fact that suspension due to circumstances beyond control and intention to resume apparent was not relevant

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## QM Development v Warrington BC [2020]EWHC 1511 (Admin)

- 2008 PP for two houses – pre-commencement gas remediation condition
- 2010 condition informally varied to allow commencement- 2010 amended PP same conditions
- LPA not satisfied with subsequent discharge
- Litigation between developer and house owner
- Developer app for LDC granted with informative that info re condition still required

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## QM Developments (2)

- JR of informative
- Common ground no legal effect
- C claimed informative wanted to establish position for county court litigation
- Held – inappropriate for JR – informative of no legal effect
- Position could as well be established in County Court – adequate alternative remedy

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## Dill v SSCHLG & Stratford-on-Avon DC [2020] UKSC 20

- Two c18 lead urns by Flemish sculptor John van Nost
- Each rested by gravity on limestone plinth
- 1725 at Wrest Park, Bedfordshire – Duke of Kent
- Undoubted artistic value
- Removed in 1939 and eventually ended up at Idlicote House, inherited by Appellant

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- Urns sold at auction in 2009 and removed overseas

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- Idlicote House listed in 1966
- Items added to List in 1986
- Listing decision not found
- No notice of listing sent to owner
- English Heritage sent notice of sale in advance

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- Piers consisted of limestone pedestals of a slab rather than solid construction
- Pedestals rested on concrete slabs which were on the ground
- Urns sitting on the pedestals without any attachment
- When removed the urns and the top of the piers were lifted together, then the remaining part of each pier
- Urn and pier together 247 cm high

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- 2015 LPA writes to Dill requiring LB consent app
- LB consent applied for and refused; LB enf notice issued
- Appeal dismissed – Insp concluded that status of items as buildings had been settled by fact of listing and could not be considered again
- High Court and CA upheld that view – both accepted that issue of whether building could not be re-opened and so no consideration of it
- Appeal to Supreme Court

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SC identified two issues (but decided three)

- Whether Insp can consider issue of whether building
- If yes, what are correct criteria
- Also considered the “extended definition” of listed building definition in section 1(5)



## Legislation – LBA 1990

- s1(5) LB a building included in a list AND “object or structure fixed to the building” or “within curtilage ... which form part of the land and has done so since before 1 July 1948” [the extended definition]
- “building” definition from s336 TCPA 1990 “includes any structure or erection, and any part of a building, as so defined, but does not include plant or machinery comprised in a building”



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- LB consent applications and appeals
- Consent appeals may include claim building not of special interest
- LB EN and appeals
- EN appeal may include claim building not of special interest
- SofS may remove “building” from list

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## First Issue – Can status as building be raised?

Lord Carnwath –

- Deals with “relatively shortly”
- Based on individuals’ “fair opportunity” to challenge legal measures taken against them (*Boddington* [1999] 2 AC 143)
- SofS argued ability to judicially review listing decision was sufficient protection – cited *Wicks* [1998] AC 92 which held wrt planning enforcement notice that statutory scheme had to be considered.

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## Two reasons to reject

- Wicks based on planning EN and explicitly said statutory grounds of appeal "*are so wide that they include every aspect of the merits of the decision to serve*"
- Statutory definition of LB includes both inclusion in the list and fact of being a building; in the absence of explicit statutory exclusion (which does not exist) no reason not to be able to argue that not a building
- Appeal allowed on first issue

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## The extended definition

- Carnwath refs the wide range of items which might be listed which are contained within this issue and refs Historic England garden and park structures listing selection guide December 2017
- Notes the absence of any clear criteria for the selection/ decision to consider as buildings

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- Important to note that extended definition does not result in the object becoming a building in its own right – it is simply treated as part of the building to which it is attached, or in whose curtilage it stands
- This distinction blurred in official publications
- Authorities found in the law of real property concerning fixture to the land
- Some non-attached objects may be considered as "fixed" if they are an essential part of the design of the house and grounds

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## Extended Definition

- *Berkley v Poulett* [1977] 1 EGLR 86
- Statue and sundial in gardens
- Tests (1) method and degree of annexation and (2) object and purpose of the annexation
- In this case, not fixed to land and, as brought on after construction of house, not for object and design of house/gardens
- Not within extended definition

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## Second Issue – Proper test for building

- Analyses line of authority from *Cardiff* [1949] 1 KB 385 (rating case) through *Barvis* (1971) 22 P&CR 710 (incorporates principles into planning) to *Skerritts* [2000] JPL 1025 (first CA consideration)
- References marquee erected for season in hotel grounds
- No reason not to use *Skerritts* tests for whether an object is building (para 52)

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## Skerritts three-fold test

- (1) Size – with some reference to whether it would ordinarily be brought to site assembled
- (2) Permanence – 5 month summer season was enough
- (3) Degree of physical attachment – spikes into ground for marquee
- Some degree of movement permitted – mobile crane in *Barvis*
- Policy objectives... see *Barvis* – LPA should have control

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## This case

- Remitted for re-hearing
- Sympathy for Mr Dill that still can't get decision
- Factors in both directions
- Strong suggestion that no longer expedient to pursue....



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## Takeaways

- Hard cases/bad law? A potentially wide ranging adaptation of the grounds of appeal – will it be applied in other circumstances?
- Strong note to heritage authorities to clarify guidance/criteria
- Clear guidance on principle to apply
- Recognition a very fact based exercise



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## **Tower Hamlets v. SSCGL**

- A planning inspector allowed appeals against rebuilding orders made after the unlawful demolition by persons unknown of three unlisted buildings in a conservation area of Tower Hamlets. The inspector effectively reasoned that the demolition had done more good than harm as it would lead to suitable development of the site.
- Issue: whether the “public benefits of the proposal” (NPPF/196) should extend to likely benefits of new development of a site, facilitated by demolition of buildings on the site, where there is no current application for planning permission to develop the site; or whether those words are restricted to the public benefits of demolishing the buildings, without considering any likely future development.

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## **Tower Hamlets ctd**

- In the DL, the Inspector said that as there was no current planning application, the benefits were “speculative”; but it was “highly likely” a suitable proposal could be found [24].
- Court found that the Inspector had been entitled to take into account likely future benefits (bearing in mind the particular circumstances of the case) [63-67].

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## Webinar on Historic Building Enforcement: Listed Building Certificates of Lawfulness of Proposed Works, demolition of unlisted buildings in a conservation area

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### **1a) Listed Building Certificates of Lawfulness of Proposed Works- Intro**

- S.26H-26K PLBCAA 1990 and Planning (Listed Buildings) (Certificates of Lawfulness of Proposed Works) Regulations 2014.
- Provides formal confirmation from LPA that proposed works of alteration or extension (but not demolition) to LB do not require LB consent because they don't affect LB's character as a building of special architectural or historic interest (s.26H (2)).
- Offers a procedure to bypass need for full application for LB consent where proposed works are relatively minor and do not affect character of LB as one of special architectural or historic interest (*R (Republic of France) v RBKC* [2017] EWCA Civ 429 at § 76)

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## **1b) Comparison with CLEUD/CLOPUD regime under TCPA 1990**

- LBCLPW regime broadly analogous to CLEUD/CLOPUD regime but with key differences.
- Does not relate to lawfulness of existing or proposed use, only works.
- Does not relate to lawfulness of existing works, only proposed works.
- Scope of 'lawfulness' for which LBCLPW is conclusive proof is much narrower. It cannot be used to show:
  - Lawfulness through immunity (indeed this can't be lawful because there's no immunity in case of works to LBs, *Braun v FSoS* [2003] EWCA Civ 665 at § 12-15)
  - That sufficient works have been carried out (lawfully) so that development has begun under a granted LB consent for the purpose of ensuring that implementing the rest of LB consent would not be time expired and/or to check that (usually more substantial) works would be lawful because they are in accordance with a granted LB consent (*R (France) v RBKC*)
  - That any works are in accordance with LB consent granted by SoS under equivalent of a development order such as GPDO (e.g. see Listed Building Consent Orders under s.26D PLBCAA 1990, Local Listed Building Consent Order under s.26E PLBCAA 1990).

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## **1c) Making and receiving an application**

- Prescribed requirements of application, validation and requests for further info etc contained in reg 2
- A LBCLPW may be issued for (s.26I (5)):
  - The whole or part of the LB specified in the application
  - All or part of the works described in the application

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### **1d) If LPA grants LBCLPW**

- Certified works will be conclusively presumed to be lawful if (s.26H (5)):
  - Works are carried out within 10 years from the date of the certificate
  - Certificate is not revoked.
- Does not remove need to comply with e.g. planning or building regulation requirements

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### **1e) If LPA refuses LBCLPW or fails to determine within time limit**

- Applicant may appeal to SoS (s.26K) if application is wholly/partly refused, is granted in a different form from application, or is deemed to have been refused where LPA has not determined application within time-limit (6 weeks starting with the day immediately following the day on which a valid application is received, unless extended by agreement; (reg 2 (5)).
- Appeal must be made within 6 months of date of notice of LPA's decision or of expiry of 6-week period (or such longer period as the SoS may at any time allow) (reg. 3 (1)).
- Prescribed requirements of making appeal in reg. 3.
- Inquiry and hearing procedure rules are same as for EN appeals, CLEUD/CLOPUD appeals, LB EN appeals etc.
- Same test as with CLEUDs/CLOPUDs- whether refusal was/any refusal would have been 'well-founded'

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## **1f) Revocation and offence**

- .Revocation if (s.26I (6)):
  - Statement or document was false in a material particular
  - Any material information was withheld.
- Revocation procedure (reg. 4)
  - Before revoking the certificate, LPA must give written notice to: owner, occupier, any other person who may in LPA's opinion be affected by the revocation, SoS (where LBCLPW issued on appeal). The recipients have 14 days to make representations
- Offence- if, for the purpose of procuring a particular decision on an application for a LBCLPW, he (s.26J):
  - Knowingly/recklessly makes a statement that is false/misleading in material particular
  - With intent to deceive, uses any document which is false or misleading in a material particular
  - With intent to deceive, withholds any material information.



## **2a) Demolition of unlisted building in a conservation area- Intro**

- .In England, require PP to demolish such a building in a CA ('relevant demolition') because it is development (*R (Save Britain's Heritage) v SSCLG* [2011] EWCA 334) and is an exception under B.1 to PD rights granted for demolition in Part 11 Class B GPDO 2015
- Requirement for CAC for such demolition abolished in light of the above to avoid duplicate control
- Planning control enforceable through:
  - Ordinary enforcement powers for breach of planning control.
  - Prosecution for per se offence under s.196D TCPA 1990.



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## **2b) Offence under s.196D TCPA 1990**

- It is an offence to:
  - Fail to obtain PP for relevant demolition carried out/caused to be carried out
  - Breach a condition or limitation imposed on a grant of PP for relevant demolition carried out/caused to be carried out
  
- Strict liability offence- do not need to prove e.g. intention or that D knew building was in a CA.
  
- Whether any retrospective authorisation is granted after the relevant demolition is carried out is immaterial (s.196D (9) TCPA 1990)



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## **2c) Defence under s.196D TCPA 1990**

- Defence for D to prove (s.196D (4) TCPA 1990):
  - (a) that relevant demolition was urgently necessary in interests of safety or health;
  - (b) that it was not practicable to secure safety or health by works of repair or works for affording temporary support or shelter;
  - (c) that relevant demolition was min measure necessary (e.g. could they have demolished less: demolition for purposes of s.196D includes removal of part of a building provided it is not so minor as to constitute as a matter of fact and degree mere 'alteration', *Barton v SSCLG* [2017] EWHC 573 (Admin)); and
  - (d) that notice in writing of relevant demolition was given to LPA as soon as reasonably practicable.
  
- Burden is on D to prove on 'balance of probabilities' (*LB of Tower Hamlets v SSCLG* [2019] EWHC 2219 at § 31)
- Court itself must be satisfied of all (a)-(d), not whether D subjectively was satisfied (*Derby CC v Anthony* [2008] EWHC 895 (QB))
- Expert evidence usually necessary (e.g. structural engineer)



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## 2d) Sentencing

- On summary conviction
  - Fine and/or imprisonment for up to 12 months
- On conviction on indictment
  - Fine and/or imprisonment for up to 2 years
- In determining the amount of any fine court among other things:
  - must in particular have regard to any financial benefit accrued or appears likely to accrue to that person in consequence of the offence (s.196D (8) TCPA 1990)
  - should have regard to considerations in *R v Duckworth* (1995) 16 Cr. App. R. (S.) 529: a) degree of damage to historic structure (if it is one), b) degree of financial benefit attempted to be secured, c) degree of D's culpability.
- POCA also an option to strip D of his benefit
- If D convicted may need Newton hearing to determine matters not able to be canvassed at trial e.g. intention/knowledge, heritage harm etc (*R v Hill (Graham)* [1997] 2 Cr. App. R. (S.) 243)

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