Neutral Citation Number: [2018] EWCA Civ 2619

Case No: C1/2017/2843

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
QUEEN'S BENCH DIVISION
PLANNING COURT IN BIRMINGHAM
THE HON MR JUSTICE SINGH
[2017] EWHC 2378 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/11/18

Before :

LORD JUSTICE McCOMBE

LORD JUSTICE HICKINBOTTOM
and
LORD JUSTICE COULSON

- -

Between :

MARCUS DILL

Appellant

- and -

(1) THE SECRETARY OF STATE
FOR COMMUNITIES AND LOCAL GOVERNMENT
(2) STRATFORD-ON-AVON DISTRICT COUNCIL

Respondents

- -
- -

Richard Harwood QC (instructed by **Shakespeare Martineau**) for the **Appellant**
Guy Williams (instructed by **Government Legal Department**) for the **First Respondent**
The Second Respondent did not appear and was not represented

Hearing date: 3 October 2018

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Approved Judgment

Lord Justice Hickinbottom :

Introduction

1. This appeal gives rise to issues relating to the scope of what is meant by "listed building" under the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the Listed Buildings Act"); and, in the event of dispute, who determines whether something is a "listed building".

2. The issues arise in relation to two early 18th century limestone piers, each surmounted by a lead urn of the same era. I shall refer to the piers and urns by the neutral term "items", a term used below. In 1973, the items were moved by the Appellant's father to Idlicote House, a Grade II listed building. In 1986, each of the items was separately Grade II listed. The Appellant came into ownership of Idlicote House and the items in 1993; but he did not appreciate that the items were listed. In 2009, he sold them at auction for £55,000, and they were exported. The Appellant does not know the name of the purchaser, and does not know where the items are now.

3. The fact that they had been removed came to the knowledge of the Second Defendant local planning authority ("the Council") in 2014. Following correspondence, the Appellant made an application for retrospective listed building consent to remove the items. Both Historic England as statutory consultee and the Society for the Protection of Ancient Buildings made submissions on the application to the effect that the items were of special architectural and historic interest, and recommending enforcement action. The application for retrospective consent was refused on 11 February 2016. On 26 April 2016, the Council issued a listed building enforcement notice requiring the reinstatement of the items at Idlicote House.

4. The Appellant appealed to the Secretary of State against the refusal of listed building consent and the enforcement notice on several grounds, including that the items were not "buildings" so that listed building consent was not required and no enforcement action could be taken in respect of them.

5. The appeals were considered together by Anthony J Wharton BArch RIBA RIAS MRTPI, an inspector appointed by the Secretary of State ("the Inspector"), who refused them in a decision letter dated 19 January 2017. The Inspector found that:

    i) It was not open to him to go behind the fact that an item appears on the list as a listed building (see paragraph 25 of his decision letter).

    ii) In considering whether the items were buildings for these purposes, concepts of property law were irrelevant (paragraph 26).

    iii) In considering whether the items were buildings for these purposes, the criteria set out in Skerritts of Nottingham Limited v Secretary of State for the Environment, Transport and the Regions (No 2) [2000] EWCA Civ 5569; [2000] JPL 1025 ("Skerritts") were irrelevant (paragraph 26-30).

    iv) The listed building consent was invalid for failing to state to where the items were being removed (paragraph 48 and following).

6. The Appellant challenged those findings by way of an application to the High Court under section 63 of the Listed Buildings Act so far as the listed buildings consent was concerned and by way of appeal to that court under section 65 of the Act in relation to the enforcement notice, the application and the appeal raising identical issues. In particular, the Appellant submitted that the Inspector had erred in making the findings (i) to (iv) above.

7. The application and appeal were heard together by Singh J (as he then was), who refused both on all grounds ([2017] EWHC 2378 (Admin)).

8. The Appellant now appeals against the conclusion of Singh J that the Inspector did not err in making findings (i) to (iv), comprising Grounds 1-4 of the appeal. The judge himself gave permission to appeal in respect of Grounds 1-3. He refused permission to appeal in respect of Ground 4, but permission was granted by Lindblom LJ on 28 November 2017.

9. Before us, Richard Harwood QC appeared for the Appellant, and Guy Williams of Counsel for the Secretary of State; and I would like to express our appreciation for their helpful submissions.

The Legislation

10. The history of the provisions now found in the Listed Buildings Act is helpfully set out in the speech of Lord Hope of Craighead in Shimuzu (UK) Limited v Westminster City Council [1997] 1 WLR 168 at page 175A-177D. For the purposes of this appeal, I can be briefer.

11. Before the modern regime for listed buildings was created by the Town and Country Planning Act 1968, there was a similar but more limited scheme for the making of "building preservation orders." The Town and Country Planning Act 1947 provided for the preparation and maintenance of lists of buildings of special architectural and historic interest. Section 30(6) of the 1947 Act provided:

> "So long as any building... is included in any list compiled or approved under this section, no person shall execute, or cause or permit to be executed, any works for the demolition of the building or for its alteration or extension in any manner which would seriously affect its character, unless at least two months before the works are executed notice in writing of the proposed works has been given to the local planning authority".

That gave the opportunity for protective measures to be taken.

12. Those provisions were essentially retained by sections 32-33 of the Town and Country Planning Act 1962, which revoked the 1947 Act. Section 32(1) concerned the preparation of lists by the Minister:

> "With a view to the guidance of local planning authorities in the performance of their functions under this Act in relation to buildings of special architectural or historic interest, the Minister shall compile lists of such buildings, or approve, with or without

> modifications, such lists compiled by other persons or bodies of persons, and may amend any list so compiled or approved."

Such buildings were to be protected in essentially the same way as under the 1947 Act.

13. Part V of the Town and Country Planning Act 1968 abandoned building preservation orders and introduced a new basis of control by local authorities over buildings of special architectural or historic interest. Again, it involved the maintenance of a list approved by the relevant Minister. The expression "listed building" was defined for the first time, in section 40(1), as follows:

> "In this Part of this Act the expression "listed building" means a building which is for the time being included in a list compiled or approved by the Minister under section 32 of the principal Act (buildings of special architectural or historic interest) [i.e. section 32 of the 1962 Act, quoted above]".

14. In respect of such listed buildings, section 40(2) provided for a new scheme of "listed building consents":

> "Subject to this Part of this Act, if a person executes or causes to be executed any works for the demolition of a listed building or for its alteration or extension in any manner which would affect its character as a building of special architectural or historic interest, and the works are not authorised under this Part of this Act, he shall be guilty of an offence.

15. In 1986, when the items were listed, the relevant legislation was contained in the Town and Country Planning Act 1971. In that Act, section 32 of the 1962 Act was repealed; but replaced by section 54 of the new Act. Section 54(9) of that new Act provided that:

> "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 the provisions of this Act relating to listed buildings and building preservation notices, any object or structure fixed to a building, or forming part of the land and comprised within the curtilage of a building, shall be treated as part of the building."

16. A similar provision is now contained in section 1 of the Listed Buildings Act. Section 1(1) provides that "the Secretary of State shall compile lists of such buildings" and "may amend any lists so compiled …". Section 1(5), one of the provisions at the heart of the present case provides:

> "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 … be treated as part of the building."

17. The list compiled by the Secretary of Section must be promptly published (and deposited with the relevant authorities (section 2(1)), and listing stands as a local land charge (section 2(2)). Both the Secretary of State and every local authority are bound to keep copies of the list at a convenient place for inspection (section 2(4) and (5)). As soon as possible after the inclusion of any building in a list, the Secretary of State is required to notify the relevant local authority, which has an obligation to notify every owner or occupier of the building (section 2(3) and (3A)).

18. Section 91 is the interpretation section. However, the word "building" is not defined in the Listed Buildings Act itself. It is defined in section 336 of the Town and Country Planning Act 1990, 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".

19. Section 7 is at the heart of the scheme of protection for listed buildings. It provides that no person shall execute or cause to be executed any works for the demolition of a listed building or for its alteration or extension in any manner which would affect its character as a building of special architectural or historic interest, unless the works are authorised under section 8. By section 9(1), if a person contravenes section 7, he shall be guilty of an offence. Section 8 provides for listed building consent to be granted by a local planning authority, and section 10 makes provision for the making of applications for such consent. Section 10(2) provides:

> "Such an application shall contain – …
>
> (a) sufficient particulars to identify the building to which it relates, including a plan;
>
> (b) such other plans and drawing as are necessary to describe the works which are the subject of the application; and
>
> (c) such other particulars as may be required by the authority."

20. Section 16(1) provides that the local planning authority or, as the case may be, the Secretary of State may grant or refuse an application for listed building consent and, if they grant consent, may do so subject to conditions. By section 16(2), in considering whether to grant consent, the local planning authority or the Secretary of State "shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses."

21. Section 20(1)(a) confers on a person the right to appeal to the Secretary of State against a refusal by a local planning authority of an application for listed building consent. By section 21(3):

> "The notice of appeal may include as the ground or one of the grounds of the appeal a claim that the building is not of special architectural or historic interest and ought to be removed from any list compiled or approved by the Secretary of State under section 1".

22. By section 22(1), on an appeal the Secretary of State may deal with the application as if it had been made to him in the first instance, and may exercise his power under section 1 to amend any list complied under section 1 by removing from it the building to which the appeal relates. Section 20 appeals may be determined by a person appointed by the Secretary of State (i.e. an inspector) who has the same powers as the Secretary of State (section 22(4) of and Schedule 3 to the Listed Buildings Act, and regulation 3 of the Town and Country Planning (Determination of Appeals by Appointed Persons) (Prescribed Classes) Regulations 1997 (SI 1997 No 420)).

23. There is no further appeal from the Secretary of State. Indeed, section 62 provides:

> "(1) Except as provided by section 63, the validity of [a decision on an appeal under section 20] … shall not be questioned in any legal proceedings whatsoever."

However, section 63(1) provides for a challenge by way of application to the High Court:

> "If any person is aggrieved by any such order or decision … and wishes to question its validity on the grounds –
>
> (a) that it is not within the powers of this Act, or
>
> (b) that any of the relevant requirements have not been complied with in relation to it, he may make an application to the High Court under this section."

24. Section 63(4) confers power on this Court to quash the relevant order or decision.

25. Section 38 of the Listed Buildings Act confers a power on a local planning authority to issue listed building enforcement notices. Section 39(1) provides for an appeal from such a notice to the Secretary of State on any of the following grounds (so far as relevant to this appeal):

> "(a) that the building is not of special architectural or historic interest;
>
> (b) that the matters alleged to constitute a contravention of section 9(1)… have not occurred;
>
> (c) that those matters (if they occurred) do not constitute such a contravention.
>
> (d) …

> (e) that listed building consent ought to be granted for the works, or that any relevant condition of such consent which has been granted ought to be discharged, or different conditions substituted; …"

26. Section 41(6), under the heading 'Determination of Appeals under Section 39', provides (again, so far as relevant to this appeal):

> "On the determination of an appeal the Secretary of State may –
>
> (a) grant listed building consent for the works to which the listed building enforcement notice relates or for part only of those works;
>
> (b) …
>
> (c) if he thinks fit, exercise his power under section 1 to amend any list compiled or approved under that section by removing from it the building to which the appeal relates. …"

27. Some provisions parallel to those in relation to a section 20 appeal apply. By section 41(6), on a section 39 appeal the Secretary of State may grant listing building consent for the works to which the enforcement notice relates, and may again exercise his power under section 1 to amend any list complied under section 1 by removing from it the building to which the notice relates. Section 39 appeals too may be determined by an appointed inspector who has the same powers as the Secretary of State (section 40(3) of the Listed Buildings Act, and the other provisions referred to in paragraph 22 above).

28. Section 65 of the Act governs appeals to the High Court relating to listed building enforcement notices; and it is common ground between the parties that this, like section 63, gives rise to a remedy which is discretionary.

Ground 1: The Powers of the Inspector

29. The Inspector proceeded on the basis that, as an inspector considering an appeal, "One cannot go behind the listing" (paragraph 25 of his decision letter), i.e. he could not consider or determine whether or not something on the list is a building. As Singh J correctly identified (at [53] of his judgment), this involves a question of construction of the relevant statutory provisions to ascertain Parliament's intention as to whether or not an appellant should be able to raise an issue as to the validity of the listing. Like the inspector, Singh J concluded Parliament intended that an appellant should not be able to do so.

30. Mr Harwood submits that both were wrong. Under the statutory provisions, the Inspector had to consider whether the removal of the items required listed building consent under section 7. That depended upon whether the removal amounted to "the demolition of a listed building" within the meaning of section 1(5); because otherwise no requirement for consent would arise under section 7; and, consequently, for enforcement purposes there would be no breach of sections 7 or 9. These circumstances, he submitted, fell within the scope of the ground of appeal against an

enforcement notice in section 39(1)(c) (quoted at paragraph 25 above), i.e. that the matters alleged to constitute a contravention of section 9(1), if they have occurred, do not constitute a contravention. What is important is not what happens to be on the list, but whether consent is required or a contravention has occurred. He submitted that the ability of an inspector to consider the validity of the fact of the listing is akin to the ability to consider the validity of a planning condition, which (as made clear by such cases as Newbury District Council v Secretary of State for the Environment [1981] AC 581 ("Newbury") and Earthline Limited v Secretary of State for Transport, Local Government and the Regions [2002] EWCA Civ 1599; [2003] 1 P&CR 24 ("Earthline")) is uncontroversially a matter which an inspector on an appeal can do.

31. Mr Harwood submits that that construction is reinforced when the provisions are looked at in their full context. He stressed that there is no right for those affected by a listing decision to be involved in the original decision – there is no evidence that the owners of the items were involved in the listing decision in 1986 – nor are they entitled to a discrete appeal or review of it. Given that (save for an application under section 63) the validity of a decision of the Secretary of State to refuse an appeal against a refusal of an application for listed building consent cannot be challenged in (e.g.) enforcement proceedings, it is clear (Mr Harwood submitted) that the scheme must allow for a challenge to the listing of a building to be dealt with by an inspector on behalf of the Secretary of State. Otherwise, relying on such authorities as Boddington v British Transport Police [1999] 2 AC 143 ("Boddington") and Wandsworth London Borough Council v Winder [1985] 1 AC 461 ("Winder"), he submitted that an affected individual would be unable properly to defend himself in relation to a matter which may form the basis of criminal or civil proceedings which could not have been the Parliamentary intention. The availability of judicial review to challenge the original decision – in this case, to list the items – does not prevent it being challenged later, unless Parliament otherwise provides which, here, it has not.

32. However, I am unpersuaded by these submissions, essentially for the reasons given by Singh J. In particular, I consider the following persuasive.

33. In my view, the wording of the relevant provisions in the Listed Buildings Act make clear that it was the intention of the statute that, for the purposes of applications for listed building consent and enforcement (and appeals from the same), being on the list is determinative of the status of the subject matter as a listed building, the protection given by the Act deriving from that status.

34. That is clear from section 1(5) of the Listed Buildings Act (quoted in full at paragraph 16 above), which defines "listed building" as "a building which is *for the time being* included in a list compiled or approved by the Secretary of State…" (emphasis added). It is particularly noteworthy that the power of the Secretary of State (and an inspector in his shoes) on an appeal to de-list does not allow for the quashing of a listing, only for forward-looking de-listing. But the intention of Parliament is also revealed by, for example, the fact that the grounds of appeal for a section 20 appeal set out in section 21(3) and for a section 38 appeal set out in section 39(1) (quoted in paragraphs 21 and 25 above respectively) expressly enable an appellant to raise issues concerning the merits of listing, but not the validity of listing. Like Singh J (see [54] of his judgment), I accept the submission now put forward by Mr Williams that, if Parliament had intended an appellant to be able to challenge the validity of the listing it could and would have made that clear.

35. Mr Harwood appeared to suggest that the fact that the Secretary of State (and, where assigned to deal with an appeal, an inspector) has the right to de-list in itself supported his construction of the statutory provisions; but, at best, it is neutral. An inspector certainly has the ability to consider the merits in an appeal and, whatever the true construction of the statutory provisions so far as the validity of listing is concerned, such a consideration may result in de-listing. (For the sake of completeness, I should say that, as Mr Williams accepts, Singh J was wrong to say, in [57] of his judgment, that the power to de-list is not conferred on an inspector: but that was not material to his analysis or conclusion.)

36. In my view, the construction I favour is clear from the wording of the relevant current provisions; but it is supported by the provenance of those provisions. As I have described, whilst the Town and Country Planning Act 1947 had a different type of protection for buildings (i.e. building protection orders), section 30(6) of that Act identified the buildings that were potentially the subject of such protection by virtue of being listed: "So long as any building... is included in any list compiled or approved under this section, no person shall execute, or cause or permit to be executed, any works for the demolition of the building…". Although the wording to identify buildings of special architectural or historic interest has become more sophisticated, there is no reason to suppose that the Parliamentary intention so far as that means of identification has changed.

37. Reflecting the apparent purpose of the Listed Buildings Act and its predecessors – to provide a clear and straightforward scheme for the protection for buildings which the state considers worthy of protection on architectural or historic grounds, and which enables members of the public to inspect quickly and easily a published list of protected buildings and regulate their affairs accordingly – the courts have consistently acknowledged that the intention of the relevant provisions is that being on the list is determinative of the protected status for the purposes of the requirement for listed building consent and enforcement proceedings. For example, Lord Hope said in Shimizu (at [183]):

> "Once the whole or any part of a building has been included in the list, however, it becomes a 'listed building' for the purposes of the Act. The fact that only part of a building has been included on the list then ceases to have any significance. It is the entry in the list which identifies the structure which is thereafter to be referred to as the 'listed building'".

Lord Hope made the same point again, forcefully, in City of Edinburgh Council v Secretary of State for Scotland [1997] 1 WLR 1447 at page 1451H-1452A:

> "The Act assumes, in regard to statutory procedures, that the question whether or not the building is a listed building can be determined simply by inspecting the list which the Secretary of state has prepared."

See also Debenhams plc v Westminster City Council [1987] AC 396 ("Debenhams") at page 406H-407A per Lord Mackay of Clashfern, and Barratt and Barratt v Ashford Borough Council [2011] EWCA Civ 27; [2011] P&CR 21 at [43] per Mummery LJ, to the same effect.

38. In support of his submission, Mr Harwood relied on the judgment of McCombe J (as my Lord then was) in Chambers v Guildford Borough Council [2008] EWHC 826 (QB); [2008] JPL 1459; but that did not concern the issue with which we are dealing – whether being on the list is determinative of the protected status – but the different question of whether a particular pillbox fell within the scope of the listed description of a listed building; and the observations at [27] and following – which McCombe J himself accepted were obiter – have to be considered in that light. I do not read these comments as being inconsistent with the construction I favour – nor do I consider that the construction I have placed on the statutory provisions to be inconsistent with the determinative analysis and conclusion of McCombe J in that case – but, insofar as any of McCombe J's observations might be construed as being inconsistent with my interpretation, I would respectfully not agree with them.

39. Mr Harwood also relied on a battery of other authorities, but I do not consider that they assist his submissions as they concerned different statutory provisions. As Lord Irvine of Lairg LC emphasised at page 160C-D of Boddington (cited at paragraph 31 above, and a case upon which Mr Harwood particularly relies), context is everything:

> "… [I]t will be necessary to examine the particular statutory context to determine whether a court hearing a criminal or civil case has jurisdiction to rule on a defence based upon arguments of invalidity of subordinate legislation or an administrative act under it. There are situations in which Parliament may legislate to preclude such challenges being made, in the interest, for example, of promoting certainty about the legitimacy of administrative acts on which the public may have to rely."

40. Boddington concerned a criminal prosecution for breach of a byelaw preventing smoking on a train. Mr Boddington argued that bringing a total smoking ban into operation was ultra vires the rail company, as it went beyond the company's power under section 67(1) of the Transport Act 1967 to regulate the railway. The House of Lords held that the stipendiary magistrate was wrong to rule that Mr Boddington could not raise that as a defence to the criminal charge; although, for Mr Boddington, it was a pyrrhic victory as they held that the rail company had power under section 67 to prohibit smoking. Lord Irvine gave the leading speech. In it, he stressed (at page 161D-E) that:

> "… it is well recognised to be important for the maintenance of the rule of law and preservation of liberty that individuals affected by legal measures promulgated by executive public bodies should have a fair opportunity to challenge these measures and to vindicate their rights in court proceedings. There is a strong presumption that Parliament will not legislate to prevent individuals from doing so."

41. Similar points were made in the context of civil proceedings in Winder (also cited at paragraph 31 above), in the context of possession proceedings in relation to a council flat for rent arrears in circumstances in which the tenant contended that he was not liable to pay the outstanding rent because the resolutions and notices of increase were ultra vires the council.

42. However, Boddington and Winder concerned very different statutory schemes from this. Both of those schemes were of a general character directed at the world at large (Boddington) or a significant group of people notably council tenants in a particular area (Winder). The Listed Buildings Act involves the compilation and publication of a list which identifies specific properties and notifies the owner of each such property of the listing, and the status of a building as a listed (and, thus, protected) building is readily ascertainable at any time. It is therefore not of a general character, but directed and focused. It operates in an area in which, so far as the buildings which are the subject of protection are concerned, clarity and certainty have a high premium. The rule of law is well acknowledged by the fact that listing can be the subject of challenge by way of judicial review, and (importantly) any interested party can apply to have a building de-listed and a refusal of such an application itself may be the subject of a challenge by way of judicial review. Such a person therefore has a "fair opportunity to challenge these measures and to vindicate their rights in court proceedings".

43. Therefore, in my view, Singh J's view (in [52]-[56] of his judgment) that the authorities of Boddington and Winder are of no application in this case was correct. Indeed, it is noteworthy that, at page 160D-H of Boddington, Lord Irvine used R v Wicks [1998] 92 as an example of a case in which it was held that the validity of an administrative act that triggered consequences for the criminal law was not capable of being challenged in criminal proceedings (but only by way of judicial review or appeal). Wicks concerned a prosecution for a failure to comply with an enforcement notice for breach of planning control, in which it was held that the Town and Country Planning Acts comprised "an elaborate code" and that on a proper construction of the relevant provisions all that was required to be proved in the criminal proceedings was that the enforcement notice issued by the local planning authority was formally valid. Although, of course, the provisions relating to listed building enforcement notices and planning breach enforcement notices are not identical, it seems to me that Wicks is a case closer to the case before us than Boddington and Winder.

44. Nor do I consider that the separate line of authority including Newbury and Earthline (both cited at paragraph 30 above) assists Mr Harwood's cause. These cases are authority for the proposition that a landowner can contend in an enforcement notice appeal, and a developer can contend on an appeal to vary a condition, that a planning condition sought to be enforced is unlawful; but these cases were, again, in a different statutory context. The ability to question the lawfulness of a planning condition in a subsequent planning appeal simply does not support the proposition that the lawfulness of the inclusion of something on the list for building of special architectural or historic interest can be challenged on a listed building appeal.

45. For those reasons, subject to the views of my Lords, I would refuse the appeal on Ground 1. I do not consider that the Inspector erred in considering that he could not question the validity of the listing of the items as listed buildings.

Grounds 2 and 3: The Relevance of Property Concepts and the Skerritt Criteria

46. These two grounds can conveniently be taken together.

47. Mr Harwood submits that the Inspector erred in proceeding on the basis that, in determining whether something is a "building" for the purposes of the Listed Buildings Act, both the property law approach to what (in terms of a building) is real property and

the approach to buildings taken in some other rating and planning cases such as Skerritts (cited at paragraph 5(iii) above) are irrelevant; and Singh J (at paragraphs 70-82 of his judgment) was wrong not so to conclude.

48. The answer to these grounds is very short: for the Inspector's purposes, what amounted to a listed building was determined by the list at the relevant time – I have dealt with that issue as part of Ground 1 – and therefore the approach to what a "building" might be in other contexts is, as the Inspector and Singh LJ said, irrelevant. That – as Mr Harwood frankly accepted – is sufficient to dispose of both of these grounds of appeal on the basis that he was unsuccessful on Ground 1.

49. It is important to note how these two grounds have arisen. As Mr Williams submits – and Singh J emphasised in [73] of his judgment – Mr Harwood's submissions confuse different parts of the statutory definition of listed building in section 1(5) of the Listed Buildings Act (quoted at paragraph 16 above). There are three distinct ways in which something may qualify as a "listed building" under that section. The first is by being included on the statutory list maintained by the Secretary of State, under the main text of the section. The second is by being an object or structure fixed to a building which is on the list under the first deeming provision (a) in the section. The third is by being an object or structure which lies within the curtilage of a building which is on the list and has done so since 1 July 1948 under the second deeming provision (b) of the section.

50. In this case, from 1986, the items were included on the statutory list in their own right, under the main text of section 1(5), not under either of the deeming provisions (a) or (b): they were listed buildings in their own right, and not simply by virtue of being fixed to a listed building or because they fell within the curtilage of such a building. Cases upon which Mr Harwood relied, such as Corthorn Land and Timber Company Limited v Minister of Housing and Local Government (1966) 17 P&CR 210 and Debenhams (cited at paragraph 37 above), concerned attachments to a building/land, and whether in all the circumstances, including the attachment, they fell within the deeming provisions of the predecessors of section 1(5). The grounds therefore necessarily fall if, as I have determined, the items were listed buildings, the validity of the listing being a matter which could not be challenged before the Inspector.

51. These grounds therefore fail.

Ground 4: Invalid Application

52. The Inspector found that the Appellant's listed building application was invalid because, contrary to the requirements of section 10(2) of the Listed Buildings act (quoted at paragraph 19 above), it failed to provide sufficient information to constitute a valid application by not stating to where the items were being moved (paragraphs 50-52 of his decision letter). Before Singh J, the Secretary of State accepted that that did not make the application invalid; but he submitted that the Inspector's error was immaterial, because he did in fact proceed to consider and determine the merits of the appeal against the refusal of listed building consent.

53. Singh J refused this ground of challenge, giving the following reasons:

> "101. In my judgment Mr Hunter is correct in that submission. Even if, strictly speaking, there was an error of law in this regard by the Inspector, I have come to the clear conclusion that the Court should exercise its discretion to refuse any remedy. After the hearing in the present case the parties provided a helpful 'Agreed Note on Remedies'. They are agreed that the Court has a discretion to withhold relief in a section 65 appeal, which should be approached on the same basis as an application under section 63. In practical terms that means that the Court should exercise its discretion in accordance with the well-known principle set out by the Court of Appeal in Simplex GE (Holdings) v Secretary of State for the Environment (1989) 57 P & CR 306 and refuse a remedy only if it is satisfied that the outcome would inevitably have been the same even if the error had not occurred.
>
> 102. That approach has been applied in the context of enforcement notice appeals: see e.g. Kestral Hydro v Secretary of State for Communities and Local Government [2015] EWHC 1654 (Admin) [2015] LLR 522, at [69] (Holgate J).
>
> 103. In my judgement it is clear that the Inspector would have reached the decision that he did in any event. That was inevitable since he did in fact consider the merits of the section 20 appeal before him despite his view that the application for listed building consent had not been made in the proper form…".

54. Mr Harwood however submits that the legal error on the part of the Inspector infected the conclusion on the merits; and, but for that error, his conclusion may have been different and it ought to be quashed.

55. The Inspector dealt with the merits at paragraphs 52-56 of his decision letter. In short, the items had been removed, sold and their whereabouts were unknown. As a consequence, their settings as listed buildings had been "completely lost or undone" and their special architectural and historic features had been put at risk. The Inspector considered that the harm to these assets could only be described as "substantial", and there were no evidenced public benefits from their removal. In those paragraphs, the Inspector dealt with the merits of the case in some detail and with some care.

56. This ground is an appeal against the exercise of the judge's discretion; and, in my view, it must fail. Singh J clearly had legitimate and proper grounds for concluding, as he did, that that analysis and conclusion on the merits by the Inspector had not been materially affected by the identified legal error.

57. For those reasons, this ground too fails.

Conclusion

58. Therefore, essentially for the reasons given by Singh J, in my view the Inspector made no material error of law. Subject to my Lords, I would refuse this appeal.

Lord Justice Coulson :

59. I agree.

Lord Justice McCombe :

60. I agree entirely with the decision of Hickinbottom LJ that this appeal should be dismissed, essentially for the reasons which he gives.

61. I confine my further comment simply to his paragraph 38 where he deals with my own decision in Chambers v Guildford Borough Council [2008] EWHC 826 (QB); [2008] JPL 1459. I agree with what my Lord says as to the real issue that arose in that case. As for my "observations" in paragraphs 27 and following, I do not think it is necessary to say anything further today, feeling (as I do) that it is best to leave anything arising out of those paragraphs to an occasion when they are of more significance than they are in the resolution of the present appeal.