Landmark Chambers

Hampshire CC and curtilage

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

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- 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

- 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.

- 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

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- 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

- 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*

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- 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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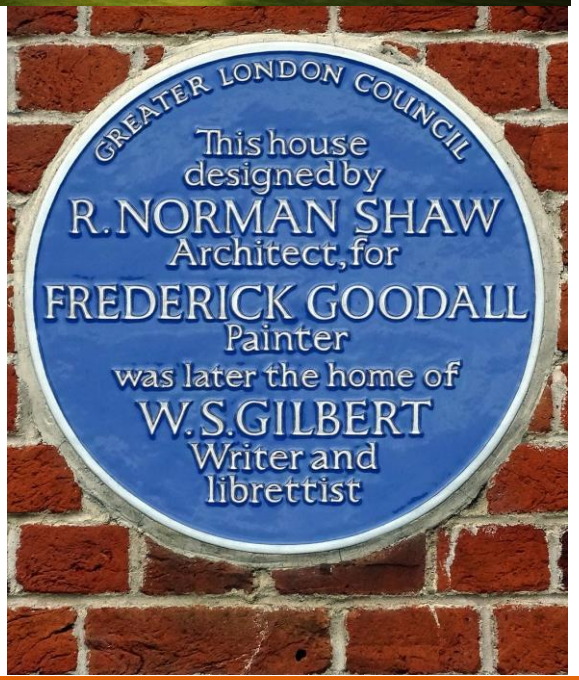
- In ***Debenhams Plc*** Lord Keith at p. 403 held that s. 1(5) implied an *ancillary relationship* to the listed building –
  - ”All these considerations, and the general tenor of the second sentence of [s. 1(5)] satisfy me that the word 'structure' is intended to convey a limitation to such structures 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*

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- ***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)*

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- 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.