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## IHBC GUIDANCE NOTES

### **Dill v Secretary of State for Housing, Communities and Local Government and another [2020] UKSC 20 – Summary**

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*This is one of a series of occasional Guidance Notes published by The Institute of Historic Building Conservation (IHBC). IHBC Guidance Notes offer current and recent guidance into topics that we consider crucial to the promotion of good built and historic environment conservation policy and practice. The Notes necessarily reflect knowledge and practice at the time they were developed, while the IHBC always welcomes new case examples, feedback and comment to [research@ihbc.org.uk](mailto:research@ihbc.org.uk) for future revisions and updates.*

#### **Introduction**

1. This note offers a description of the case of *Dill v Secretary of State for Housing, Communities and Local Government and another* [2020] UKSC 20 determined in the Supreme Court on 20 May 2020 and a discussion of the implications of the judgment.

2. The case addresses important questions about:

- Whether an inspector considering an appeal under section 20 or section 39 of the Planning (Listed Buildings and Conservation Areas) Act (The Listed Building Act) can consider whether or not something on the list is a “building”
- The interpretation of “building” for the purposes of the Planning (Listed Buildings and Conservation Areas) Act 1990.

3. The case concerned objects or structures that are listed in their own right rather than falling within the curtilage of a Listed Building by virtue of S. 1 (5) of the Listed Building Act, but the judgment may equally have implications for determining the status of objects and structures falling within the curtilage of a listed building.

4. The case arose from the removal of a pair of Grade II listed C18 urns from the grounds of Grade II listed Idlicote House in Warwickshire and was the result of a unique set of circumstances that created “a perfect storm”:

- i) The owner of the urns had stated that he was unaware that they were listed
- ii) Historic England was unable to locate the paperwork associated with their assessment of the objects that informed the decision to list them.

- iii) There was no option to review the listing because Historic England will not undertake review where enforcement procedures are in progress, resulting in the matter being pursued through the appeal process.

## **Background**

5. The piers/urns were not commissioned for Idlicote House but were originally located at Wrest Park, Bedfordshire in the late 1720s. The urns were relocated several times by the appellants' family and ended up, in 1973, at Idlicote House.

6. Unknown to their owners, they were both individually listed in 1986 under Section 32(1) of the Planning Act 1962. The list descriptions, both identical, are:

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

7. The current owner, the son of the previous owner who had acquired the urns, sold them in 2009 at auction for £55,000 allegedly to fund repairs to the house. They were subsequently exported.

8. The Local Authority became aware that they had been removed in 2014 and after correspondence with the owner a retrospective application for listed building consent (LBC) was submitted and refused in February 2016 and an enforcement notice was issued for their return in April 2016.

9. Appeals against the refusal of LBC and the Enforcement Notice were considered together, and both were dismissed in January 2017.

10. The Inspector's decisions were challenged 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 under section 65 of the Act in relation to the planning enforcement notice. Both applications were refused on all grounds.

11. The applicant appealed the conclusions of the High Court on the following grounds:

- i) Ground 1: The Inspector erred in considering that he could not question the validity of the listing of the items as listed building.
- ii) Grounds 2 and 3: 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* [\[1\]](#) are irrelevant.
- iii) Ground 4: The Inspector erred in finding the retrospective LBC application to be invalid for failing to provide sufficient information by not stating where the urns were being moved to.

12. In November 2018 Mr Dill also lost in the Court of Appeal. That Court ruled that being on the register of Listed Buildings was enough to give a structure (such as the urns) protection and the validity of the listing could not be challenged in disputes over enforcement. Giving the lead judgment in *Dill v The Secretary of State for Communities and Local Government & Anor* [2018] EWCA Civ 2619, Hickinbottom LJ noted the inspector had decided it was not open to him to go behind the fact that an item was a listed building.

The judge upheld Singh J's view in his High Court judgment that:

*"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."*

### **Supreme Court Judgment**

13. Last year the appellant was granted the right to appeal to the Supreme Court. Its judgment was issued on 20th May 2020 allowing the appeals and referring the case back to the Planning Inspectorate. The Supreme Court focused on the Listed Building Enforcement Notice and the two matters considered were:

- i) 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"?
- ii) What criteria are relevant in determining whether an item appearing in its own right in the statutory list is a "building" for this purpose: whether concepts of property law (the extent and purpose of a structure's annexation), or the criteria set out in *Skerritts of Nottingham Ltd v Secretary of State for the Environment, Transport and Regions (No 2)* [2000] JPL 1025 (size, permanence and degree of annexation) are relevant.

14. With respect to the first issue they found in favour of the appellant, finding that:

- i) Section 20(1)(a) confers the right to appeal to the Secretary of State against a refusal of consent by a local planning authority. 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"

- ii) 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 compiled 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 (in other words a Planning Inspector) who has the same powers as the Secretary of State.

- iii) Fairness requires that the grounds of appeal should extend to “every aspect of the merits” of the enforcement action in planning cases, it is hard to see why it should be any different in the context of a listed building enforcement notice. In particular whether a particular structure constitutes a “building”, and its erection a “building operation”, is an issue which may undoubtedly be raised in the context of a planning enforcement appeal.
- iv) A listed building means “a building which is ...included in [the] list ...”. Thus, there are two essential elements: it must be both a “building” and it must be “included in [the] list ...”. If it is not in truth a building at all, there is nothing to say that mere inclusion in the list will make it so.

15. With respect to the second issue, there is a great deal of analysis of past case law in relation the definition of “building” for the purposes of the Planning and Listed Buildings Legislation. The key points made were:

- i) This case has revealed a disturbing lack of clarity about the criteria which have been adopted by the relevant authorities, not only in this instance but more generally, in determining whether free-standing items such as these are regarded as qualifying for listing protection, whether as “curtilage structures”, or as separate “buildings” as in this case.
- ii) To be included on the Statutory List a structure or item has to be a building

*[24] “A listed building means “a building which is ...included in [the] list ...”. Thus, there are two essential elements: it must be both a “building” and it must be “included in [the] list ...”. If it is not in truth a building at all, there is nothing to say that mere inclusion in the list will make it so.”*

- iii) The test for determining whether a structure or item constitutes a building for the purposes of the Planning (Listed Buildings and Conservation Areas) Act 1990 is the same as the Planning test outlined in *Skerritts* (size, permanence and degree of annexation).

### **Implications**

16. The main implications would appear to be:

- i) Appellants can now in effect seek a review of an object or structure’s status as a listed building, including whether it is a “building” for the purposes of the Listed Buildings Act, through the Appeal process.

*[17] “...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 compiled 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 (in other words a planning inspector) who has the same powers as the Secretary of State."*

- ii) The *Skerritts* criteria for identifying a "building" of size, permanence and degree of physical attachment are also relevant in the listed building context
- iii) With respect to street furniture (for example statues/war memorials/gravestones/telephone and pillar boxes/street lights/bollards) there is a probably a sufficient degree of permanence to their installation to suggest they would meet the *Skerritts* criteria.
- iv) However, with respect to more portable objects currently included on the Statutory List such as garden ornaments and furniture there is more uncertainty as to how they would fare under the *Skerritts* criteria.
- v) Historic England and Department for Digital, Culture, Media and Sport have been urged to consider the criticisms made about the lack of reliable guidance in the existing publications on this subject in light of the judgment.
- vi) Regulations concerning the review of buildings on the statutory list could easily be amended to include whether the object or structure is a building in addition to consideration of whether they are of special architectural or historic interest.
- vii) It is not by any means certain that *Skerritts* is of full application in Scotland, where the law about adherence and annexation may be different.

IHBC Legal Panel

## ENDNOTES

1. *Skerritts of Nottingham Ltd v Secretary of State for the Environment, Transport and Regions (No 2)* [2000] JPL 1025