Easter Term
[2020] UKSC 20
On appeal from: [2018] EWCA Civ 2619

JUDGMENT

Dill (Appellant) *v* Secretary of State for Housing, Communities and Local Government and another (Respondents)

before

Lord Wilson
Lord Carnwath
Lady Arden
Lord Kitchin
Lord Sales

JUDGMENT GIVEN ON

20 May 2020

Heard on 10 March 2020

Appellant	*Respondent (1)*
Richard Harwood QC Catherine Dobson (Instructed by Shakespeare Martineau LLP (Birmingham))	David Elvin QC Guy Williams (Instructed by The Government Legal Department)
	Respondent (2) John Hunter (Instructed by Stratford- on-Avon District Council)

Respondents:-

(1) Secretary of State for Housing, Communities and Local Government
(2) Stratford-on-Avon District Council

LORD CARNWATH: (with whom Lord Wilson, Lady Arden, Lord Kitchin and Lord Sales agree)

Introduction

1. This appeal raises two important questions, one procedural and the other substantive, arising out of the decision of a planning inspector under the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the Listed Buildings Act"). It concerns the correct treatment of a pair of early 18th century lead urns (or "finials"), attributed to the Flemish sculptor John van Nost, each resting on a limestone pedestal of a slightly later date. The two vases, together in each case with its plinth, were described in the judgments below as "the items". I shall do the same. There is no doubt as to their artistic significance, which led to them being sold at auction in 2009 for £55,000. There is however a dispute as to whether they were properly treated as "buildings" under that legislation; but also a prior question as to whether such a dispute could and should have been addressed by the planning inspector in the proceedings before him.

Factual background

2. The items were originally at Wrest Park in Bedfordshire, owned by the first Duke of Kent. According to the 2009 auction particulars "Wrest Park … was one of the grandest and most admired gardens established in England in the first part of the 18th century". Apparently, a large plan of the garden by John Roque in 1735 showed the items flanking the entrance to the gardens. They remained at Wrest Park until 1939, when it was sold by the then owner, Mr J G Murray, who took various items of statuary, including these items, with him to Coles Park, Buntingford in Hertfordshire.

3. In 1954-55, following the death of Mr Murray, his estate was left to a trust, with his grandson, Major R P G Dill, as a lifetime beneficiary. In 1955-56, under Major Dill, Coles Park was sold and he took the items with him to the Dower House, Buntingford. Major Dill sold the Dower House in 1962, when he moved to Badgers Farm, Idlicote, Warwickshire, again taking the items with him. In 1973 he sold Badgers Farm and moved to Idlicote House. He again took the items with him and placed them on either side of a path in the gardens which had served as the front drive to the house since the 1820s. No alteration was made to the garden design to accommodate the items, which were free-standing. The piers were not attached to the ground and the urns were not attached to the piers.

4. In 1966 Idlicote House had been designated a Grade II listed building. In June 1986 the items were themselves added to the list under section 54 of the Town and Country Planning Act 1971. Each was described as follows in both of the list entries:

> "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 cherub's heads and flame finial."

The listing decision and paperwork on which it was based have not been found despite enquiries. Although notice of the listing was required to be given to the owner or occupier by the local planning authority, there appears to be no extant record of such a notice. However, in January1987 (six months after listing - the delay has not been explained) the items were entered on the local land charges register. The present owner, Mr Marcus Dill, acquired the house and the items in 1993. He was not aware of the listing of the items, and does not understand that his father, Major Dill, was aware of it.

5. In 2009 he removed and arranged for sale of the items at auction. English Heritage was notified in advance and was sent the auction catalogue (as a potential purchaser) but did not respond. It is understood that they have since been removed from the United Kingdom.

6. As to the physical qualities of the items, and the method of removal, I take the following (which I do not understand to be contentious) from Mr Dill's statement in the planning appeal:

> "The piers … consist of limestone pedestals of a slab rather than solid construction. Consequently they were not especially heavy. Together a pier and finial was 274cm high ...
>
> At Idlicote House the pedestals were resting on concrete slabs which were on the ground. They were not fixed to the slabs. The finials were also sitting on the pedestals without any attachment. The top of the piers can be removed. 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."

Procedural history

7. In 2014 the local planning authority became aware that the items had been removed and began correspondence with Mr Dill. On 29 April 2015 they wrote to Mr Dill informing him that listed building consent had been required for their removal and threatening formal action. On 17 June 2015 Mr Dill made a retrospective application for listed building consent. This was refused by the local planning authority on 11 February 2016. In response to consultation on the application, Historic England had advised that the grounds for listing "these structures" were the same as for any listing, that is their "special architectural and historic interest". They observed that:

> "Many garden items (as well as structures such as buildings relocated in open air museums), including statues and urns have been listed after they have been moved because they still qualify under that definition."

8. On 26 April 2016, the local planning authority issued a listed building enforcement notice requiring the reinstatement of the items at Idlicote House. Mr Dill 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". The appeals were considered together by a planning inspector appointed by the Secretary of State, who gave his decision dismissing the appeals in a letter dated 19 January 2017. He took the view, in summary, that the status of the items as "buildings" was established by the listing; that he could not reconsider that issue; and, that issues of property law or the so-called *Skerritts* tests of size, permanence and degree of annexation (see below) were irrelevant.

9. The view that the status of the item as a building was not open to challenge was upheld by Singh J in the High Court ([2017] EWHC 2378 (Admin)) and by the Court of Appeal ([2018] EWCA Civ 2619; [2019] PTSR 1214). In the leading judgment, Hickinbottom LJ (with the agreement of McCombe and Coulson LJJ) held:

> "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." (para 33)

He thought that view was supported by the statutory background, and was not displaced by any of the authorities relied on by Mr Harwood QC for Mr Dill. That conclusion made it unnecessary to consider the separate grounds relating to the correct test for categorisation of such items as "buildings" (paras 46-50). McCombe LJ (para 61), concurring, noted the possible conflict with the view expressed by him at first instance in *Chambers v Guildford Borough Council* [2008] EWHC 826 (QB); [2008] JPL 1459, but agreed with Hickinbottom LJ (para 38) that the real issue in that case was different.

10. Two issues are agreed as arising before the Supreme Court, in short:

> 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) (In so far as this issue arises) 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).

Legislation

11. The current statutory provisions are contained in the Listed Buildings Act. They are subject to minor variations in the same form as enacted in the Town and Country Planning Act 1968, and repeated in subsequent consolidations. For present purposes it is sufficient to refer to the current Act.

12. Section 1(1) requires the Secretary of State to compile lists of buildings of special architectural or historic interest. Section 1(5) 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 1 July 1948,
>
> shall … be treated as part of the building."

Subsection (5A) enables the list to indicate that particular objects or structures mentioned in subsection (5)(a) or (b) are "not to be treated as part of the building for the purposes of this Act"; or that any part or feature of the building is not of special architectural or historic interest.

13. In this judgment I shall refer to the second part of subsection (5) ("and for the purposes of …") as "the extended definition". I shall refer to objects or structures within paragraph (b) as "curtilage structures".

14. The word "building" is not separately defined in this Act. By section 91(2), except where the context otherwise requires, it has the same meaning as in section 336 of the Town and Country Planning Act 1990 which provides:

> "'Building' 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."

15. Section 7 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.

16. Section 8 provides for listed building consent to be granted by a local planning authority or the Secretary of State, and section 10 makes provision for the making of applications for such consent. Section 16(1) provides that the local planning authority or 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."

17. 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."

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. 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."

Section 63(1) provides for a challenge by way of application to the High Court on legal grounds.

18. Section 38 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 potentially 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; …"

19. Section 41(6):

"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. …"

Section 64 provides:

"The validity of a listed building enforcement notice shall not, except by way of an appeal under section 39, be questioned in any proceedings whatsoever on any of the grounds on which such an appeal may be brought."

Section 65 gives a right to appeal to the High Court on legal grounds against a decision of the Secretary of State or inspector on an enforcement appeal under section 39.

The first issue - is designation as a listed building conclusive?

20. Without disrespect to the courts below, I can deal with the first issue relatively shortly. The principles are not in doubt. As Mr David Elvin QC for the Secretary of State rightly accepts (in the words of his written submissions, citing *Boddington v British Transport Police* [1999] 2 AC 143):

> "The issue of statutory construction is subject to the rule of law that individuals affected by legal measures should have a fair opportunity to challenge these measures and to vindicate their right in court proceedings, and there is a strong presumption that Parliament will not legislate to prevent individuals from doing so."

The same principle is reflected in the European Convention on Human Rights article 6, under which an individual must "have a clear, practical opportunity to challenge an act that is an interference with his rights": *Bellet v France* CE:ECHR:1995:1204JUD002380594, para 36. However, as Mr Elvin also correctly submits, that principle needs to be read in the context of the particular statutory scheme in question (citing Lord Hoffmann in *R v Wicks* [1998] AC 92, 117B). In the present scheme, he submits, identification as a "building" is not one of the matters that can be questioned through the statutory appeal route; but the right to challenge the validity of the listing by judicial review provides the fair opportunity required by the principle.

21. *Wicks* is of particular relevance because it arose under the parallel enforcement provisions for breach of planning control. It concerned a prosecution for failure to comply with an enforcement notice for breach of planning control under the Town and Country Planning Acts. The relevant statute had a provision (in similar terms to section 64 of the Listed Buildings Act: see para 19 above) excluding challenges to the validity of an enforcement notice other than by the statutory appeal procedure. It was held that on a proper construction of the relevant provisions all that was required to be proved in the criminal proceedings for breach of an enforcement notice was that the enforcement notice issued by the local planning authority was formally valid, and that it was not open to the defendant to raise other public law challenges to its validity, such as bad faith, bias or procedural impropriety ("residual grounds"), by way of defence to the charge.

22. In my view that authority if anything supports the appellant's case. There was no issue but that the enforcement appeal could encompass every aspect of the planning case. As Lord Hoffmann said (p 122D):

> "I do not think that in practice hardship will be caused by requiring the residual grounds to be raised in judicial review proceedings. *The statutory grounds of appeal are so wide that they include every aspect of the merits of the decision to serve an enforcement notice*. The residual grounds will in practice be needed only for the rare case in which enforcement is objectively justifiable but the decision that service of the notice is 'expedient'… is vitiated by some impropriety. As Keene J said in the Court of Appeal, the owner has been served with the notice and knows that he has to challenge it or comply with it. His position is quite different from that of a person who has contravened a byelaw, who may not have heard of the byelaw until he contravened it." (Emphasis added)

If in that context 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, as will appear from the cases considered later in this judgment, 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. As those cases show, it may raise difficult issues of factual judgement, which are much more appropriate for a planning inspector than for the High Court in judicial review. No convincing reason was offered as to why the question whether something qualifies as a "building" should be treated in a different way in the listed building context. One advantage of allowing these issues to be dealt with through the planning appeal route is that it enables the inspectorate, with appropriate legal advice, to develop workable criteria on a case-by-case basis.

23. Mr Elvin points to the desirability of certainty as to the identification of listed buildings, which may have to be considered as material considerations in various statutory contexts. He cites for example Lord Hope of Craighead in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR 1447:

> "The Act assumes, in regard to the 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."

That of course is correct as a general proposition, but it says nothing about the circumstances in which a listing may be questioned. Similar uncertainty attaches to the possibility of a successful appeal (under ground (a)) on the grounds of lack of special interest. Against the desirability of certainty, is the fact that (unlike breach of planning control) contravention of listed building control is a criminal offence,

whether or not an enforcement notice is served. In that context the starting point must be the presumption that the accused should be able to raise any grounds relating to the lawfulness of the proceedings on which the prosecution is based (see eg *R v Wicks* at p 106 per Lord Nicholls of Birkenhead).

24. Furthermore, Mr Elvin's argument overlooks the form of the statutory definition of "listed building". 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. Section 7 prohibits the demolition of a "listed building", and section 9(1) makes contravention of section 7 a criminal offence. There is nothing to prevent the accused arguing that the item on the list is not a "building" and so not within the definition. Short of a specific provision that the listing is to be treated as "conclusive" for such purposes, there is no reason to displace the ordinary presumption that the accused may raise any relevant defence. Notably there is no equivalent to the exclusivity provision of section 64.

25. If that is the case under section 9, then the same approach applies to the grounds of appeal under section 39. Under section 39(1)(c) the appellant can argue that the "the matters alleged to constitute a contravention of section 9(1) … do not constitute such a contravention". If there would be no contravention of section 9(1), because the relevant item is not a "building", there is no reason why the same point cannot be taken under section 39. If that ground is made out on the facts, the Secretary of State has power to deal with the matter by removing it from the list. There might be a theoretical question whether this would operate retrospectively, so as to preclude any further action based on the original listing. However, I do not see that as a practical problem, given that there would be an authoritative decision by the Secretary of State to cancel the listing, specifically on the grounds that the items were not properly categorised as buildings. That would carry with it the clear implication that they should never have been listed in the first place, and should be sufficient in practice (if not in law) to protect the owner against any further proceedings.

26. Accordingly, I would allow the appeal on the first issue. In principle (subject to consideration of the second issue), this means that the enforcement appeal must be remitted to the Secretary of State for redetermination.

27. I am conscious that there is before us also an appeal in respect of the application for listed building consent. Although this may in theory raise different legal issues, I do not understand them to have any practical consequences in this case which cannot be dealt with in the context of the enforcement appeal. Subject to

any submissions to the contrary, it should be possible to leave that aspect to be dealt with so far as necessary by agreement between the parties.

The second issue - were they buildings?

28. On one view, if the appeal has to be remitted to the Secretary of State in any event, it might be better to leave the second issue for consideration at that level. However, there is in my view a need for more general guidance as to the legal principles in play. 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. Even now, in spite of the issue having been raised by Mr Dill in 2015, and after a planning appeal and three court hearings, he has had no official explanation of the criteria by which it was determined that these items qualified as "buildings".

29. It is useful to begin by looking at the wide variety of items which may fall to be considered, before going on to look at the development of the relevant legislation, and case law, and its application to different categories, including the items in issue in this case.

Garden and Park Structures

30. A good idea of the significance and variety of structures under potential consideration for listing purposes is given by a publication by Historic England *Garden and Park Structures - Listing Selection Guide* (December 2017). This is one of 20 listing selection guides issued by Historic England, which has adapted and updated the selection guides originally issued by English Heritage in 2011. The *Garden and Park Structures* guide overlaps with other listing selection guides, including those for commemorative structures and for street furniture (including items such as fountains). The introduction explains its purpose:

> "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." (p 1)

31. The following pages contain a fascinating historical survey of the role of such structures in designed landscapes, parks and gardens since medieval times. It makes clear the extraordinary variety of objects or structures apparently considered for listing, by no means limited to features such as "balustraded terraces". I take three examples:

i) Wrest Park itself, as it was in the 19th century (p 5), is given as an example of reversion to "the severely formal fashions" of the 17th and earlier 18th centuries:

> "with terraces, balustrades, vases, basins and fountains, elaborate steps and gateways, seats, summerhouses, and statuary."

Some of these latter features, it is said, were "industrially produced, moulded from terracotta, Coade stone, or cast iron". A photograph shows the restored parterre at Wrest Park, with formal planting and some large classical statues, which appear to be an intrinsic part of the design. We were informed by Mr Elvin that these are not fixed in place other than by their own weight, and are separately listed as "buildings" in their own right. On the same page, the guide also refers to raised terraces, which were sometimes "decorated with elaborate flower urns". At p 10 the guide refers to statuary, urns and other features such as sundials and astronomical devices which adorned formal gardens; and at p 11 it states that even when these have been moved from elsewhere, pre-1850 examples will generally merit designation.

ii) A more recent item is shown by a photograph of Henry Moore's Reclining Woman (1947), at Dartington Hall, a large stone sculpture resting on a substantial stone base, said to be listed Grade II (p 7).

iii) Perhaps the most unusual example is the group of -

> "27 life-size Crystal Palace dinosaurs (listed Grade I), survivors from an exceptional High Victorian pleasure ground created in the early 1850s, [which] show the singularity park features could sometimes attain." (p 18)

32. Although the guide gives much useful information about the assessment of the historic interest of such objects and uses the word "structures" to describe them, it contains no discussion of the criteria by which they are to be treated as "buildings" within the statutory definition, nor in particular whether they are thought to qualify

in their own right, or under the extended definition. I will return to this issue in the next section of this judgment.

33. In considering the correct legal and policy approach to such garden and park structures, it is also important to bear in mind the limited protection available for the gardens and parks themselves. It was not until 1983 that there was any statutory recognition of the need to identify and safeguard historic gardens. Section 8C of the Historic Buildings and Ancient Monuments Act 1953, introduced by paragraph 10 of Schedule 4 of the National Heritage Act 1983, provided for the preparation by English Heritage of "a register of gardens and other land situated in England and appearing to them to be of special historic interest". No doubt for practical reasons, there is no statutory protection for the garden layout itself nor any restriction on works within a registered garden, but being on the register may be required to be taken into account as a material factor in a range of planning decisions. There is no protection for garden and park structures as part of a registered garden as such. If the garden is attached to a listed building, they may be protected as curtilage structures, under the extended definition, but as part of the listed building, not of the garden.

Identifying a "building" - legislation and case law

34. As has been seen, although listed building control has a long history, dating back before the Town and Country Planning Act 1947, the provisions were substantially recast in the Town and Country Planning Act 1968. (There is a detailed history in *Shimizu (UK) Ltd v Westminster City Council* [1997] 1 WLR 168, 175 per Lord Hope. That case itself was concerned with a relatively narrow issue relating to the scope of "demolition" and is of no direct assistance in this case.)

35. Protection is given to "buildings" as defined. For this purpose, as already noted, the statute adopts the ordinary planning definition of "building" as including a "structure or erection". The one significant variation comes in the extended definition, that is the provision that certain "objects or structures" are to be "treated" as part of the building, if they are either "fixed to the building" or "within the curtilage of the building" and "form[ing] part of the land …" (subject, since 1986, to an exception for those placed since July 1948). It is important to note that the extended definition does not result in the item in question becoming a listed building in its own right; it merely results in its being treated as part of the building to which it is attached, or in whose curtilage it stands. That is to be distinguished from the circumstances in which a garden object or structure may qualify for listing as a building in its own right.

36. Unfortunately, this critical distinction is blurred in the other official guidance to which we were referred. That is a Department for Digital, Culture, Media and Sport publication *Principles of Selection for Listed Buildings* (November 2018). This states:

> "For the purposes of listing, a 'building' includes any structure or erection and a 'listed building' includes any object or structure: (a) fixed to it; or (b) within its curtilage which, although not fixed to it, forms part of the land and has done so since before 1 July 1948, unless the list entry expressly excludes such things. In some cases, such as for works of art or sculptures, it will be necessary to consider the degree and purpose of annexation to the land or building to determine whether it may be listed under the 1990 Act." (para 6)

This acknowledges (rightly as will be seen) the relevance of "the degree and purpose of annexation" in considering whether a work of art or sculpture forms "part of the land" under the extended definition. But the second sentence might be taken to confuse that issue, relevant to whether the sculpture is to be treated as part of a building already on the list, with the distinct question whether the sculpture itself "may be listed under the 1990 Act" as a separate entry. This depends upon whether the sculpture constitutes a "building", in the sense of being a structure or erection within the statutory definition, in relation to which the degree and purpose of annexation to the land may be relevant factors but are not necessarily conclusive.

37. In what follows it will be convenient to consider first the application of the extended definition to free-standing objects such as sculptures, before considering the criteria by which they might be treated as "buildings" in their own right.

Garden objects or structures under the extended definition

38. The extended definition, first introduced in the Town and Country Planning Act 1968, seems to have been designed to clarify the position following the case of *Corthorn Land and Timber Co Ltd v Minister of Housing and Local Government* (1966) 17 P & CR 210. *Corthorn* concerned a building preservation order made under section 30(1) of the Town and Country Planning Act 1962, prohibiting the removal from a listed building of various portrait panels, wooden panels, a large wood carving of the Crowning with Thorns, and a large wooden equestrian figure of St George and the Dragon. The issue was whether they were part of the listed building. In deciding that they were, Russell LJ applied a property law approach, saying:

> "It is not, in my judgment, open to serious doubt that these items were all fixed and annexed in their places as part of the overall and permanent architectural scheme and intended in every sense to be annexed to the freehold …" (p 217)

In *Debenhams plc v Westminster City Council* [1987] AC 396, 408-409 Lord Mackay of Clashfern confirmed that the word "fixed" in the extended definition was to have "the same connotation as in the law of fixtures … so that any object or structure fixed to a building should be treated as part of it", thereby "put[ting] beyond question the matter that was decided by Russell LJ in the *Corthorn* case …".

39. *Corthorn* was not concerned with objects or structures within the curtilage of a listed building. We were not referred to any contemporary information as to the derivation of that part of the extended definition in the 1968 Act. It can be assumed to have been a recognition of the important part often played by such objects in the overall architectural composition or setting of a listed building, even though the architectural quality of the curtilage structure itself is not part of the test. The requirement that they should "form part of the land" is clearly designed to tie this part of the definition, like the first part, to real property concepts under the common law.

40. It is not known what if any assumptions would have been made in 1968 about how the common law would treat statues or other ornamental objects resting only by their own weight. Reliance may have been placed on the then current edition of *Megarry & Wade, The Law of Real Property*, 3rd ed (1966) which stated:

> "Statues, figures, vases and stone garden seats have been held to become part of the land because they are essentially part of the design of the house and grounds, even though standing by their own weight."

This was supported by a footnote reference to *D'Eyncourt v Gregory* (1866) LR 3 Eq 382, but with a cautionary note: "the authority of this decision is not great; see *De Falbe* [1901] 1 Ch 523, at 531, 532".

41. Some years after the 1968 Act the treatment of such objects in real property law was considered by the Court of Appeal in *Berkley v Poulett* [1977] 1 EGLR 86. The dispute was about certain pictures and other objects which, it was said, should pass as fixtures on the sale of a house. The disputed items included a statue and sundial in the garden. The court was agreed that the sundial was a chattel, but there was disagreement as to the sculpture. Scarman LJ, in the leading judgment (pp 88-

89), with which Stamp LJ in substance agreed (p 96), explained that, following *Leigh v Taylor* [1902] AC 157:

> "The answer today to the question whether objects which were originally chattels have become fixtures, that is to say part of the freehold, depends upon the application of two tests: (1) the method and degree of annexation; (2) the object and purpose of the annexation."

Having discussed the principles and the other objects in dispute, he turned to the statute and sundial. The latter was "a small object" which had been detached from its pedestal many years earlier and thus "ceased to be part of the realty". Of the statue he said:

> "The statue was heavy. It weighed 10 cwt and stood 5 ft 7 in high on its plinth. There is an issue as to whether it was cemented into the plinth or rested on its own weight. The question is not decisive, for, even if it was attached by a cement bond, it was (as events proved) easily removable. However, upon the balance of probability, I agree with the Vice-Chancellor in thinking it was not attached. The best argument for the statue being a fixture was its careful siting in the West Lawn so as to form an integral part of the architectural design of the west elevation of the house. The design point is a good one so far as it goes: it explains the siting of the plinth, which undoubtedly was a fixture. But what was put upon the plinth was very much a matter for the taste of the occupier of the house for the time being. We know that at one time the object on the plinth had been a sundial. At the time of the sale it was this statue of a Greek athlete. The plinth's position was architecturally important: it ensured that whatever stood on it would be correctly positioned. But the object it carried could be whatever appealed to the occupier for the time being. Sundial or statue - it did not matter to the design, so long as it was in the right place - a result ensured by the plinth which was firmly fixed into the ground. Being, as I think, unattached, the statue was, prima facie, not a fixture, but, even if it were attached, the application of the second test would lead to the same conclusion."

42. Goff LJ took a different view of the statue (p 90) which had been placed at a "focal point … in the grounds", not for better enjoyment as a chattel but "for the permanent enhancement of the beauty of the grounds", a case "where resting upon

its own bulk was a sufficient annexation". On that point he regarded *D'Eyncourt v Gregory* (1866) LR 3 Eq 382 as still authoritative, not overlooking the criticisms in *In re De Falbe* [1901] 1 Ch 523, which in his view related to the inferences drawn from the facts, rather than "the principle that a thing may be a fixture because it is part of the architectural design".

43. As I read the judgments the difference was not as to the principle, but as to its application to the particular facts. This view accords with the current 9th edition of *Megarry & Wade*, (2019) para 22.010, which repeats the relevant passage from the earlier editions, with the same case references, but adds:

> "… the principle that an object resting on its own weight can be a fixture if it is part of the overall design of the property has been approved: *Berkley v Poulett* [1977] 1 EGLR 86 at 89."

Although that is not a precise formulation, it follows in my view that a statue or other ornamental object, which is neither physically attached to the land, nor directly related to the design of the relevant listed building and its setting, cannot be treated as a curtilage structure and so part of the building within the extended definition.

44. Further confirmation of that approach can be found in a much more recent judgment of the High Court. It was held that a Henry Moore bronze sculpture "Draped Seated Women", weighing 1,500 kg and resting on a plinth, which in 1962 had been placed by the London County Council in a new housing estate, under its policy of promoting works of art in public places, remained a chattel rather than part of the land (*Tower Hamlets London Borough Council v Bromley London Borough Council* [2015] EWHC 1954 (Ch); [2015] LGR 622). The judge (Norris J) noted as material that the sculpture was "an entire object in itself", resting by its own weight on the ground, and able to be removed without damage, and that it did not form part of an integral design of that estate (para 17).

Garden objects or structures as "buildings"

45. I turn to the criteria which might be relevant in determining whether such an object or structure may qualify as a listed building in its own right.

46. Both sides have referred to the so-called *Skerritts* test, that is "a three-fold test which involved considering size, permanence and degree of physical attachment". That formulation was derived from the judgment of Schiemann LJ in the Court of Appeal in *Skerritts of Nottingham Ltd v Secretary of State for the Environment, Transport and the Regions (No 2)* [2000] JPL 1025, para 39. It can in

turn be traced back through the leading planning case on the definition of "building" in the planning statutes (*Barvis Ltd v Secretary of State for the Environment* (1971) 22 P & CR 710, DC), and to the judgment of Jenkins J in a rating case *Cardiff Rating Authority v Guest Keen Baldwin's Iron and Steel Co Ltd* [1949] 1 KB 385.

47. The *Cardiff* case was concerned with a different expression (plant "in the nature of, a building or structure") in a different statutory context. In *Barvis* and *Skerritts*, however, the decisions turned on whether the item in question qualified as a "building" for the purpose of the definition in the relevant planning statute, which is the same definition (now contained in section 336 of the Town and Country Planning Act 1990) which applies for the purposes of the Listed Buildings Act. They refer to the *Cardiff* case for that purpose. The meaning of "building" was relevant to deciding whether the operations in issue qualified as "building operations", as part of the statutory definition of "development".

48. The *Cardiff* case is relevant principally for a passage in the judgment of Jenkins J (pp 402-403) from which the three-fold test was later derived. In addressing the question whether certain apparatus was or was in the nature of a building or structure, he said (as quoted by Bridge J in giving the leading judgment in *Barvis* (1971) 22 P & CR 710, 716):

> "The general range of things in view consists of things built or constructed. I think, in addition to coming within this general range, the things in question must, in relation to the hereditament, answer the description of buildings or structures, or, at all events, be in the nature of buildings or structures. That suggests built or constructed things of substantial size: I think of such size that they either have been in fact, or would normally be, built or constructed on the hereditament as opposed to being brought on to the hereditament ready made. It further suggests some degree of permanence in relation to the hereditament, ie, things which once installed on the hereditament would normally remain in situ and only be removed by a process amounting to pulling down or taking to pieces. I do not, however, mean to suggest that size is necessarily a conclusive test in all cases, or that a thing is necessarily removed from the category of buildings or structures or things in the nature of buildings or structures, because by some feat of engineering or navigation it is brought to the hereditament in one piece. ... The question whether a thing is or is not physically attached to the hereditament is, I think, certainly a relevant consideration, but I cannot regard the fact that it is not so attached as being in any way conclusive against its being a building or structure or in the nature of a

> building or structure. ... Nor can I regard the fact that a thing has a limited degree of motion in use, either in relation to the hereditament or as between different parts of itself, necessarily prevents it from being a structure or in the nature of a structure, if it otherwise possesses the characteristics of such."

As Bridge J held in *Barvis* at pp 716-717, in a judgment with which Lord Parker CJ and Widgery LJ agreed, if one substitutes throughout that passage the phrase "structure or erection" for the phrase "structure or in the nature of a structure", this guidance "is fully applicable to the considerations which govern the application of the definition in the Town and Country Planning Act 1962" (ie in section 221 of that Act, now re-enacted as section 336 of the 1990 Act).

49. *Barvis* was concerned with alleged development comprising the laying of a length of steel track and the mounting thereon of a moveable tower crane some 89 feet in height. The court upheld the Secretary of State's view (disagreeing with the planning inspector) that it involved a building operation. Bridge J, giving the leading judgment, cautioned against reliance on the application of tests from real property law as to what amount to fixtures, rather than focusing on the statutory definition in the Act. He asked himself if the crane when erected was a "building" as defined, and said that if it was:

> "I should want a great deal of persuading that the erection of it had not amounted to a building or other operation. 'Building' includes any structure or erection. If, as a matter of impression, one looks objectively at this enormous crane, it seems to me impossible to say that it did not amount to a structure or erection."

He found nothing in the statutory context to displace that impression:

> "I would be very surprised if the planning legislation did not give to a planning authority the opportunity to control this kind of operation, and, in my judgment, this crane was not the less a structure or erection by reason of its limited degree of mobility on its rails on the site, nor by reason of the circumstance that at some future date, uncertain when it was erected, the appellants contemplated that it would be dismantled and the rails and beams broken out of their concrete beds and that it would be transported in pieces to other sites where it would be re-erected for use in contract work." (pp 715-716)

That view was confirmed by reference to the passage cited above from the judgment of Jenkins J in the *Cardiff* case. Bridge J distinguished a previous planning case, *Cheshire County Council v Woodward* [1962] 2 QB 126, DC, in which it was held that the Minister of Housing and Local Government had not erred in finding that the placing on a site of a mobile hopper and a mobile conveyancer, some 16 to 20 feet high, did not amount to development.

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.

51. The case itself related to a marquee erected in the grounds of a hotel, and retained on site between February and October each year. On appeal against an enforcement notice, the inspector had concluded that it was to be regarded as "a building for planning purposes" and that its erection was a "building operation" requiring planning permission. In respect of its size and method of assembly he said:

> "The marquee is a substantial object which is about 40m long, including the additions, and some 17m wide and the ridge height is around 5m … There is no direct evidence before me of the assembly method or period, but from my inspection, I consider that it took several days with a number of erectors and amounted to a sizable and protracted event. I imagine that its dismantling follows much the same process. It is assembled on site, not delivered ready made. I do not regard its considerable bulk to be de minimis in relation to planning controls."

It was sitting on "square metal plates which are spiked to the soil beneath" and appeared to be "held in place by its own considerable weight, the internal bracing and the ground spikes". The timber floor was supported by metal ground beams resting on the land. He concluded:

> "I conclude that, as a matter fact and degree, the marquee, due to its ample dimensions, its permanent rather than fleeting character and the secure nature of its anchorage, is a structure which is to be regarded as a building for planning purposes …"

The main issue in the Court of Appeal was whether the marquee had a sufficient degree of permanence to qualify as a building. The court held that the inspector had been entitled to arrive at the conclusion that he did.

52. None of these cases is of direct assistance in deciding how to categorise an object of artistic significance in the listed building context. 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. *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.

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.

55. For completeness I should note that no assistance is to be gained from another case mentioned by the inspector: *R (Judge) v First Secretary of State* [2005] EWHC 887 (Admin); [2006] JPL 996. The inspector cited Sullivan J's statement (para 17) that the treatment of items as a matter of property law was "wholly irrelevant". But that was said in relation to the quite different question whether the dismantled components of something which had unquestionably been a listed building could, by the process of dismantling, become chattels rather than "buildings" and thereby lose their statutory protection as such. Not surprisingly the court rejected that interpretation as wholly incompatible with the purpose of the legislation. It throws no light on the present issue.

56. At this point, it may be useful to consider how the *Skerritts* criteria might apply to the various forms of garden structure identified in the guide discussed in the previous section. In doing so I emphasise that we have not heard any detailed submissions on these matters. Nor were we shown any commentary which was critical of the existing guides from the Department for Digital, Culture, Media & Sport and Historic England. Taking the three examples selected above from the Historic England guide (para 31), the latter two are readily understandable. Even if the Dartington statue is resting by its own weight, the plinth appears as a substantial built structure, and together they appear to form an integral design for the site in which it is placed. Similarly, the Crystal Palace dinosaurs, having regard to their relative size and permanence (whether or not physically attached to the land) could reasonably have been seen as buildings in their own right. But the first of the examples is more debatable. It is hard to see how it could be appropriate to include without discrimination items such as "vases, basins … seats, ... and statuary", without any indication of how they might be brought within any part of the definition, whether as separate buildings or as curtilage structures under the extended definition. In particular, most ordinary forms of garden vases or seats would be unlikely to have become part of the land in real property terms, nor would they naturally be regarded as "buildings" under any of the tests considered above.

The present case

57. I return finally to the two items at issue in this case. It is not, as I understand it, suggested that they would have qualified for protection as curtilage structures within the extended definition. I agree. It seems clear that, whatever might have been the position had they remained in Wrest Park, the vases and their piers did not fall to be treated as part of the listed building of Idlicote House. Not only had they had been placed on the land after July 1948, but also, being freely movable, there is no suggestion that they were related in any relevant way to the design of that particular listed building and its setting. The applicable real property tests were not satisfied.

58. How then might they fare under the *Skerritts* criteria: size, permanence and degree of physical attachment? Again in the absence of full submissions anything we say can only be provisional. There are arguments both ways. On the one hand, it can be said, they comprised a set of elements which had to be assembled together (a "structure"), required a small crane to move them and to assemble them (as an "erection"), and were intended to occupy a stable and near permanent position in situ (with greater permanence than the marquee in *Skerritts*). On the other hand, they are not particularly large, compared for example with the items considered in the three planning cases. It may also be relevant that the vases themselves, which are the real focus of the special interest, are physically separate. If they had been resting on the ground, rather than a plinth, I doubt if it would have occurred to anyone that they might qualify as buildings. Relevant also is the apparent ease of their installation and removal (as compared for example to the works in *Skerritts*). These are issues which can only be satisfactorily investigated and determined in the context of a renewed appeal.

Conclusion

59. The second agreed issue asks us simply to determine whether the *Skerritts* criteria for identifying a "building" are also relevant in the listed building context. For the reasons given above I would answer that question in the affirmative. As indicated above, I do not think it is possible or appropriate for us to reach a concluded view on how those tests should be applied in this case. Not only do we not have a full view of the facts, but the issue also involves questions of factual evaluation which are best dealt with by a planning inspector in the context of a renewed appeal. I would in any event urge those responsible on the part of the Secretary of State to consider the criticisms I have made about the lack of reliable guidance in the existing publications on this subject.

60. I understand that this will be deeply frustrating for Mr Dill. There is as I understand it no suggestion that he acted other than in good faith in disposing of items which he believed to be his own disposable property, and had been so treated by his family for several decades. Since this problem was first drawn to his attention by the local authority in April 2015 he has been attempting to obtain a clear ruling on that issue. On the view I have taken, that opportunity has been wrongly denied to him for five years. Even if his appeal were ultimately to fail, the practicability of restoring the vases to their previous location in the grounds of Idlicote House is uncertain. Accordingly, this court's formal order for remittal should not prevent the respondents from giving serious consideration to whether in all the circumstances it is fair to Mr Dill or expedient in the public interest to pursue this particular enforcement process any further.