

IN THE HIGH COURT OF JUSTICE  
QUEEN'S BENCH DIVISION  
PLANNING COURT

Royal Courts of Justice  
Strand, London, WC2A 2LL  
20/03/2017

Before:  
HIS HONOUR JUDGE JARMAN QC

Between:

**KAREN**

**BARTON**

**Appellant**

- and -

**SECRETARY OF STATE FOR COMMUNITIES  
AND LOCAL GOVERNMENT**

**BATH AND NORTH EAST SOMERSET COUNCIL** Respondent

Mr Mathew Reed QC (instructed by Thrings Solicitors) for the claimant  
Miss Isabella Tafur (instructed by Government Legal Department) for the defendant  
The interested party did not appear  
Hearing dates: 8 March 2017

HTML VERSION OF JUDGMENT

**HH JUDGE JARMAN QC:**

1. This is an appeal under section 289 of the Town and Country Planning Act 1990 (the principal Act) which raises a small but important point as to the proper approach in deciding whether works to a gate and wall in a conservation area amount to alteration (which is permitted development) or demolition (which is not).
2. The appeal is from a decision dated 2 September 2016 of an inspector appointed by respondent, the Secretary of State for Communities and Local Government, whereby an enforcement notice served by the interested party as the local planning authority (the authority) on the appellant was upheld. The inspector made her decision on the written representations of the parties.
3. The notice which was issued on 4 May 2016 alleged a breach of planning control as unauthorised demolition of a curtilage listed wall in the Bath Conservation Area (BCA) and required the appellant to reinstate the wall to the North Upper Landsdown Mews at the rear of Dixon Gardens to match the remaining section of the wall. The inspector amended the allegation by deleting the term 'curtilage listed' and further amended the requirements to include reference to reinstating a pedestrian gate, lintel and stonework which had been removed in September 2015 (the works). The inspector found that such removal amounted to demolition and not alteration. The gate itself was some 1m wide and the stonework removed amounted to a further 2.5 meters of a wall which run in total to some 25 meters, although only that section removed is within the control of the appellant.
4. Mr Reed QC, for the appellant, whilst accepting that whether works amount to demolition or alteration is a matter of fact or degree, nevertheless submits that the inspector in this case made an error of law by focusing on what was removed rather than considering the works in the context of the whole wall. Alternatively, he submits that even if that were the proper approach, the inspector having found that the works amounted to demolition should have gone on to consider whether they might also amount to alteration. Finally, he submits that the inspector erred in failing to have regard to the fact that the works were part of a process of alteration.
5. The background can be stated briefly. The gate and the section of demolished wall are part of the southern boundary to extensive walled gardens laid out to the north of Upper Landsdown Mews as part of William Beckford's landscaping undertaken in the 1820s. The gate provided the only access, and hence only pedestrian access, from the highway at Upper Landsdown Mews to a parcel of land within the control of the appellant on which she wants to build a dwelling house. In 2014 she applied for permission to carry out this development showing the creation of a new vehicular access to replace the pedestrian gate.
6. In order to understand the points taken on the appeal regard must be had to the statutory scheme which applied at the time of the enforcement notice, but also to the regime which applied previously.
7. Section 55 (1) and (1A) of the principal Act provides that development means, amongst other things, building operations which includes the demolition of buildings. Under the interpretation section, Section 336(1), except in so far as the context otherwise requires, "building" includes any structure or erection, and any part of a building, as so defined..."
8. Section 55 (2)(g) provides that the demolition of any description of building specified in a direction given by the Secretary of State shall not be taken for the purposes of the 1990 Act to involve development of land.
9. The current direction under that subsection is The Town and Country Planning (Demolition-Description of Buildings) Direction 2014 (the 2014 Direction), paragraph 3(1)(b) of which provides so far as material that the demolition of the whole or any part of any gate or wall shall not be taken for the purposes of the 1990 Act to involve development of land. However, paragraph 3(2) provides that the descriptions of building in the previous sub-paragraph do not include the whole or any part of any gate, fence, wall, or other means of enclosure in a conservation area.
10. Accordingly, the present position is that the demolition of the whole or part of this gate or this wall being in the BCA involves the development of land. Such was also the case under paragraph 2 of the previous direction made in 1995 under section 55(2)(g) of the principal Act. This is to be contrasted with paragraph 2(1)(b) of that direction, which provided that the demolition of any building in a conservation area was not to be taken for the purposes of the principal Act to involve development of land. In respect of this gate and wall therefore, as the works amount to development, permission for the development is needed under the principal Act.

11. That is now dealt with in England by the Town and Country Planning (General Permitted Development) (England) Order 2015/596 (the 2015 GPDO). Article 2 defines "building" as including any structure or erection and includes any part of a building, subject to certain exceptions which do not apply here. Article 3 grants planning permission for classes of development set out in Schedule 2. Part 11 of that schedule deals with heritage and demolition. Article 3(9) provides that except as provided in Classes B and C of Part 11, Schedule 2 does not permit any development which requires or involves the demolition of a building, "but in this paragraph "building" does not include part of a building."
12. Class B provides that any building operation consisting of the demolition of a building is permitted development, but B1 provides that development is not permitted by Class B if the demolition is "relevant demolition" for the purposes of section 196D of the principal Act.
13. Class C permits development of "Any building operation consisting of the demolition of the whole or any part or any part of any gate, fence, wall or other means of enclosure." However, by C1, it is provided that development is not permitted by Class C if the demolition is "relevant demolition" for the purposes of section 196D of the principal Act.
14. That section was added to the principal Act by the Enterprise and Regulatory Reform Act 2013 (the 2013 Act). So far as relevant, section 196D(3) provides that "relevant demolition" means the demolition of a building that is situated in a conservation area in England. On the face of it, because of the definition in section 336(1) of the principal Act, "building" in this context would include part of a building.
15. However, Mr Reed submits that the context requires otherwise, and that "building" in 196D(3) does not include part of a building. In doing so, he does not refer to context as it appears in the principal Act as amended, but rather upon the wider context of the statutory regime relating to the control of works to conservation areas and listed buildings.
16. He relies heavily upon the House of Lords case of *Shimizu (UK) Ltd v Westminster City Council* [\[1997\] 1 WLR 168](#), which was cited extensively in the appellant's written representations before the inspector but not referred to by her. The issue in that case was whether the claimant's application for listed building consent for the removal of certain structures within a listed building was an application for the alteration or extension of that building within the meaning of section 27(1)(a) of the Planning (Listed Buildings and Conservation Area) Act 1990 (the 1990 Act).
17. The lead speech was given by Lord Hope. Lord Cook also gave a short speech. Lord Griffiths dissented. The other members agreed with Lord Hope without adding anything substantive. At that time, Part 1 of the 1990 Act dealt with listed buildings and Part 2 dealt with conservation areas. Lord Hope at page 179D said that the word building where it appears on its own must unless the context requires otherwise be given the extended meaning which it has in terms of section 336 of the principal Act.
18. At page 180E, he said the definition of "listed building" in section 1(5) of the 1990 Act, namely "a building which is for the time being included in a list compiled or approved by the Secretary of State" the extended meaning of "building" could be applied without difficulty so that the expression "listed building" can be taken to mean a building or part of a building which is for the time being included in the list. However, when it came to section 7 which provided for the control of works in respect of listed buildings, the matter was different. That section provided:

"Subject to the following provisions of this Act, 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."

19. At page 181A Lord Hope said this:

"I do not think it is necessary to give the word "building" in the expression "listed building" its extended meaning in order to make sense of section 7. On the contrary, the wording of section 7 suggests that the extended meaning of "building" has no function here. All one needs to identify, in order to apply its provisions, is the building or part of a building which is for the time being in the list as a listed building—in other words, is the structure a listed building? If it is, its demolition – assuming for the moment that this word means the removal of the entire building – would be bound to affect its character as a building of special architectural or historic interest, because if it were not of that character it would not be in the list. Works of alteration or extension on the other hand may or may not have that effect, hence the qualification which applies to these words for the purposes of section 7."

20. One of the submissions made in that case was that such an interpretation would be inconsistent with the regime for the control of demolition in conservation areas which was at that time dealt with by section 74 of the 1990 Act. Subsection (1) provided that a building in a conservation area shall not be demolished without consent of the appropriate authority, and subsection (3) provided that various sections in Part 1 of the 1990 had effect in relation to buildings in conservation areas.
21. Lord Hope, in a passage at page 183C, which Mr Reed accepts did not form part of the reasoning for deciding that case, said:

"I do not think that there is any inconsistency, so long as it is appreciated that a listed building can consist of part of a building. Buildings in conservation areas are put on the same footing as buildings of special architectural or historic interest, or any part of a building which has that character, which is for the time being included in the list. In the context of section 74(1), subject to any exceptions or modifications in this regard which may have been prescribed under subsection (3) of that section, the reference to the demolition of a building in a conservation area must be taken to mean the removal of a whole building.... "
22. Lord Hope towards the end of his speech referred to a planning policy guidance note (PPG 15) issued by the Department of the Environment in September 1994 to the effect that the demolition of part of a building should be regarded as falling within the scope of conservation area control, and then said:

"It follows from what I have said that the advice in that paragraph will require to be reconsidered. Subject to such exceptions or modifications as may have been prescribed by regulations under section 74(3) of the Act of 1990, it will no longer be correct to say that, because of the definition of "building" in the principal Act the demolition of part of a building in a conservation area should be regarded as falling within the scope of conservation area control. In the context of section 74 of the Act of 1990, which requires to be read together with the legislation relating to listed buildings in Part I of that Act, the reference to demolition of a building means the demolition of the whole building. But advice can still be given to the effect that the question what constitutes the demolition of the whole building is a question of fact and degree which will need to be decided on the facts of each case."
23. PPG 15 was amended as a result of that decision to state that works for the demolition of an unlisted building in a conservation area must also involve the total or substantial destruction of the building concerned.
24. In *R (on the application of Save Britain's Heritage) v Secretary of State for Communities and Local Government and others* [2011] EWCA 334, the Court of Appeal decided that demolition of a building was capable of constituting a project to which Council Directive 85/337/EC applies. That directive dealt with the environmental effects of public and private projects which are likely to have significant effects on the environment.
25. As a result of that decision, section 74 of the 1990 Act was amended by the 2013 Act to remove the system of conservation area consent as it applied to buildings in conservation areas in England, although that section continues to apply in Wales. Accordingly, in England, instead of having a separate system of conservation area consent, planning permission is now required under the principal Act. The 1995 GPDO then in force, which provided that the demolition of a building was, subject to certain conditions, permitted development, was replaced by the 2015 GPDO. That, as has been referred to above, provides that the demolition of certain buildings in a conservation area in England is not permitted development and therefore requires planning permission.
26. Mr Reed submits that there is nothing in section 196D which indicates any different approach to the meaning of demolition of buildings in a conservation area. Any disparity between the assessment of buildings in a conservation area on the one hand and of listed buildings on the other would be contrary to the approach of the House of Lords in *Shimizu* in applying the two regimes consistently. The need for consistency is a positive indicator that a different interpretation of "building" is required for the purposes of section 196D. Such disparity is also contrary to intention behind the amendments to the principal Act as set out in the explanatory memorandum to the 2013 Act, namely to continue the current regime of control. Moreover, had such a disparity been the intention it would only have been necessary to remove all works of demolition from Class B Part 11 of the 2015 GPDO.
27. Miss Tafur, for the Secretary of State, in a departure from the departmental approach previously expressed, submits that the principal Act, the 2014 Direction and the 2015 GPDO all make clear that demolition of part of a gate or wall in a conservation area is not permitted development. In giving the 2014 Direction, the Secretary of State made it clear that this sort of demolition did amount to development. Had the intention been that only demolition of the whole gate or wall would amount to development that it would have been an easy matter to provide that expressly. It should not be the approach of the court to say whether there is benefit in a

consistent approach in respect of control or works to conservation areas and listed buildings, but to interpret the statutory provisions as they now stand. The House of Lords decision in *Shimizu* was not considering such provisions and did not consider the 1995 Direction or the 1995 GPDO.

28. In my judgment, the starting point must be to consider the definition of "building" in section 336(1) of the principal Act. Parliament in enacting the statutory amendments in 2013 must be taken to be aware of that definition, and must be taken to have intended that it would apply to the word "building" in section 196D(3) unless "the context otherwise requires."
29. There is nothing in the wording of section 196D, or indeed of any provision of the principal Act, which requires a different interpretation of the word building to that provided for by section 336(1) in my judgment. The submissions of Mr Reed acknowledge as much by referring to a far wider context. That contrasts with what led the House of Lords in *Shimizu* to conclude that a different interpretation of the statutory provisions then under consideration was indicated in that case. There, it was the precise wording of section 7 of the 1990 Act which led the majority to conclude that the extended meaning of the word "building" has no function there. The same cannot be said of the current statutory provisions. The extended meaning does have a function in section 196D, and that is to provide that the demolition of part of a gate or wall is not permitted development in a conservation area.
30. The question is whether the points raised by Mr Reed are sufficient to require a different interpretation to that provided by section 336(1). In my judgment, they are not. I accept Miss Tarfur's submission that it is a matter of interpreting the statutory provisions rather than assessing the need for consistency between the control of conservation areas and listed buildings. Whereas the control of works to both were formerly dealt with under the 1990 Act in an approach which was heavily interrelated, the former now has been taken out of that regime and is subject to the planning regime. There is a difference of principle between listed buildings, where one building or part of a building as listed is under consideration, and conservation areas where a wider area is under consideration.
31. In my judgment, the inspector made no error of law in focusing on what had been removed, rather than upon what had been removed in the context of the wall as a whole.
32. In advancing his alternative way of putting this ground, Mr Reed accepts that before the inspector the parties adopted polarised positions as to whether the works amounted to demolition or alteration, and no one suggested to her that if she concluded that the works amounted to demolition she should then go onto consider whether they might also amount to alteration. He relies upon Article 3(9) of the 2015 GPDO.
33. At paragraph 11 of her decision letter, the inspector said this:

"Whether the works are demolition or an alteration is a matter of judgment in this case. However, the common meaning of the word "alteration" is a change or modification or action to make (a structure or thing) different. It seems to me that these both imply the adaption of the existing structure rather than its removal. In contrast the work demolition means the act of pulling down, to lay in ruins or destroy a structure."

34. She then referred to the fact that the appellant and her advisor used the word demolition in respect of the works in her application, and then continued:

"Taking these altogether, and coupled with the absence of any work other than the removal of the pedestrian gate, lintel, and stonework, it appears to me that the building operations fall fairly and squarely into the description "to lay in ruins." Hence as a matter of fact and degree they constitute a act of demolition."

35. In my judgment, it is clear from these passages and from the use of the phrase "fairly and squarely" that the inspector regarded the works as being purely works of demolition without any aspect of alteration. She had visited the site. She was entitled to come to the judgment she did, and that conclusion is not vitiated by a failure to spell out that even though the works were works of demolition they did not at the same time amount to works of alteration.
36. The final ground of appeal is that the inspector did not engage with the question whether, if the works were part of an overall project that was intended to be carried out, they would fall within Class A of Part 2 of the 2015 GPDO, which permits development of the erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure.
37. The inspector referred to this argument in paragraph 9 of her decision letter and continued:

"To support this argument the appellant says that her intentions have been to alter the wall and gates and in evidence of this she submitted a planning application. The proposed development was described in the application form as "To demolish a small section of the wall to obtain access."

38. In paragraph 10 the inspector examined the reasons why the application was withdrawn and concluded that it was probable that it was withdrawn because of adverse comments by the authority's conservation officer, a conclusion to which she was entitled to come. The works took place in September 2015 and the enforcement notice was not served until May 2016. The inspector's site visit took place in August 2016. In paragraph 13, already referred to, the inspector noted the absence of any work other than the removal of the pedestrian gate, lintel and stonework.
39. In my judgment, the inspector was clearly aware of the argument that the works were part of a process of alteration but concluded that the works amounted to demolition, having regard in particular to the absence of any work other than the removal of the gate the lintel and the stone work. Mr Reed relied upon the appellant's statement of case before the inspector, which stated that after the authority issued a planning contravention notice, works were continued as simple gardening activities to tackle the management and effective clearance of the site "although works to complete the access arrangement as a whole had not been progressed significantly in themselves before the enforcement notice was issued."
40. Mr Reed suggested that this was clear evidence that the works stopped because of the enforcement notice. Such a notice, in the absence of a further stop notice, does not of itself give rise to a legal requirement to stop work. In my judgment that statement does not have the clarity contended for. It is true that the inspector dealt with this argument very shortly, but I am satisfied that she did deal with and rejected it, which on the evidence before her she was entitled to do.
41. Accordingly, none of the grounds are made out and the appeal is dismissed. Counsel helpfully indicated that in the absence of agreement on consequential matters, those could be determined on the basis of written submissions. If such submissions are necessary, they should be filed within 7 days of handing down.