

Challenge Fencing Limited v Secretary of State for Housing Communities and Local Government v Elmbridge Borough Council



Positive/Neutral Judicial Consideration

Court

Queen's Bench Division (Administrative Court)

Judgment Date

8 March 2019

Case No: CO/2801/2018

High Court of Justice Queen's Bench Division Planning Court

[2019] EWHC 553 (Admin), 2019 WL 01227994

Before: The Honourable Mrs Justice Lieven DBE

Date: 8/03/2019

Hearing dates: Thursday 28th February 2019

Representation

Mr Jonathan Clay (instructed by Charles Russell Speechlys LLP) for the Claimant.

Mark Westmoreland Smith (instructed by Government Legal Department) for the Defendant.

Approved Judgment

Mrs Justice Lieven:

1. This is an application under [section 288 of the Town and Country Planning Act 1990](#) ("the 1990 Act") made against the decision of the Secretary of State, given by his Inspector, Simon Hand MA, in a decision letter dated 5 June 2018 ("DL") to dismiss an appeal against Elmbridge Borough Council's ("the Council") refusal to grant a certificate of lawful use or development for the replacement of a hard surface within the curtilage of the industrial/ warehouse building A ("Building A") to be used for the purpose of the undertaking concerned, as being permitted development under Class J of Part 7 to Schedule 2 to the Town and Country Planning (General Permitted Development) (England) Order 2015 (S.I. 2015/596) ("the GDPO") on land at Lian Yard, Redhill Road, Cobham, Surrey, KT11 1EG ("the Site").

2. Permission was initially refused on the papers by John Howell QC (sitting as Deputy High Court Judge). The application was renewed orally and refused by Rhodri Price Lewis QC (sitting as a Deputy High Court Judge); permission was then granted by Lewison LJ on 22 November 2018.

3. The site is roughly 'L' shaped. The northern section is grassed, the central section contains building 'A', surrounded by a concrete hardstanding and the south-western section has two concrete strips leading to separate accesses in the northern and southern corners of this part of the site, with the land in between being unmade ground. The Lawful Development Certificate ("LDC") application related to all the hardstanding and the access strips, but not the rest of the site.

4. An LDC had been granted on the site by the Council in 2013 for "whether planning permission is required for the continuous use of buildings as B1 and B8". The certificate was for "the existing use of Buildings A and D at Lian Yard, Redhill Road, Cobham for uses falling within use classes B1 and B8". Building B was demolished after 2013, so the only building left on the site was Building A.

5. Class J of GPDO is headed "hard surfaces for industrial and warehouse premises" and states;

"Development consisting of-

The provision of a hard surface within the curtilage of an industrial building or warehouse to be used for the purpose of the undertaking concerned...."

6. The Claimant submitted three statutory declarations from the owner of the land and director of the company, Mr Stewart-Clark, and one from a manager with the company Mr Scott.

7. The Inspector rejected the appeal on the grounds that the area of land for which the certificate was sought did not fall within the curtilage of the building (Building A); and that the hard surface was not be used for the requisite purpose. Issues/ Grounds One to Five advanced before me relate to the curtilage issue, and the final issue or ground relates to the purpose of the undertaking issue. However, Mr Clay for the Claimant accepts that if he fails on the curtilage grounds then it matters not whether he succeeds on the purpose of the undertaking issue.

8. The Decision Letter (DL) is as follows (I will refer to paragraphs in the Decision Letter as "DLx"):

i) DL4-8 deal with the history of the site. At DL4 the Inspector records that the history of the site was contentious. He refers to the appellant's statutory declaration as to the fact that the appellant (now claimant) began to use the pre 2016 area of hardstanding for storage of fencing and wood products. In 2013-15 Building A was completely refurbished and then the hardstanding was replaced. The intention had been to use that area, but the Council visited the site and said that the hardstanding was outside the area of permitted development rights. Mr Stewart-Clark then made the LDC application.

ii) DL 5 states:

"Given this history of continuous use it seems a little odd that in 2013 the appellant made an application for a LDC for the use of building A for B1 and B8 purposes. However, at the hearing local residents explained there had been a previous LDC application in 2012 for a similar use, which they had vociferously opposed. They say the site had been abandoned and derelict for many years. This application was withdrawn and the 2013 one made without the knowledge of locals who were outraged when the Council granted the LDC. The planning history of the site also paints a different picture. While a lawful use for timber storage and milling seems to have been established in 1972, since then it seems that apart from the 2013 LDC, every application has been refused. This includes in 2000 a change of use from timber storage to B1 and in 2006 a LDC for the use of the land and buildings for B1, B2 and B8 uses. It seems therefore that a lawful use of the site as a whole for B1 and B8 purposes may not have been established"

iii) DL 6 refers to the fact that as part of the 2013 LDC application a plan was submitted showing an area called the "teardrop":

... A new plan was submitted, labelled "Proposed Block Plan" showing building A and an area, called the 'teardrop' in front of the building and extending down to the access in the southern corner of the site, which is shared with the builder's yard. This area was outlined in red and labelled "site boundary specific to application buildings and associated circulation space", and "access and circulation spaces shown shaded". The certificate issued makes no reference to this plan other than to confirm it is the plan attached to identify the land.

7. It is difficult to understand what the purpose of this plan was except to denote an area of land associated with buildings A and D for which an LDC was being sought to confirm their use for B1 and B8 purposes. The appellant suggested that it would be unreasonable to read the LDC in any other way and I have some sympathy with this view. But it does suggest there was uncertainty as to what the lawful use of the land as a whole was. However, setting aside what everybody thinks the site has been or not been used for, the only evidence before me is the 2013 LDC and the plan. Therefore the starting point for this appeal is that building A and the teardrop area of land shown on the plan attached to the certificate can be lawfully used for the purposes of B1 and B8. I do not know what the lawful use of the rest of the site is and make no further comment on it.

iv) At DL8 he set out the words of Class J and correctly said "the issue therefore is to define the curtilage of Building A and determine what use is made of it".

v) At DL9-13 the Inspector dealt with the curtilage issue, and said that the case law said that this was a matter of fact and degree to be decided on a case by case basis. Then he said in DL9 " *In this case the appellant argues the entire site forms the curtilage of building A. Whereas the Council says it is, at best, the smaller teardrop shaped area of land that was defined in an LDC application in 2013.*"

vi) At DL10:

"The site is large and building is modest in size.... With the 2013 LDC application another plan was provided showing buildings A, B, C and D and a further plan submitted with the application to retain the hardstanding shows a different, larger building C. The appellant suggests these were all movable or temporary buildings that were taken down to allow the hardstanding to be laid, with the intention of returning some of them once the yard began work again. They were thus all ancillary to building A and stood within its curtilage. I have no real evidence about these buildings, but building C could have had its own curtilage, and other buildings on the site before that could too. I say this only to suggest that the curtilage of buildings on the site could have grown and shrunk over time depending on the buildings themselves and the uses they were put to. It does not follow that because building A is the only one left its curtilage automatically covers the entire site. Indeed I have considerable difficulty accepting this proposition".

vii) In DL11 -13 he said:

11. The courts have held in *Skerritts* that the concept of smallness is not relevant in determining the size of the curtilage. In that case it was held that a substantial listed building could have a substantial curtilage. In *Lowe*² the court held that the concept of curtilage is not restricted in size, but must be fairly described as being part of the enclosure of the house to which it refers. In that case, another listed building appeal, the court held "it might include accommodation land such as a small paddock close to the house. But it cannot possibly include the whole of the parkland setting in which *Alresford Hall* lies, nor the driveway along which the fence was erected". In my view while size and smallness are not part of the definition of curtilage the courts are suggesting that proportionality can be. Curtilage is not necessarily the same as the planning unit or all the land in the ownership of one person. In this case it would be excessive to consider that the whole of *Lian Yard* formed the curtilage of the modest building A, by virtue of it being the only building left on the site. Although there are no boundaries within the site, much of it is not being used in conjunction with the building and has no functional link to it. In my view therefore the curtilage of building A is not the whole site.

12. The 2013 LDC does not mention curtilage, and I accept that the curtilage of a building need not be on land that is lawfully in the same use as the building, but I consider the plan attached to the LDC is helpful in setting out the area of land that the applicant at that time thought was connected to the use of building A. There is quite clearly a functional link between the teardrop shape and building A and I have no doubt therefore this area of land is within the curtilage of building A. The appellant argues this was never demarcated on the site which may well be true. However, he also says the existing hardstanding (ie that on site when he took it over in 2009) covered more or less the same area. Another plan put forward with the LDC application is labelled "Historical Block Plan – all previously existing, and existing buildings and associated circulation space". This shows buildings A-D, the "circulation space", which I take to be hardstanding covering the teardrop area and extending around buildings C1 and C2 to the north and linking to both accesses. The appellant has said that when he took over the site the hardstanding was in poor shape, hence his desire to improve it. All this leads me to conclude that the teardrop shape shown on the Proposed Block Plan was all that was left of the hardstanding that was usable, hence its incorporation into the LDC as circulation space associated with building A and that it could, at the time, have been readily discernible on the site and was separate from the land around which was not hardstanding. Otherwise it would not have made sense to provide 2 plans with what would have been randomly drawn areas of circulation space. That was clearly not the intention of either plan. Thus, it seems to me reasonable to assume the teardrop shape and access link shown on the Proposed

Block Plan form the curtilage of building A. 13. I think it might well have been quite reasonable for the appellant to have squared off the edges of the curtilage when laying the hardstanding, but he has done much more than this, extending the hardstanding to the north beyond where building D stood and to where building C stood and to the south where building B stood, as well as to the northern access. Even if I were to take a different view, and accept the historical block plan as showing the curtilage of building A, the hardstanding has still been extended significantly to the north and the northern access track is significantly larger. In both cases the hardstanding lies without the curtilage of building A and so is not permitted development according to Class J."

viii) At DL4- 16 the Inspector dealt with the purpose of the undertaking issue. The critical paragraph for this part of the challenge is DL15:

"However, setting that aside, the Council make the point that the hardstanding is massively in excess of what is necessary for an undertaking in the modest building A. They say the hardstanding should be ancillary to the building and it is clearly not. Class J is headed "hard surfaces for industrial and warehouse premises". J.(a) says "the provision of a hard surface within the curtilage of an industrial building or warehouse to be used for the purpose of the undertaking concerned". I can see why the Council consider the hardstanding is ancillary to the building, but there is no mention of it being ancillary in the Class. However, it seems clear to me that there must be an undertaking going on in an industrial or warehouse building that requires a hardstanding. In this case it seems to me the hardstanding is the prime requirement and the building an optional extra. Storage for a forklift, staff facilities and secure storage could all be provided in any number of ways and do not require building A, but the fencing business could not operate without a substantial and solid concrete hardstanding. This is what I think the Council meant by idea of the hardstanding being ancillary to the building. In that sense I agree, there was no undertaking in building A that required a hardstanding. There was a large site that required a hardstanding to operate as a base for a fencing company, a by-product of which was that a building would be useful. Consequently I do not think the second limb of Class J is met and so the hardstanding is not permitted development."

9. The Appellant argues the Inspector erred in law in the following respects:

- i) That the Inspector wrongly took into account the historic position on the land in order to identify the curtilage, whereas he should have focused on the position as at 2016 when the hardstanding was laid and the application was made.
- ii) The Inspector wrongly relied on the "teardrop" plan submitted in 2013, when it was not the purpose of that plan to identify the curtilage;
- iii) The Inspector failed to make findings on the 2016 situation when the work was done, and disregarded the evidence of the Appellant in this regard;
- iv) The Inspector misdirected himself as to the case law relating to the size of the curtilage;
- v) The Inspector erred by applying a bald comparison of scale, rather than going through the various factors set out in the caselaw.

10. There is extensive caselaw on the legal approach to the decision as to what is the curtilage of a building. Most if not all of this caselaw concerns the curtilage of listed buildings, and to the degree that slightly varied considerations may be in play when considering the curtilage of an industrial building for the purposes of the GPDO, I will deal with this below.

11. In *Att-Gen ex rel Sutcliffe v Calderdale BC (1982) 46 P. & C.R. 399* at 407, Stephenson LJ identified three factors which must be taken into account in determining what constitutes the "curtilage" of a building in any given case:

"Three factors have to be taken into account in deciding whether a structure (or object) is within the curtilage of a listed building ... whatever may be the strict conveyancing interpretation of the ancient and somewhat obscure word 'curtilage'. They are (1) the physical 'layout' of the listed building and the structure, (2) their ownership, past and present, (3) their use or function, past and present. Where they are in common ownership and one is used in connection with the other, there is little difficulty in putting a structure near a building or even some distance from it into its curtilage."

12. Lord Donaldson MR explained the approach to be taken to curtilage in *Dyer v Dorset CC* [1989] 1 Q.B. 346 at 355B:

"The question of determining the extent of the curtilage] is a question of fact and degree and thus primarily a matter for the trial judge, provided that he has correctly directed himself on the meaning of 'curtilage' in its statutory context."

13. At 358B–G in *Dyer*, Nourse LJ further discussed the meaning of curtilage by reference to the Oxford English Dictionary definition:

"A small court, yard, garth or piece of ground attached to a dwelling-house, and forming one enclosure with it, or so regarded by the law; the area attached to and containing a dwelling-house and its outbuildings."

14. He then accepted the proposition drawn from the authorities that "an area of land cannot properly be described as a curtilage unless it forms part and parcel of the house or building which it contains or to which it is attached" (358D–E).

15. In *Skerritts of Nottingham Ltd v Secretary of State for the Environment, Transport and the Regions* [2001] Q.B. 59; [2000] J.P.L. 789, the Court of Appeal noted that it is the relationship between the main dwelling and the land in question which is relevant when considering function/use. Walker LJ at p.66J–67 E said as follows:

"In my view the decision in *Dyer*'s case [1989] QB 346 was plainly correct. As Nourse LJ said, at p 358:

"While making every allowance for the fact that the size of a curtilage may vary somewhat with the size of the house or building, I am in no doubt that the 100 acre park on the edge of which Mr *Dyer*'s house now stands cannot possibly be said to form part and parcel of Kingston Maurward House, far less of any of the other college buildings. Indeed, a park of this size is altogether in excess of anything which could properly be described as the curtilage of a mansion house, an area which no conveyancer would extend beyond that occupied by the house, the stables and other outbuildings, the gardens and the rough grass up to the ha-ha, if there was one."

"But in my respectful view this court went further than it was necessary to go in expressing the view that the curtilage of a building must always be small, or that the notion of smallness is inherent in the expression. No piece of land can ever be within the curtilage of more than one building, and if houses are built to a density of 20 or more to an acre the curtilage of each will obviously be extremely restricted. But Nourse LJ recognised that in the case of what the now-moribund *Settled Land Act 1925* refers to as a "principal mansion house"—which is what Grimsdyke was built as—the stables and other outbuildings are likely to be included within its curtilage.

I also respectfully doubt whether the expression "curtilage" can usefully be called a term of art. That phrase describes an expression which is used by persons skilled in some particular profession, art or science, and which the practitioners clearly understand even if the uninitiated do not. This case demonstrates that not even lawyers can have a precise idea of what "curtilage" means. It is, as this court said in *Dyer*'s case, a question of fact and degree.

In my judgment the deputy judge was mistaken in treating *Dyer*'s case as having such clear force as he thought it had. Not only was it concerned with dispropriatory legislation, but the *Calderdale* case, 46 P & CR 399 and the *Debenhams* case [1987] AC 396 were not cited, and the court's observations about smallness were not, on the facts of *Dyer*'s case [1989] QB 346, necessary to the decision. In the context of what is now *Part I* of the Act, the curtilage of a substantial listed building is likely to extend to what are or have been, in terms of ownership and function, ancillary buildings. Of course, as Stephenson LJ noted in the *Calderdale* case, 46 P & CR 399, 407, physical "layout" comes into the matter as well. In the nature of things, the curtilage within which a mansion's

satellite buildings are found is bound to be relatively limited. But the concept of smallness is in this context so completely relative as to be almost meaningless, and unhelpful as a criterion."

16. In *Lowe v Secretary of State* [2003] EWHC 537 (Admin); [2003] J.P.L. 1281, Sir Richard Tucker reviewed the relevant authorities and commented:

"Of the authorities cited to me, I derive most assistance from the decision of the Court of Appeal in *Dyer v Dorset CC*, and in particular the judgment of Nourse LJ in the passage already referred to at 358F–G. The expression 'curtilage' is a question of fact and degree. It connotes a building or piece of land attached to a dwelling house and forming one enclosure with it. It is not restricted in size, but it must fairly be described as being part of the enclosure of the house to which it refers. It may include stables and other outbuildings, and certainly includes a garden, whether walled or not. It might include accommodation land such as a small paddock close to the house. But it cannot possibly include the whole of the parkland setting in which Alresford Hall lies, nor the driveway along which the fence was erected. It could not sensibly be contended that the site of the fence was attached to the hall, or that it formed one enclosure with it, or was part of the enclosure of it."

17. In *Sumption v London Borough of Greenwich* [2007] EWHC 2776 Admin, Collins J was dealing with the issue of whether a wall and gates were within the curtilage of a listed building. The facts, as I understand them, were that the area of the building and gates had not historically been within what could properly be described as the curtilage, but consequential on the works being carried out, they had come within the curtilage. At [27] Collins J said:

"It would, in my view, be well nigh impossible to contend that once the wall was erected and the garden use confirmed so that the land did indeed form part of the garden of Hillside House it was not within the curtilage. It does not seem to me to be relevant that the garden use has not formally been approved. What matters is what is in fact the use being made of the land. It is clearly capable of being used by the IP and some work has been done, if only tidying. He has access to it and it is now part of the land attached to Hillside House and being enjoyed with it. I do not regard the historical lack of connection as being capable of carrying weight in the circumstances. The situation as at November 2006 is what is material. In reaching its decision, the Council must have proper regard to all material considerations and eschew all immaterial. I do not think it can be said to have done that and I am clearly of the view that the facts permit of only one conclusion, namely that the curtilage of Hillside House does extend over the land. The reference in the application to the "recently expanded garden" is accurate and is fatal to the grant of the certificate"

18. From these cases I draw the following propositions:

- i) The extent of the curtilage of a building is a question of fact and degree, and therefore it must be a matter for the decision-maker, subject to normal principles of public law;
- ii) The three *Stephenson* factors must be taken into account;
 - a) Physical layout;
 - b) The ownership past and present;
 - c) The use or function of the land or buildings, past and present.
- iii) A curtilage does not have to be small, but that does not mean that the relative size between the building and its claimed curtilage is not a relevant consideration. *Skerritts* p.67;
- iv) Whether the building or land within the claimed curtilage is ancillary to the main building will be a relevant consideration, but it is not a legal requirement that the claimed curtilage should be ancillary; *Skerritts* p.67C;
- v) The degree to which the building and the claimed curtilage fall within one enclosure is relevant, *Sumption* at para 17 and the quotation from the OED of curtilage as "A small court, yard or piece of ground attached to a dwelling house and forming one enclosure with it". In my view this will be one aspect of the physical layout, being the first of the *Calderdale* factors.

vi) The relevant date on which to determine the extent of the curtilage is the date of the application; but this will involve considering both the past history of the site, and how it is laid out and used at the time of the application itself; *Sumption* at [27]. It appears from *Sumption* that the Judge considered future intended use of the land or buildings may be relevant, but in my view some care would be needed in applying this proposition to the facts of a particular case. A developer cannot change the curtilage simply by asserting that s/he intends to use the site in a particular way in the future.

19. The approach that this Court should take to a challenge to a decision letter is extremely well known and set out by the Court of Appeal in *Barwood Strategic Land v East Staffordshire [2017] EWCA Civ 893* at [50] and the Supreme court in *Suffolk Coastal DC v Hopkins Homes 2017 UKSC 37*. The two most important principles relevant here are that the decision letter should be read as a whole, and the Court should not take an overly legalistic approach. Mr Clay sought to persuade me that because this was a challenge to an LDC, specifically on the grounds of the meaning of "curtilage", a stricter approach should be taken to the Inspector's reasoning and analysis. This was on the basis that the decision did not turn on the type of planning judgment which arose in *Hopkins Homes* or similar types of cases. However, as I have explained above the decision as to the curtilage is one of fact and degree and therefore necessarily involves a judgment by the decision maker. In my view the principles on the Court's approach to decision letters is no different in this case than in any other.

Issue One

20. Mr Clay on behalf of the Claimant argues that the Inspector wrongly looked at the historic situation on the land, rather than focusing on the position on the land as at 2016. He particularly criticises the Inspector's approach in DL10 and his consideration of the relationship between the buildings that were referred to in the 2013 plans and the land around.

21. In my view there is no error of law here. The starting point is, for all the grounds, that the determination of what is the curtilage is a question of fact and degree for the inspector taking into account the relevant considerations. That determination will involve a considerable amount of judgment by the inspector. Such a judgment is not identical to the type of planning judgment referred to in cases such as *Tesco Stores v Dundee CC [2012] 2 P&CR 9*, where the judgement is on matters such as the appropriateness of an alternative site, but it is still a judgment. Whether a piece of land (or another building) falls within the curtilage of a building will necessarily involve considerations of physical layout, scale and evidence on the nature of the uses, which are very largely ones for the Inspector. I therefore reject Mr Clay's argument that the Court should take a more intrusive approach to decisions on curtilage, than to planning judgments on matters such as appropriateness.

22. It is clear that the historic relationship between the land and the buildings is a relevant consideration, see the third *Calderdale* factor. Therefore the Inspector was entirely correct to take into account the evidence, including the plans, which had been submitted in 2013 to try to judge how the buildings and land related to each other at that time, in order to determine the curtilage in 2016. The Inspector was also entirely correct to consider the condition of the hardstanding in 2013 in order to understand how the use of the building had related to the surrounding area.

23. Mr Clay submits that the Inspector wrongly focused on the lawfulness of the buildings and use. He is correct to say that the issue of what is the extent of the lawful development, is not the same question as what is the extent of the curtilage, and that Class J is not concerned specifically with lawfulness of the use of the site. However, I do not accept that the lawfulness of either the uses or the buildings is necessarily irrelevant to judgments about the curtilage. What is, or is not, lawful is part of the planning history of the site and may well go to how the site was used, and therefore be relevant to the third *Calderdale* factor. All will depend on the circumstances of an individual case.

Issue Two

24. It follows from what I have said on issue one that I think that the Inspector did not err in having regard to the 2013 teardrop plan, or attaching weight to it. Mr Clay emphasises that the teardrop plan was not submitted to show the curtilage, and the 2013 LDC application did not apply for the certificate to cover any land outside the two buildings, so the issue of curtilage did not arise. The Inspector was fully aware that the 2013 LDC did not relate to the curtilage, see the first sentence of DL12. However, the teardrop plan was submitted by the Appellant to show how the site was being operated in 2013. As such it was obviously relevant to the third *Calderdale* factor, when the Inspector was trying to determine the curtilage as at the date of application in 2016.

25. It is clear from DL9 that the Inspector asked himself the right question, namely - was the curtilage the entire site? - and then considered the entire site in DL11.

Issue Three

26. It is alleged that the Inspector failed to take into account the Appellant's evidence, in particular the statutory declarations of Mr Stewart-Clark, as to what the use of the site had been and how it was intended to use it in 2016. There is no dispute that the burden was on the Appellant to satisfy the Inspector that the development was lawful.

27. The Inspector was not obliged to accept the Appellant's evidence, simply because the LPA, or third parties, had no evidence with which to contradict it. The decision of a planning inspector is an inquisitorial jurisdiction, and it was for the Inspector to weigh the evidence to decide whether s.195 was met. The Inspector is entitled to rely on his/her own judgement. It will often be the case in planning applications and appeals, particularly where there is no public access and limited views of a site, that the only evidence of what was happening on a site historically is from the owner/developer/applicant. However, it is trite that the Inspector does not have to accept this evidence, s/he must reach their own judgement, see *Kentucky Fried Chicken Ltd v Secretary of State for the Environment* 1977 JPL 727 and *Westminster Renslade v Secretary of State for the Environment* 1983 JPL 454. In this case the Inspector explained what material he had taken into account, and his view on the extent of the curtilage by reference to the size and use of the Building A. He therefore met the test in *South Bucks v Porter* [2004] 1 WLR 1953 at [36] for the standard of reasons in a planning decision letter.

Issue Four

28. Mr Clay submits that the Inspector misdirected himself in relation to "smallness". At DL11 in the middle of the paragraph the Inspector said, "*In my view while size and smallness are not part of the definition of curtilage the courts are suggesting that proportionality can be.*" Mr Clay argues that the Inspector took the wrong approach in DL11 by effectively requiring that a small building (Building A) could only have a small curtilage.

29. My analysis of the law on this point, is that the Court of Appeal in *Skerritts* make clear that there is no test that a curtilage has to be small, and to the degree something different was being suggested in *Dyer* it was wrong. Therefore, a small bungalow with a large garden may well have a large curtilage. However, that is an entirely different proposition from the one being advanced by Mr Clay, that relative size is an irrelevant consideration. It may well be the case that a large house would more easily be found on the facts to have a curtilage that extended to outbuildings, than if the house was a small cottage. Equally, there is no error of law in the Inspector taking into account the fact that Building A is a small building, and the curtilage being claimed is an extensive one. Further, it is plainly relevant that there were a number of other buildings on the site which were demolished, and which will in all likelihood have had their own curtilages.

30. Therefore the Inspector did not err in law by having regard to the relative sizes of Building A and the large area of the hardstanding being claimed as curtilage.

Issue Five

31. Mr Clay then argued that the Inspector failed to consider a number of essential elements in determining the curtilage. Firstly, the means of enclosure and the fact that the entire site was enclosed by one fence. In my view it is obvious the Inspector was well aware of this fact, particularly as he had been on the site twice. However, he made entirely clear why he took the view that the curtilage was not the entire area within the fence, even though there was no internal fence, or clear boundaries. Secondly, the fact that the site was in the same ownership and occupation. It is obvious the Inspector was well aware of this fact. The appeal was being brought by one party, and it was fundamental to the Appellant's case that the site was being occupied and used as one whole. Thirdly, that the land and building were intimately associated with each other and integral to each other. These are the words used in *Methuen Campbell v Walters* 1979 1 QB 525. Although the language used by the Inspector was slightly different, these concepts were key to the Appellant's case- that Building A and the land were being used together and related closely to each other. It was this case that the Inspector was addressing through the DL, so in my view it is wholly unrealistic to suggest the Inspector was not taking into account these matters. Fourthly, the fact of there being a single name – Lian Yard. It is obvious the Inspector was well aware of this. Fifthly, the way the site was being used showed it was a single planning unit. There may well be situations where the planning unit is different (and almost certainly larger) than the curtilage of the building. The two concepts are not the same, and many of the factors that go into defining the planning unit will not apply to determining curtilage. I therefore do not think the Inspector erred in this regard.

32. For these reasons I do not think the Inspector erred in law in respect of the curtilage issue. That means that the issue of the purpose of the undertaking does not need to arise, because if the Claimant fails on curtilage then the next part of Part J does not come into play. However, as the argument was advanced before me I will deal with it, albeit what I says is necessarily obiter.

Issue Six

33. Mr Clay that the Inspector erred in DL15 when he said that the hard standing had to be required for Building A. He argues that the test is merely that the hardstanding has to be used for the same purpose as takes place in the building. Mr Westmoreland Smith argues that there has to be an undertaking taking place in the building, for Class J to arise. The Inspector's conclusion in DL15 was that there was no undertaking in Building A that required a hardstanding at all, and therefore the terms of Class J were not met.

34. The Inspector's reasoning on this point in DL15 is not particularly clear. However, I think it is sufficiently clear that he was making a finding as to the use of Building A, and its relationship to the undertaking. In any event, as I have explained above, this issue does not strictly arise given that I have found against the Claimant on the curtilage arguments.

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