

SUMPTION v GREENWICH LBC

ADMINISTRATIVE COURT

(Collins J.): November 30, 2007¹

[2007] EWHC 2776 (Admin); [2008] 1 P. & C.R. 20

 Certificates of lawful development; Conservation areas; Curtilage; Delay; Enclosures; Listed buildings; Permitted development

H1 *Town and Country Planning—Certificate of Lawful Development—Town and Country Planning (General Permitted Development) Order 1995—permitted development—Class A development—curtilage—listed buildings—relevance of historical connection between land and listed building—ambit of curtilage—developments to a means of enclosure—delay—proposal for erection of boundary wall and gates in respect of listed building to replace existing fence—grant of certificate of lawful development—whether Class A development—whether development within curtilage of listed building—whether replacement of fencing by wall and gate classed as development to a gate or to a means of enclosure—whether undue delay*

H2 The defendant granted the interested party (the IP) a certificate of lawfulness pursuant to s.192 of the Town and Country Planning Act 1990 (the Act) on January 17, 2007. It certified that on November 28, 2006 the erection of a boundary wall and gates under one metre in height, replacing existing fencing, in respect of Hillside House, 13 Crooms Hill, Greenwich, a Grade II listed building in a conservation area, would have been lawful within the meaning of the Act. The reasons given for the grant were that the proposed development conformed to the criteria of the Town and County Planning (General Permitted Development) Order 1995 (GDPO), Pt 2, Minor Operations, Class A. The claimants, residents on the other side of Crooms Hill opposite Hillside House, lodged a claim on June 8, 2007, having become aware of excavation works commencing on June 5, 2007. They obtained an interim injunction preventing any work continuing, in exchange for a cross-undertaking in damages.

H3 The claimants argued: (1) that the wall would involve development within the curtilage of Hillside House, a listed building and; (2) that it would involve development to a gate, fence, wall or other means of enclosure surrounding a building, both of which were excluded from Class A of the GDPO. Reliance was placed on the land's physical proximity to the listed building, its enclosure by means of a fence and a reference in the application to the erection of a boundary wall and gates to Hillside House.

¹ Paragraph numbers in this judgment are as assigned by the court.

- H4 The defendant and the IP argued that the decision, on the facts, that the development in issue did not fall within the curtilage of Hillside House was unassailable, and could only be challenged if shown to have been irrational in the *Wednesbury* sense. This assessment was supported by the absence of a historical connection between land on which the wall was to be erected, acquired in 2004, and the listed building as well as the absence of any grant of permission for a change of use of the acquired land from nil use to garden use. Further, the requirement in Sch.2, Pt 1, A.1(D) of the GDPO that development be “to” a gate, excluded development which envisaged the removal of a fence and its replacement. The IP argued further that the claim had not been brought promptly.
- H5 **Held**, allowing the application:
- H6 (1) The claimants could not have known that the application had been made nor that it had been granted until the commencement of building operations. It was quite impossible in those circumstances to conclude that there had been any undue delay in taking action to challenge the certificate. There was a need to give consideration to whether some publicity or notification of applications under s.192 should be required.
- H7 (2) The grant of a certificate presupposed that the building of the wall was development within the meaning of the Act. The wall was development, probably because it was a “building” for the purposes of s.55. It was necessary to determine the status of the land from the factual situation at the date of the application. The land acquired in 2004 had been fenced and was usable and intended to be used as an extension to the garden of Hillside House.
- H8 (3) The facts permitted only one conclusion, namely, that the curtilage of Hillside House did extend over the land. It would be nigh on impossible to contend otherwise once the wall was erected so that the land enclosed formed part of the garden. The reference in the application to a “recently expanded garden” was accurate and fatal to the grant of the certificate.
- H9 (4) Whether or not within its curtilage, the new building would, as an extension to the existing means of enclosure, surround Hillside House. It would therefore be excluded from the ambit of permitted development under the second part of Pt 1 A1.(d), as a development to a gate. It would be strange if this prohibition as regards changes made to an existing means of enclosure could be avoided by the its demolition and replacement.
- H10 **Legislation referred to:**
- (1) The Town and Country Planning Act 1990
 - (2) The Supreme Court Act 1981
 - (3) The Town and Country Planning Act 1990 General Permitted Development Order
 - (4) The Planning (Listed Buildings and Conservation Areas) Act 1990
- H11 **Case referred to:**
- (1) *Ortenberg v Austria* (1995) 19 E.H.R.R. 524
 - (2) *R. (on the application of Hall Humber Partnership) v First Secretary of State* [2006] EWHC 3482; [2007] 2 P. & C.R. 5

- (3) *Skerritts of Nottingham Ltd v Secretary of State (No.2)* [2000] 2 P.L.R. 102
- (4) *Cambridge City Council v Secretary of State for the Environment* [1992] 3 P.L.R. 4
- (5) *Coleshill & District Investment Co Ltd v Minister for Housing & Local Government* (1969) 20 P. & C.R. 679; [1969] 1 W.L.R. 746
- (6) *Methuen-Campbell v Walters* [1979] Q.B. 525
- (7) *A-G v Calderdale BC* (1982) 46 P. & C.R. 399
- (8) *Lowe v First Secretary of State* [2003] EWHC 537 (Admin); [2003] 2 P. & C.R. 24

- H12 **Application for Judicial Review** by the claimants, Mr and Mrs Sumption, of the grant to the Interested Party by the defendant of a certificate of lawfulness pursuant to s.192 of the Town and Country Planning Act 1990 certifying that on November 28, 2006 the erection of a boundary wall and gates in respect of Hillside House, 13 Crooms Hill, Greenwich, would have been lawful. The claimants argued, inter alia, that the wall would involve development within the curtilage of a listed building. The facts are set out in the judgment of Collins J. below.
- H13 The claimants appeared in person.
James Strachan, instructed by LBC Greenwich Legal Department, for the defendant.
Matthew Horton Q.C. and *Richard Wald*, instructed by Bates, Wells & Braithwaite. London LLP, for the Interested Party.

JUDGMENT

- 1 **COLLINS J.:** This claim seeks to quash the grant to the Interested Party (IP) by the defendant of a certificate of lawfulness pursuant to s.192 of the Town and Country Planning Act 1990. The certificate, granted on January 17, 2007, certified that on November 28, 2006 (the date when the application was received by the defendant) the operation, namely the erection of a boundary wall and gates under 1m in height in respect of Hillside House, 13 Crooms Hill, Greenwich, would have been lawful within the meaning of the Act. The certificate was defective in that it referred to s.191 instead of s.192 of the Act, but, as Mr Sumption properly accepted, that could not justify quashing it. The error did not affect the substance of the certificate. The reasons given were these:

“The proposed development namely the erection of a boundary wall and gates under 1m in height conforms with the criteria of the Town & Country Planning Act 1990 General Permitted Development order, Part 2 Minor Operations. Class A. As such the proposed development is permitted.”

- 2 Hillside House in Crooms Hill, Greenwich is a Grade II listed building. It is in a conservation area, part of a UNESCO World Heritage Site comprising a visual whole with Greenwich Park and the Royal Naval Hospital within it. Crooms Hill contains a number of houses built between the 17th and the early 19th centuries, all of which are listed and which create a harmonious whole. The claimants live on the other side of Crooms Hill opposite Hillside House.

3 The present Hillside House was constructed in the early 19th century on the site of an existing cottage originally built in the 17th century on what was a relatively small strip of land lying between the wall of Greenwich Park and a public way (now Crooms Hill) between Greenwich and Blackheath. It was substantially extended in the 1880s. By the mid nineteenth century the garden of Hillside House constituted a roughly triangular area, its western boundary being the wall of Greenwich Park. Its eastern boundary was for a short distance bounded by Crooms Hill and then it veered towards the Park wall forming the triangle. The park wall and Crooms Hill meet to the north leaving a narrow area of land which was owned until the IP bought it in 2004 by a convent and school on the other side of Crooms Hill. The IP erected a chestnut paling fence running as an extension to the existing fence to the then garden of Hillside House along the boundary of Crooms Hill until it abutted the park wall at the apex of the extended triangle.

4 In 2005 and 2006 applications were made for planning permission to build a wall in place of the fence. Objections were made to those applications which were turned down. The objections were based on the need to protect the settings of the listed buildings in and the conservation area itself. The application which led to the certificate was for a brick wall about 125m in length with a 1m gate towards its north-western end. The application form stated:

“The proposed boundary wall would replace the existing timber ‘chestnut fencing’ to provide a new means of enclosure to the recently expanded garden of Hillside House. It will extend from the existing wall of the house at its southern end, to the existing Greenwich Park wall, at its northern end. The proposed 1m wall will not be fixed to, or physically abut, the existing Hillside House boundary wall on the Greenwich Park wall to the south and north respectively. A narrow gap of approximately ... 10mn will be left between the proposed new wall and the existing walls to either end.”

5 Section 192(1), so far as material enables anyone who wishes to ascertain whether any operations proposed to be carried out on land would be lawful to make an application to the local planning authority ‘specifying the land and describing the ... operations in question’. Section 192(2) provides:

“If, on an application under this section, the local planning authority are provided with information satisfying them that the ... operations described in the application would be lawful if begun at the time of the application, they shall issue a certificate to that effect, and in any other case they shall refuse the application.

S.192(3) requires reasons to be given in the certificate for determining the operations to be lawful as well as specifying what it must otherwise include. By s.192(4), the lawfulness of any operations for which a certificate is in force “shall be conclusively presumed unless there is a material change, before the ... operations are begun, in any of the matters relevant to determining such lawfulness.”

6 The certificate was granted on January 17, 2007. This claim was lodged on June 8, 2007. This has led the IP, but not the defendant, to assert that there has been undue delay which should require that relief is refused whether or not it would

otherwise be considered appropriate. The procedure set out for obtaining a certificate of lawfulness does not require any notification to be given either to the public generally or to any individual who might be affected by the development. Thus the claimants could not have known that the application had been made nor that it had been granted unless the IP had chosen to inform them or others, such as the Greenwich Society which, by its objections to the previous planning applications, had shown itself to be opposed to the development sought. It was not until excavation works commenced on June 5, 2007 for the footings for the wall that the claimants became aware of the grant of the certificate. They immediately made their claim that the certificate ought not to have been granted known. On June 8 the claim was lodged and an interim injunction to prevent any work continuing sought and obtained. There is a cross-undertaking in damages.

7 In my view, it is quite impossible in those circumstances to conclude that there has been any undue delay in taking action to challenge the certificate. Since Charles J. granted permission, the relevant test, as he recognised, is that set out in s.31(6) of the Supreme Court Act 1981. That enables the court, if there has been undue delay, to refuse relief if it would, inter alia, be prejudicial to anyone to do so. But the reference to “undue delay” presupposes that the claimant has been guilty of delay, which may in some circumstances not need to be long. In this case the claimants acted with the greatest expedition the moment they were aware—and they could not have been aware before—that the operations in question were permitted.

8 I am bound to say that I think there is a need to give consideration to whether some publicity or notification of applications under s.192 should be required. Good neighbourliness no doubt indicates that any land owner who intends to carry out development which, even though it may affect his neighbour (for example, a permitted extension to his house which could mean there was overlooking or loss of light or other amenity), may not be preventable should inform that neighbour. Discussions could take place to see whether variations which lessened any adverse impact could be made. But sometimes, as this case demonstrates, there may be valid objections to the grant of any certificate or at least arguments which the planning authority should take into account. If any impact would affect the value of adjoining land, there is the need to consider the possible application of the Human Rights Act with particular regard to Art.6 of the ECHR: *cf. Ortenberg v Austria* (1995) 19 E.H.R.R. 524.

9 The grant of the certificate presupposes that the building of the wall is development within the meaning of the Town & Country Planning Act 1990 (the 1990 Act). Section 55(1) of the 1990 Act defines the type of development with which this case is concerned as:

“the carrying out of building, engineering, mining or other operations in, on, over or under land . . .”

“For the purposes of this Act “building operations” include—

- (a) demolition of buildings;
- (b) rebuilding;

- (c) structural alterations of or additions to buildings; and
- (d) other operations normally undertaken by a person carrying on business as a builder.”

“Building” is defined in s.336 in these terms:

“‘building’ includes any structure or erection, and any part of a building, as so defined . . .”

“Erection” is defined to include “extension, alteration or reerection.” In *R. (on the application of Hall Humber partnership) v First Secretary of State* [2006] EWHC 3482 (Admin); [2007] 2 P. & C.R. 5, a case which concerned polytunnels in which soft fruits were grown, Sullivan, J., applying earlier authority, in particular *Skerritts of Nottingham Ltd v Secretary of State (No.2)* 2000 2 P.L.R. 102, observed ([24]):

“If the ‘thing’ (to use a neutral phrase) that is placed on the land is sufficiently large, sufficiently attached to the land and sufficiently permanent as to amount to a ‘building’, then, while it is in situ, the character of the land is changed from that of open land without any building upon it to land upon which a ‘building’ stands.”

- 10 No doubt size is often to be regarded as a material consideration in determining whether what is placed on the land is a building; if it is not, there will have been no development. A means of enclosure, in this case a wall, of a height of 1m is not particularly large. But, as will be seen, it is regarded as development and that is probably because it is a building so that its construction is a building operation. However, one must bear in mind that the Act refers to “other operations”. Thus it may not be essential to regard the wall as a building.
- 11 It is convenient now to refer to the relevant provisions of the GPDO. Article 3 grants planning permission for the classes of development described as permitted development in Sch.2. Part 2 of Sch.2 is headed Minor Operations. Class A reads:

“Permitted development

A. The erection, construction, maintenance, improvement or alteration of a gate, fence, wall or other means of enclosure.

Development not permitted

A.1 Development is not permitted by Class A if—

- (a) the height of any gate, fence, wall or means of enclosure erected or constructed adjacent to a highway used by vehicular traffic would, after the carrying out of the development, exceed one metre above ground level;
- (b) the height of any other gate, fence, wall or means of enclosure erected or constructed would exceed two metres above ground level;
- (c) the height of any gate, fence, wall or other means of enclosure maintained, improved or altered would, as a result of the development, exceed its former height or the height referred to in

sub-paragraph (a) to (b) as the height appropriate to it if erected or constructed, whichever is the greater; or

- (d) it would involve development within the curtilage of, or to a gate, fence, wall or other means of enclosure surrounding, a listed building.”

- 12 Mr Strachan has argued that a fence and, indeed, in some cases a wall will not be a building and so there would in any event be no development. He accepts that generally the construction of a wall is likely to be regarded as a building operation. While I see the force of the submission in relation to a fence and some other means of enclosure (for example, a hedge), the grant of planning permission is on the basis that these minor operations are development. If they are not, no certificate is needed. If not buildings, they could perhaps fall within the “other operations” referred to in s.55(1). These are operations which must at least be of a constructive character leading to an identifiable and positive result or similar to building or engineering operations: see per Glidewell, L.J. in *Cambridge City Council v Secretary of State for the Environment* [1992] 3 P.L.R. 4 at 17 citing observations of Lords Wilberforce and Pearson in *Coleshill & District Investment Co Ltd v Minister of Housing & Local Government* (1969) 20 P. & C.R. 679; [1969] 1 W.L.R. 746. If sufficiently permanent and affecting the character of the land, I think they are capable of being regarded as operational development. However, the construction of the wall would clearly be development.
- 13 The claimants rely on two separate matters. They contend first that the wall would involve development within the curtilage of Hillside House, a listed building. Secondly, they say that it would involve development to a gate, fence, wall or other means of enclosure surrounding a listed building. If they are right on either point, the grant of the certificate is unlawful.
- 14 I should add that in the course of argument my attention was drawn to paragraphs in Circular No.10/95 dealing with planning controls over demolition. Section 55(2)(g) of the 1990 Act enables the Secretary of State to issue a direction to local planning authorities, which may be either general or specific, indicating that demolition of any description of building contained in such a direction will not constitute development. Annex A of the Circular reproduces the Direction. It excludes from development the demolition of any building in a conservation area but, by para.2(2), that exclusion does not cover “the whole or any part of any gate, fence, wall or other means of enclosure”. The general exclusion is explained because controls in conservation areas can be dealt with by other means than by applying the 1990 Act, but it is apparent that the direction presupposes that gates etc can be buildings. However, I do not think that this really assists me in the decision I have to make on the facts of this claim.
- 15 Mr Sumption suggested that the GPDO was intended to permit developments which did not require individual scrutiny because no reasonable objection could be taken to them. I do not think that assumption can be made. Rather it allows a person to make what may be regarded as reasonable because relatively minor and generally acceptable developments without the need to obtain formal planning permission. It tries to balance a person’s ability to use or undertake operations on

his land as he wishes against the need to impose controls in the interest of others who may be affected by any such uses or operations. The provisions contained in A.1 constitute some limitations on the freedom to undertake minor operations by imposing some constraints in the public interest. Paragraph A.1(d) is aimed at protecting listed buildings. This accords with the requirements of s.66 of the Planning (Listed Buildings and Conservation Areas) Act 1990 which provides that in considering whether to allow developments which affect a listed building or its setting special regard must be had to the desirability of “preserving the building or its setting”. Since the erection of or carrying out development to a means of enclosure within the curtilage of or surrounding a listed building will not usually affect the building itself, it is apparent that A.1(d) is largely aimed at protection of the listed building’s setting.

- 16 Mr Horton draws attention to the definition of listed building in the Act which extends s.1(4)(b) of the Act to “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 before 1st July 1948”. This follows from s.1(3) which requires, when consideration is given to listing a building, that the Secretary of State may take into account not only the building itself but also “any feature of the building consisting of a man-made object or structure ... forming part of the land and comprised within the curtilage of the building”. He has undertaken a historical investigation and made the point that the concept of the setting of listed buildings did not enter the legislation until 1974. An old wall could itself constitute a listed building, but it is clear that A.1(d) is not limited to a means of enclosure which is itself listed nor to a structure within the curtilage which has existed since 1948. I confess I do not follow how the historical exercise supports any argument that A.1(d) is not concerned with the setting of a listed building, although I recognise that where the means of enclosure is a man-made structure which has existed since before 1st July 1948 development to it may be regarded as development to the listed building.

- 17 There have been a number of authorities which have discussed the meaning to be given to the word “curtilage” in the context of the Planning Acts and what should be the approach of the court where issues have arisen as to whether a particular piece of land is within the curtilage of a dwelling house. While A.1 (d) prevents permission for particular developments if within the curtilage of a building, some of those permitted by the GPDO will only be permitted within the curtilage of a building. Thus it is important that curtilage is not extended beyond what can properly be regarded as covered by it. The dictionary definition (*Oxford English Dictionary*) is “an area of land attached to a house and forming one enclosure with it”. In the 1973 edition of the *OED*, the definition includes the adjective “small”: it read:

“A small court, yard or piece of ground attached to a dwelling house and forming one enclosure with it.”

In *Methuen-Campbell v Walters* [1979] 1 Q.B. 525, Buckley L.J. gave some helpful guidelines. He said this (at 543–544):

“What then is meant by the curtilage of a property? In my judgment it is not sufficient to constitute two pieces of land parts of one and the same curtilage that they should have been conveyed or demised together, for a single

conveyance or lease can comprise more than one parcel of land, neither of which need be in any sense an appurtenance of the other or within the curtilage of the other. Nor is it sufficient that they have been occupied together. Nor is the test whether the enjoyment of one is advantageous or convenient or necessary for the full enjoyment of the other. A piece of land may fall clearly within the curtilage of a parcel conveyed without its contributing in any significant way to the convenience or value of the rest of the parcel. On the other hand, it may be very advantageous or convenient to the owner of one parcel of land also to own an adjoining parcel, although it may be clear from the facts that the two parcels are entirely distinct pieces of property. In my judgment, for one corporeal hereditament to fall within the curtilage of another, the former must be so intimately associated with the latter as to lead to the conclusion that the former in truth forms part and parcel of the latter. There can be very few houses indeed that do not have associated with them at least some few square yards of land, constituting a yard or a basement area or passageway or something of the kind, owned and enjoyed with the house, which on a reasonable view could only be regarded as part of the messuage and such small pieces of land such as outhouses, a garage, a driveway, a garden and so forth. How far it is appropriate to regard this identity as parts of one messuage or parcel of land as extending must depend on the character and the circumstances of the items under consideration. To the extent that it is reasonable to regard them as constituting one messuage or parcel of land, they will be properly regarded as all falling within one curtilage; they constitute an integral whole. The conveyance of that messuage or parcel by general description without reference to metes or bounds, or to the several component parts of it, will pass all those component parts sub silentio. Thus a conveyance of The Gables without more, will pass everything within the curtilage to which that description applies, because every component part falls within the description. The converse proposition, that because an item of property will pass sub silentio under such a conveyance of The Gables, it is therefore within the curtilage of The Gables, cannot in my opinion be maintained, for that confuses cause with effect.”

- 18 In *A-G v Calderdale BC* (1982) 46 P. & C.R. 399 at 409, Stephenson L.J. recorded with apparent approval the submissions of counsel in that case, which raised the question whether a row of cottages which historically had been closely related to a mill but which had been transferred to different owners, remained within its curtilage. These defined the curtilage of a listed building to be “an area of land which includes any related objects or structures which naturally form, or formed, with the listed building an integral whole”. They continued:

“The boundaries of the area are to be determined by such factors as may be relevant to the circumstances of the particular case and by the manner in which the listed building, any related objects or structures, and the land have been, or are being, used.”

- 19 I do not think that Stephenson L.J. was expounding a definition which could be used in all circumstances to identify the curtilage of a listed building. The

submissions recorded were adapted to the facts of that case. But he did at 405 suggest that the approach to consideration of the setting of a building which was to be considered for listing should be a broad one. And he observed that arguments based upon incongruities could be met “by the fact that the code of listed building control does not prevent demolition or alteration; it merely requires consent to it”.

- 20 In *Dyer v Dorset CC* [1989] 1 Q.B. 346, Lord Donaldson M.R. stated at 355 that whether or not a building was in the curtilage of another was “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”. In the context of this case, for “trial judge” one should substitute the council. However, with respect to Lord Donaldson, the proviso rather begs the question. If it is a question of fact and degree, it is difficult to see what direction on the meaning (beyond its dictionary definition) would be necessary. *Dyer’s* case involved a house in a 100 acre park surrounding the main building in whose curtilage the claimant contended it lay. It is not surprising that the court did not agree.

- 21 In *Skerritts of Nottingham Ltd v Secretary of State* [2000] 2 P.L.R. 102, the Court of Appeal through Walker L.J. considered the various authorities which had dealt with the meaning of curtilage in their particular factual and statutory contexts. He observed that the notion of smallness was not inherent in the expression. He concluded (at 67):

“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.”

- 22 This has led counsel for the defendant and the IP to submit that the Council’s decision is unassailable. It decided on the facts that the development in issue did not fall within the curtilage of Hillside House. The facts justified that conclusion which can only be upset if shown to have been irrational in the *Wednesbury* sense. They also make the point, relying on a decision of Sir Richard Tucker in *Lowe v First Secretary of State* [2003] EWHC 537 (Admin), that the reason why a means of enclosure is erected cannot create a curtilage where there otherwise was or would be none. That case concerned enforcement against the erection of a chain link fence some 65m long running alongside the driveway of Alresford Hall in Cambridgeshire. The fence had been erected because Mr Lowe had attracted the unwanted attention of a group of people who had “ripped up trees, cut down shrubs, dug holes and hidden in woods near the Hall, abusing employees”. The inspector said that Mr Lowe was obviously attempting to enclose the land within his ownership and the reasons given for erecting the fence suggested to him that it was either defining or lying within the curtilage and that it was most unlikely that it was outside the curtilage. That, Sir Richard unsurprisingly decided, was wrong.

- 23 Since no reasons were given for granting the certificate, it is necessary to see what information was before the Council. The application referred, as I have said, to the “recently expanded garden of Hillside House” and stated that the proposal comprised “the formation of a new means of enclosure to part of the western

boundary of Hillside House adjacent to a highway". It went on to seek to demonstrate that the development was outside the curtilage and would not surround the house. It was said that it was separated from the cultivated garden which had been attached to the house since the 1840s. No work, other than as the photographs show, some mowing and tidying, had been done to the land in question and it did not "serve the property in a useful or necessary manner" nor did it provide amenity space for the enjoyment of the occupier of Hillside House nor did it provide any functional purpose. It was visually separated from the original garden in that it was enclosed by shrubs and trees. There had been no historical connection.

- 24 Since in the *Calderdale* case in particular, historical connection was regarded as important in deciding that the particular buildings were within the curtilage of the mill, it was submitted that lack of historical connection should equally point against land being within the curtilage. While I have no doubt that lack of such connection is a relevant fact, it is not determinative. The reason for the erection of the fence in this case will not of itself determine whether the land enclosed by it comes within the curtilage. However, it is necessary to look at the factual situation created by the erection of the fence. In an urban environment, land attached to a dwelling house which is able and intended to be used in conjunction with the house (whether or not formally described as its garden) is likely to be within its curtilage. Over the years, land may have been acquired which extends a garden. One has to ask oneself whether there is a minimum period over which it has to be held and perhaps used before it can properly be said to form part of the curtilage.
- 25 Reliance was also placed on the absence of any permission for change of use of the land from a nil use to a garden use. That, it was submitted, shows that it must still be regarded as separate from the garden and not yet brought within the curtilage, if that could in fact ever happen.
- 26 It seems to me that it is necessary to determine the status of the land from the factual situation existing at the date of the application. The land had been acquired in 2004, it had been fenced and it was useable and, as I have said, intended to be used as an extension of the garden of Hillside House. The summary put forward in the application of reasons why it should not be regarded as within the curtilage of Hillside House reads as follows:

"The proposed site of the wall and gates:

- Is not 'around / about' the listed property: it lies beyond an area of cultivated land attached to and surrounding Hillside House;
- Does not serve Hillside House in some necessary or useful manner e.g. recreation, visual amenity;
- Does not have the appearance of being part of the same enclosure due to the distinct separation between the historic garden and recently acquired land fronting Crooms Hill; and
- Does not have an intimate historical association with the listed property.. Up until 2004 the proposal site was under separate ownership."

Mr Sumption relies on the fact that the land is physically proximate to the house, has been enclosed with the house and is being landscaped with the rest of the

grounds. In addition, he relies on the reference in the certificate to the erection of a “boundary wall and gates” to Hillside House.

27 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.

28 I should add that it was suggested that the proposed wall would not be within the curtilage since it was marking the edge of the land. But it must be constructed on the IP’s land and so is clearly within that land.

29 The second matter which may preclude the grant of a certificate is if what is proposed involves development to a gate etc. The crucial word is “to”. It is submitted that the removal of the fence and the erection in its place of a wall cannot be regarded as development to the fence, which is the existing means of enclosure, and the erection of a wall cannot by itself be regarded as development to any means of enclosure.

30 Whatever be the true construction of this part of A.1(d), it produces anomalies. The first thing to note is that a gate cannot surround a listed building. The provision can only make sense if the relevant development is to be to part of a means of enclosure surrounding the listed building. It is also apparent that the means of enclosure in question need not be in the curtilage. If it is, the first part of A.1(d) will apply. Thus it is only if the means of enclosure lies outside the curtilage that this part applies. Thus the wall to Greenwich Park, which forms part of the means of enclosure of Hillside House, would be within the part. I appreciate it is itself no doubt listed, but one can well imagine circumstances where a neighbour might want to do work to his wall which in fact forms part of the means of enclosure surrounding a listed building which might adversely affect the setting of the listed building.

31 It seems that for whatever reason A.1(d) was intended to apply only to development where there was an existing means of enclosure surrounding a listed building. Counsel for the defendant and the IP point out that it would have been easy for the draftsman to make clear that any development which was to or which created a means of enclosure was covered; the use of the word “of” in addition to “to” would have been all that was needed. But it is to say the least strange that, if those submissions are right, the prohibition can be avoided by demolishing the existing means of enclosure and erecting the new.

- 32 It is necessary to bear in mind the definition of development in s.55 of the 1990 Act and that building operations include rebuilding. The fence is the existing means of enclosure. The removal of the fence and its replacement by a wall seems to me to constitute rebuilding of the relevant means of enclosure. It cannot have been intended that the prohibition can be avoided by the expedient of demolition and construction of a different means of enclosure. Whether or not within its curtilage, the new wall will, as an extension of the existing means of enclosure, surround Hillside House. Thus on the facts I am persuaded that it would be prohibited under the second part had it not been within the curtilage.
- 33 Mr Sumption submitted that even if the fence had not been there, because there was already a means of enclosure which partially surrounded Hillside House so that the development was to fill the gap, it would fall within A.1(d). Since the provision makes no sense unless it relates to part of a means of enclosure, I see the force in that submission. However, I do not need to reach a conclusion on the facts of this case. Mr Sumption went further and submitted that even if there was no previous physical enclosure at all, A.1(d) would apply. He relied on the description of permitted development in Class A, namely the erection, construction, maintenance, improvement or alteration of a gate etc. Since the proviso was intended to prevent such otherwise permitted development, he argues that it must mean that the permission to construct a means of enclosure will not be granted where that means of enclosure surrounds a listed building. The difficulty with that submission, ingenious though it is, is that development to a means of enclosure is itself covered by maintenance, improvement or alteration and there is no reason why the draftsman should not have intended to limit the proviso. Mr Sumption went further and suggested that even if there were nothing at the boundary of the land, there was still a means of enclosure. This meant no more than some indication (perhaps even the edge of a lawn) of where the land attached to the building ended. That I think was a step too far. Means of enclosure must in my view presuppose the existence of something which marks the boundary of and is capable of being regarded as enclosing land. It need not be particularly substantial, but it must show clearly that the land is being enclosed.
- 34 For the reasons set out in this judgment, I am persuaded that the grant of the certificate was not lawful and must be quashed. The IP must apply for planning permission to enable him to construct a means of enclosure which does not adversely affect the setting of Hillside House.

Reporter—Colin Thomann