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Urning its place on the List?

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Supreme Court makes landmark decision in Listed Building dispute.

Over the last few years, the Courts have been asked countless times to decide how far the listing of a building extends. This has led to several landmark decisions which have established some basic principles, allowing us to more reliably gauge whether a building is listed. We have had tests handed down in respect of whether outbuildings are listed (the Calderdale test), or the extent of the curtilage of a listed building (the Egerton test). However, the Courts were not prepared when challenged as to whether a listed building met the legal definition of a building at all.

On Wednesday 20 May the Supreme Court gave its decision in ***Dill v Secretary of State for Housing and Local Government***. Dill had inherited a country house, Idlicote House in Warwickshire. In the grounds were two large freestanding 18th century lead urns sitting on limestone plinths, which were protected as listed buildings in their own right. In 2009, Dill sold the urns to an overseas buyer. In 2014, Stratford-on-Avon District Council brought enforcement proceedings against Dill, on the basis that he should have obtained Listed Building Consent for removal/demolition of the urns.

Dill appealed against the proceedings on the basis the urns were not actually 'buildings' and therefore should not have been listed at all. Dill failed in the High Court and the Court of Appeal. These courts had agreed with the planning inspector that whether something was a building in the first place was not actually a limb under which an appeal could be made through the statutory appeal route. The right to challenge the validity of the listing itself by judicial review had long passed. The structure was a building because the list of listed buildings said it was.

Overruling these decisions, the Supreme Court stated that the planning inspector was able to consider this issue and therefore should go back and reconsider whether the urns were 'buildings'. Firstly, Lord Carnwath concluded that in order for a structure to be a 'listed building', fairness required that the structure constitute a 'building'. He reasoned that the definition of a listed building is "a building which is... included in the list". This requires two elements; that it is on the list, and that it is a building.

He then drew an important distinction between structures listed in their own right, and those structures protected as fixtures attached to the building or within the curtilage of a listed building.

Clearly, in these scenarios, something that is not in itself a 'building' could be protected under the wider listing. In this case, however, the urns were listed in their own right as a building, and so alone had to meet the definition of a building.

The Lord Justices noted "a disturbing lack of clarity about the criteria" used by local authorities to determining whether free-standing items qualify for listing protection. In the absence of specific guidance in this matter, Lord Carnwath felt it appropriate to apply the test in *Skerritts*. In this case, which related to a marquee, rather than a listed building; the size, permanence and degree of physical attachment of the structure all had to be considered. Other tests were called upon, including whether the structure's erection constituted a 'building operation' (the *Cardiff Rating Authority* case), and whether something not attached to the land and not directly related to the design of the listed building could be treated as part of the building (*Berkley v Poulett*). An interesting contextual point here is that the urns didn't actually belong to this particular residence, having been commissioned for the gardens at a different country estate, Wrest Park in Bedfordshire.

The Supreme Court felt that a planning inspector would be better placed to undertake the actual application of the tests, so note that the decision was not actually quashed, merely handed back to the Planning Inspectorate. It is quite possible that this isn't the end of the matter…

I cannot help but feel that whilst the planning inspector's judgement was somewhat rigid, it is completely understandable. It was definitely novel that a planning inspector should have to decide whether something is a listed building. Should not the real opportunity to challenge the listing be following the entry of the building on the list? Inspectors could then rely on the decision laid down by Historic England, a body set up to for that purpose. After all, the list includes gravestones and milestones; why wouldn't it include large urns?

Some will feel that justice was done in this case, and that a pair of urns simply does not meet the legal definition of a building. However, this judgment will have far-reaching ramifications for many structures currently enjoying protection as listed buildings; a party can now challenge the listed status of a structure as part of their enforcement appeal. Whether you think this is good or bad, there is no doubt that many such structures have now been put at risk because planning inspectors will now be allowed to set aside a listing decision made by Historic England.

One has to wonder whether the term 'listed buildings' is even a helpful way to describe the structures that the heritage protection system seeks to protect. It seems that this restrictive definition is letting down certain heritage assets that will fall through the cracks.

Also, is it really too much to expect a custodian of a listed building to check whether it (or any part of it) is listed before damaging it or selling it off?

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