Neutral Citation Number: [2017] EWHC 2378 (Admin)

Case No: CO/804/2017
CO/806/2017

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

Civil Justice Centre
33 Bull Street
BirminghamB4 6DS

Date: 28/09/2017

Before :

THE HONOURABLE MR JUSTICE SINGH

- -

Between :

MARCUS DILL	**Claimant**
- v -	
SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT	**1st Defendant**
- and -	
STRATFORD-ON-AVON DISTRICT COUNCIL	**2nd Defendant**

- -
- -

Mr Richard Harwood QC (instructed by **Shakespeare Martineau**) for the **Claimant**
Mr John Hunter (instructed by **the Government Legal Department**) for the **1st Defendant**
Mr Gary Grant (instructed by **Macer Nash Solicitor to Stratford-on-Avon District Council**) for the **2nd Defendant**

Hearing dates: 17 & 18 July 2017

- -

Approved Judgment

Mr Justice Singh :

Introduction

1. There are two cases before the Court. The first is an application under section 63 of the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the Listed Buildings Act"). The second is an appeal under section 65 of the same Act.

2. The cases concern a single decision letter by the Secretary of State's Inspector dated 19 January 2017. By that decision the Inspector dismissed the Claimant's appeals, first, against the refusal of retrospective listed building consent for the removal of two limestone piers and lead urns from Idlicote House in Shipston-on-Stour, Warwickshire (known before the Inspector as Appeal B); and, secondly, against a listed building enforcement notice which had been issued by the local planning authority (the Second Defendant) on 26 April 2016 for the restoration of the piers and lead urns to Idlicote (known before the Inspector as Appeal A). Appeal B was brought under section 20 of the Listed Buildings Act and Appeal A was brought under section 39 of that Act.

3. Permission to bring these cases was granted by me after a hearing on 10 April 2017. The issues in the two cases are identical.

4. I am grateful to all counsel for their comprehensive written and oral submissions. The Claimant has been represented by Mr Richard Harwood QC, who argues that the Inspector erred as a matter of law on 11 grounds. On behalf of the Secretary of State Mr John Hunter resists the challenge made in this case. In that he is supported by Mr Gary Grant, who appeared on behalf of the local planning authority.

Factual Background

5. The urns in question (which are also sometimes described as finials) are made of lead and are attributed to the Dutch sculptor John van Nost. They have been dated to around 1700. The piers on which they rested have been dated to the late 1720s and consist of limestone pedestals of a slab rather than solid construction. Together a pier and urn were 274 cms high. I will use the neutral term "the items" to refer to the urns and piers. While they were in the grounds of Idlicote House the items were free-standing. The pier was not attached to the ground and the urn was not attached to the pier.

6. The items were originally at Wrest Park in Bedfordshire. In 1939 Mr J G Murray sold Wrest Park and took various items of statuary, including these items, with him to Coles Park, Buntingford in Hertfordshire. In 1954-5, following the death of Mr Murray, the estate was left to a trust, with his grandson, Major R P G Dill, being a lifetime beneficiary. In 1955-6, under Major Dill, Coles Park was sold and the items went with him to the Dower House, Buntingford. Major Dill sold Dower House in 1962 and moved to Badgers Farm, Idlicote. Again the items went with him. He positioned them at Badgers Farm. The farmhouse at Badgers Farm was listed in 1966 but the list description makes no mention of the items.

7. In 1973 Major Dill sold Badgers Farm and bought Idlicote House. These items followed him. These two items were positioned on either side of a path in the gardens which had served as the front drive to the house since the 1820s. No alteration was made to the garden design to accommodate the items.

8. In 1966 Idlicote House was designated a Grade II listed building.

9. In 1986 the items were themselves added to the list under what was then section 54 of the Town and Country Planning Act 1971 ("the 1971 Act").

10. The listing decision and paperwork on which it was based have not been found despite enquiries. It is presumed that there was advice given at that time by English Heritage (the then statutory consultee) to the Secretary of State and that the advice supported listing the items.

11. At that time notice of the listing to the owner or occupier of the relevant land was required to be given under section 54(7) of the 1971 Act.

12. The present owner, Mr Marcus Dill, was not aware of the listing until 2015. He does not understand that his father, Major Dill, was aware of it either.

13. In 1993 ownership of the piers and urns passed to Mr Dill.

14. In 2009 the items were sold at auction. English Heritage was notified in advance but did not respond. The items were sold and it would seem were exported from the United Kingdom.

15. In 2014 the local planning authority became aware that the items had been removed and began correspondence with Mr Dill.

16. On 17 June 2015 Mr Dill made a retrospective application for listed building consent. This was refused by the local planning authority on 11 February 2016.

17. In the course of consideration of that application, the local planning authority received letters from the Society for the Preservation of Ancient Buildings ("SPAB") dated 24 September 2015; and from Historic England (now the relevant statutory consultee) dated 13 December 2015.

18. On 26 April 2016 the local planning authority issued a listed building enforcement notice requiring the reinstatement of both original piers and urns to Idlicote House.

19. Mr Dill appealed against those two decisions. The appeals were considered by the Inspector by way of written representations. He also conducted a site visit.

20. On 19 January 2017, the Inspector dismissed both appeals. It is that decision which is the subject of challenge in these proceedings.

Material Legislation

21. Before the modern regime for listed buildings was created by Parliament in 1968 there was a similar but more limited scheme for the making of "building preservation orders." The relevant provision was contained section 30 of the Town and Country Planning Act 1962, which provided that:

> "(1) Subject to the provisions of this and the next following section, if it appears to a local planning authority that it is expedient to make provision for the preservation of any building of special architectural or historic interest in their area, they may for that purpose make an order (in this Act referred to as a 'building preservation order') restricting the demolition, alteration or extension of the building."

22. The modern scheme, for a statutory list of buildings which were to be given protection, was first created by the Town and Country Planning Act 1968. At the time of the listing of the items in the present case in 1986 the relevant legislation was contained in the Town and Country Planning Act 1971. In that Act provision was made for the Secretary of State to compile a list of buildings of special architectural or historic interest: section 54. Section 54(9) provided that:

> "In this Act 'listed building' means a building which is for the time being included in a list compiled or approved by the Secretary of State under this section; and, for the purposes of the provisions of this Act relating to listed buildings and building preservation notices, any object or structure fixed to a building, or forming part of the land and comprised within the curtilage of a building, shall be treated as part of the building."

23. A similar provision is now contained in section 1 of the Listed Buildings Act.

24. Section 1(1) provides that "the Secretary of State shall compile lists of such buildings" and "may amend any lists so compiled …"

25. Subsection (3) provides that:

> "In considering whether to include a building in a list compiled … under this section, the Secretary of State may take into account not only the building itself but also – …
>
> (b) the desirability of preserving, on the ground of its architectural or historic interest, any feature of the building consisting of a manmade object or structure fixed to the building or forming part of the land and comprised within the curtilage of the building."

26. Subsection (4) provides that:

> "Before compiling, approving … or amending any list under this section the Secretary of State shall consult –
>
> (a) in relation to buildings which are situated in England, with the Commission [at one time this used to be English Heritage but, since 2015, this has been Historic England]; …"

27. One of the provisions at the heart of the present case is subsection (5), which provides:

> "In this Act 'listed building' means a building which is for the time being included in a list compiled or approved by the Secretary of State under this section; and for the purposes of this Act –
>
> a) any object or structure fixed to the building;
>
> b) any object or structure within the curtilage of the building which, although not fixed to the building, forms part of the land and has done so since before 1st July 1948, shall … be treated as part of the building."

28. Section 7 of the Listed Buildings Act provides that no person shall execute or cause to be executed any works for the demolition of a listed building or for its alteration or extension in any manner which would affect its character as a building of special architectural or historic interest, unless the works are authorised under section 8.

29. Section 9 provides that, if a person contravenes section 7, he shall be guilty of an offence.

30. Section 8 provides for listed building consent to be granted by a local planning authority. Section 10 makes provision for the making of applications for listed building consent. Subsection (2) provides:

> "Such an application … shall contain – …
>
> (b) such other plans and drawing as are necessary to describe the works which are the subject of the application; …"

31. Section 16 provides that the local planning authority or, as the case may be, the Secretary of State may grant or refuse an application for listed building consent and, if they grant consent, may grant it subject to conditions: subsection (1). Subsection (2)

provides that, in considering whether to grant listed building consent, the local planning authority or the Secretary of State "shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses."

32. Section 20 confers on a person the right to appeal to the Secretary of State against (among other things) a refusal by a local planning authority of an application for listed building consent: see in particular subsection (1)(a). The scope of such an appeal is a merits-based one, so that the issue for the Secretary of State is (as it was for the local planning authority) whether or not listed building consent should be granted.

33. Section 38 confers a power on a local planning authority to issue listed building enforcement notices.

34. Section 39 provides for an appeal to the Secretary of State against an enforcement notice on any of the following grounds, which are set out in subsection (1):

> "(a) that the building is not of special architectural or historic interest;
>
> (b) that the matters alleged to constitute a contravention of section 9(1) or (2) have not occurred;
>
> (c) that those matters (if they occurred) do not constitute such a contravention. …
>
> (e) that listed building consent ought to be granted for the works, or that any relevant condition of such consent which has been granted ought to be discharged, or different conditions substituted; …"

35. Section 41, which is headed 'Determination of Appeals under Section 39', provides in subsection (6):

> "On the determination of an appeal the Secretary of State may –
>
> (a) grant listed building consent for the works to which the listed building enforcement notice relates or for part only of those works ; …
>
> (d) if he thinks fit, exercise his power under section 1 to amend any list compiled or approved under that section by removing from it the building to which the appeal relates. …"

36. Section 62 provides:

> "(1) Except as provided by section 63, the validity of [for present purposes a decision on an appeal under section 20] … shall not be questioned in any legal proceedings whatsoever."

37. Section 63 provides that:

> "(1) If any person is aggrieved by any such order or decision … and wishes to question its validity on the grounds –
>
> (a) that it is not within the powers of this Act, or
>
> (b) that any of the relevant requirements have not been complied with in relation to it, he may make an application to the High Court under this section."

38. Subsection (4) confers power on this Court to quash the relevant order or decision.

39. Section 65 of the Act governs appeals to the High Court relating to listed building enforcement notices. It is common ground between the parties that this, like section 63, gives rise to a remedy which is discretionary.

40. Section 91 is the interpretation section. However, the word "building" is not defined in the Listed Buildings Act itself. It is defined in section 336 of the Town and Country Planning Act 1990 as follows:

> "'Building' includes any structure or erection, and any part of a building, as so defined, but does not include plant or machinery comprised within a building".

The Inspector's decision letter

41. The Inspector's decision was issued on 19 January 2017. Having summarised the factual history, he said at para. 17 (original italics are used when I quote from the decision letter here and later):

> "In considering what should be listed, only a '*building*' may be listed. However, the term '*building'* is widely defined in section 336(1) of the Town and Country Planning Act 1990 (the principal Act). It includes '*any structure or erection, and any part of a building as so defined, but does not include plant or machinery comprised in a building'*. Over the years *'listed buildings'* have included many unusual '*structures and erections'*, as well as the obvious whole, or parts of qualifying buildings. These have included, for example, telephone kiosks, pill boxes, post boxes, shipyard cranes and, as in this case, pieces of sculpture or statuary."

42. He continued:

"***The facts of this case***

18. The piers and urns, when produced for the owner of 'Wrest Park' (Duke of Kent) in the 1720s, were '*chattels*' for the purposes of property and ownership law. They remained as such, when the house was owned by the appellant's family and following their subsequent moves, via the Dower House and Badger's Farm. At Idlicote, they remained as *'chattels'* in their positions on either side of the driveway to the south east of the house.

19. When the piers and urns were separately listed on 30 June 1986, they became '*listed buildings'* in their own right. They were still in the ownership of the appellant and remained his '*chattels'* as a matter of property law. However, they were now '*chattels'* which were '*listed buildings'.* As such, from that date, they were subject to all of the protective provisions of the PLBCAA.

20. In the case of '*R (Judge) v First Secretary of State and Middleborough BC [2006] JPL 996,* it was held that it was *'wholly irrelevant'* what status the building's component parts might have as a matter of property law, because planning was a statutory code. It was also held that the term '*relocation'* was simply convenient shorthand for *'demolition and reconstruction'.* In this case the '*relocation'* was to a place unknown, outside of the UK."

43. The Inspector addressed whether the items could be listed at paragraphs 24 to 31:

"24. I consider that, for the purposes of the PLBCAA, both the right and the left piers and finials are '*listed buildings'.* The fact that they are not what one would normally call '*buildings'* is irrelevant. Section 336(1) of the principal Act includes '*any structure or erection'* (see above). The SOS added these two *'structures or erections'* to the statutory list of '*buildings'* on the advice of the HBMC (EH, now HE).

25. In the PLBCAA, Section 1(5) sets out that '*listed building'* means one which for the time being included in the statutory list. There is no question that the descriptions of the piers and finials (right and left) are on the formal list and that these descriptions accord with the submitted photographs. There is no evidence before me to indicate that they were mistakenly or unjustifiably listed. One cannot go behind the listing. It is there as a matter of fact and, therefore, there can be no valid argument that the piers and finials were not *'listed buildings'.*

26. I have concluded that each pier and finial is a '*listed building'* in its own right for the purposes of the PLBCAA. The items are '*buildings'* for this purpose. It is not a question of whether or not the piers are '*buildings'* and whether or not the finials are fixed to them. These arguments are also irrelevant. So too is the argument that they are not curtilage listed buildings. Also, the '*Debenhams plc v Westminster City Council [1987] AC 396; 'R v SOS Wales ex p Kennedy [1996] JPL 645; and 'Berkeley v Poullet' [1977] 1 EGLR 86'* cases as referred to by the appellant do not directly apply to the situations in these appeals.

27. In these appeals it is not a question of whether or not the piers and urns were objects or structures fixed to a building (or even to each other). Nor is it a situation whereby chattels might, or might not, be considered to be fixtures. The tests of the '*method and degree of annexation'* and the '*purpose of the annexation'* are equally not relevant in the assessment of whether or not the piers and urns are '*listed buildings'.* It matters not how they were fixed to each other or whether they were fixed to the ground since they were both listed in their own right where they stood at Idlicote.

28. Neither do the cases of '*Holland v Hodgson LR 7C.P 328'* and '*London Borough of Tower Hamlets v London Borough of Bromley [2015] EWHC 1954* assist the appellant in the argument that the piers and urns are not '*listed buildings'.* In the former case the question related to whether articles resting by their own weight formed part of the land.

In the latter case the question was whether or not a piece of sculpture formed part of the land. In these appeals the fact is that the piers and urns were listed in their own right and positioned within the grounds of Idlicote House. On the date of listing they were in their positions on either side of the entrance drive.

29. The appellant also refers to the *'Skerritts of Nottingham Ltd v SOS Environment Transport and the Regions (no2) [2000] JPL 1025* case, in judging whether or not an object is a '*building'*. Again this case does not assist since, once added to the statutory list, the piers and urns became '*listed buildings'* for the purposes of the PLBCAA. It is not a case of applying the '*Skerritts*' tests as suggested by the appellant.

30. The questions of size; nature and degree of attachment and degree of permanence do not need to be considered to assess whether or not the piers and urns are '*listed buildings'* for the purposes of the PLBCAA. Nor can it be a question of applying sections 5(a) or 5(b) of the Act, since the piers and urns were not objects or structures fixed to any other listed building and nor were they curtilage buildings.

31. I do not accept the contention that the piers and urns were not capable of being listed under section 1 of the PLBCAA or that they were listed by mistake. As '*erections or structures'* they clearly were treated as '*buildings'* and added to the list compiled by the SOS. As such, listed building consent was required for their removal. There is no consent in place and it follows that a contravention of the PLBCAA has occurred and that the appeal on ground (c) cannot succeed."

44. On the enforcement notice appeal under ground (a), that the items were not of special architectural or historic interest, the Inspector said:

"32. An appeal on this ground in essence challenges the listing and is normally made on the basis that the listed building(s) is/are not of special architectural or historic interest. It effectively constitutes an application to the SOS to remove the building from the list which he is empowered to do by section 41(6)(c) of the PLBCAA. In such situations the SOS is obliged to consult with HE and with such other bodies or persons as appear to him appropriate as having special knowledge of, or interest in, buildings of architectural or historic interest.

33. The SOS will require professional advice as to why the *'listed building(s)'* are not of special historic or architectural interest. In this case the appellant asks that the SOS finds this to be so. It is stated that, since the listing documentation has not been found it is not known why the SOS (through English Heritage) considered them to be of special interest in 1986. It is not clear whether it was known at the time of listing that the piers and urns had only been at Idlicote House for just 13 years.

34. It is contended that the list description is brief and fails to say anything about the history of the items and it is also considered curious that far more interesting items, such as the statue of Diana and a Thomas Tompion Sundial were not listed. The HE comments on the LBC application links the significance of the items to the value realised at auction. It is contended that this identifies interest in them as objects, rather than buildings. It is stated that SPAB disagreed with HE in stating that the objects had no value 'financial or otherwise'.

35. However, as referred to by the LPA, the decision (for the SOS to make) as to whether or not a *'listed building'* is of special or historic interest is a straightforward matter of fact and opinion based on professional advice/evidence. The SOS will need to be convinced that the *'listed building'* is no longer of special historic or architectural interest if it is to be removed from the list.

36. I agree with the LPA that, in addressing this ground of appeal, the need for professional judgement is central. In this case it would appear that the only professional judgement made in relation to the decision to list the items was made by the EH (now

HE) and as a result the piers and urns were listed in 1986. The LPA indicates that it now relies on the professional advice of HE who are still of the view that the piers and urns are of special historic and architectural interest.

37. At this appeal stage neither the LPA nor the appellant have provided any detailed professional evidence on the special historic or architectural interest of the piers and urns. The former indicates that it had not been possible to inspect the items before their removal and the latter refers to the LPA and HE simply relying on the listing rather than fully justifying why they are of special interest.

38. Normally when ground (a) is pleaded there is detailed evidence from the parties on which an assessment can be made. In this case such detailed evidence is lacking. However, having seen photographs of the piers and urns, they are still distinctly recognisable from their list description. I have no reason to question the designating Inspector's professional judgement on the special interest of the items and the SOS clearly agreed with the recommendation to add the piers and urns to the statutory list. HE and SPAB are equally of the view that the piers and urns were of special historic and architectural interest. The details set out in the auction catalogue reinforce my view that the piers and urns were of significant special historic interest.

39. The fact that they date back to around 1720, in my view, is most relevant as is their historic provenance and initial link with Wrest Park. Whilst acknowledging that they were brought to Idlicote as items of garden statuary (as chattels), the piers and urns were prominently positioned, close to the house and on what used to be the main driveway entrance. It was in their respective positions, either side of this entrance, that they were listed. As indicated above they could be seen together with the house and were clearly intended to signify the original driveway entrance, separating the lawned gardens from the mature tree-lined driveway which leads to the gatehouse.

40. HE's selection Guide for *Garden and Park Structures* acknowledges that statuary, urns and other features became extremely popular in formal gardens. It also indicates that survivals are fairly common and that some items have often been moved or introduced from elsewhere (as in this case). It goes on to indicate that pre-1840 examples will generally merit designation. Thus, even though these piers and urns were not in their original positions they date back to the 1720s and are attributed to John van Nost, a Flemish sculptor who was also responsible for many other notable works in grand English Country Houses. In my view, these facts, together with their historic provenance linked to Wrest House, merited their Grade II designation in 1986.

41. There is nothing before me to indicate that the piers and urns were not worthy of their listed status in 1986. Between then and 2009 there was no application to the SOS to de-list them. There is also no evidence to indicate why, at the time of their removal, that they were unworthy of their listed status. In conclusion on this ground of appeal, therefore, I do not consider that there could have been any justification to de-list the piers and urns. The appeal also fails, therefore, on ground (a)."

45. As to whether listed building consent should be granted in the appeal under section 20, the Inspector said:

"42. The main issues in both appeals are the effects of the removal of the piers and urns on their integrity and character as listed buildings; on their setting(s) and on their features of special historic and architectural interest.

The cases for the appellant and the LPA

43. The appellant acknowledges that if the piers and urns are found to be '*listed buildings'* then LBC would have been required for their removal and that this amounted to demolition. However, it is contended that that this was a demolition which did not affect or harm their special interest. It is indicated that the piers and finials remained

intact and, having been sold for a considerable sum, they would now have a new owner who would '*cherish them'.*

44. It is further contended that any *'special interest'* would be in the items themselves rather than where they were located. As recent additions to the Idlicote grounds it is considered that their interest was not at all based on their setting. Referring to the duty under section 16(2) of the PLBCAA, the appellant considers that since the '*buildings'* special interest is unaffected by their removal, they have been duly '*preserved'.*

45. The NPPF is also referred to and it is contended, again, that the significance lay in the objects themselves. Furthermore, it is argued that if any harm is caused, it is less than substantial since the significance of the objects survives with them. Due to their short and '*coincidental'* presence at Idlicote it is not considered that their removal has had any significant effect on the setting of the house.

46. In further support of this ground of appeal the appellant reflects on the reality of the position, indicating that he and his agents were unaware of the listings of such recently arrived chattels and that EH had been made aware of the intended sale and made no objection. The items have now been sold to an '*anonymous'* buyer and there is no reason to believe that they are still within the UK. It is indicated that even if the owner could be identified they could not be compelled to return the piers and urns. It is not considered to be realistic that they could be returned. It is, however, considered to be realistic that they will be preserved.

47. The LPA stands by its reason for refusing LBC for the removal of the listed piers and urns. The refusal notice refers to the removal as equating to demolition and that; as a result, substantial harm has been caused to the historic and architectural significance of these heritage assets. It refers to the NPPF and that such substantial harm should be '*exceptional'* and that '*substantial'* public benefit would be needed to outweigh the harm. It is stressed that the appellant has failed to demonstrate any such benefits and that the removal was not justified.

Assessment

48. Section 10 of the PLBCAA prescribes the form and content for applications for LBC. For England the procedures for making and determining applications are prescribed by the Planning (Listed Buildings and Conservation Areas) Regulations 1990 as amended and applications must include items specified in section 10(2)(a) to (c). These require sufficient particulars to identify the listed building (10(2)(a)); such other plans and drawings to describe the works which are subject of the application (10(2)(b)) and other particulars as required by the LPA (10(2)(c)).

49. In the case of '*R (Judge) v First Secretary of State and Middleborough BC [2006] JPL 996* (already referred to above) it was held that it is plain from sections 7 and 17 of the PLBCAA that LBC can be granted for the relocation of a listed building. In *'R v Leominster District Council Ex p Antique Country Buildings and others [1987] 56 P&CR.240*, it was held that a building does not cease to be a listed building if it is demolished or removed without authorisation.

50. Applying these cases, it follows that the appellant could indeed apply for removal of the piers and urns and that wherever these items are now kept, they remain on the SOS's list. However, in this case, in applying for removal there was no indication of the new location of the piers and urns. Neither at the time of the LBC application, nor within the appeal process have any details been provided to indicate the whereabouts of the '*listed buildings'.* I consider, therefore, that despite the fact that the LPA determined the application, the requirements of section 10(2)(b) of the PLBCAA were not complied with.

51. In the case of *'R. (Wilson Dyer Gough) v SOS CLG [2008] EWHC 3188',* it was held that were an application to be lodged, on the basis of the provision of plans as to what was to be removed or altered, without those plans showing how the building would be presented after those changes had been carried out, it would fail the section 10(2)(b) test. This is because it would not include the necessary drawings (or information) and because it would be impossible for a decision-maker to discharge the statutory duty under section 16(2) of the PLBCAA. There would be no necessary information on which to have *'special regard'* to the desirability of preserving the building or its setting or any features of special or historic interest which it possesses.

52. This is exactly the situation here with the decision-makers (first the LPA and now in these appeals) being unable to assess whether or not the two '*listed buildings'* have been preserved. I therefore agree with the LPA and find it inconceivable that LBC can be countenanced for the total removal of the piers and urns to an unknown and unspecified location (or possibly more than one location). I also agree with the LPA that to grant LBC for such works carried out would create an extremely dangerous precedent, potentially endangering the preservation of innumerable other designated heritage assets such as these historic piers and urns.

53. Although the appellant contends that the assets are fully preserved and that there can be confidence in their continued preservation, not only is there a complete lack of evidence to show that this is the case, there would appear (at this stage) to be no way of providing such evidence.

54. On the Appeal A ground (e) and the Appeal B facts, I find that the removal of the piers and urns has affected their integrity and character as '*listed buildings'*. They were removed from the positions in which they were listed to a place unknown; they possessed settings of their own (once listed) which have been completely lost or undone and their special historic and architectural features have been put at risk.

55. Overall I consider that the works carried out cannot be said to have preserved the two '*listed buildings'* and that their total removal (amounting to demolition) is contrary to policy CS8 of the SDCS, which seeks to protect and enhance the historic environment for its inherent value. The works of removal/demolition are also contrary to policies within the NPPF contained within paragraphs 126 to 141. I find that the harm to these historic assets can only be described as being substantial and there are clearly no public benefits which can outweigh the harm caused.

56. I do not consider that LBC should be granted for the removal of the listed piers and urns. I agree with the LPA's reasons for not granting LBC and there can be no justification in granting consent at this appeal stage. Appeal A also fails on ground (e) and Appeal B fails."

The Grounds of Challenge

46. There are 11 grounds of challenge advanced by Mr Richard Harwood QC on behalf of the Claimant. However, it will be convenient, as the parties found at the hearing before me, to group some of those grounds together in order to address the main issues in this case. I will also address them in a slightly different order, so as to consider the issues in the order in which they logically arise.

The First Issue

47. The first issue is whether it is open to an inspector on an appeal such as this to go behind the fact that an item appears on the list: this is the subject of Ground 5.

48. This Ground arises principally from para. 25 of the Inspector's decision letter. As I have mentioned, in that paragraph, the Inspector stated that:

> "One cannot go behind the listing. It is there as a matter of fact …"

The Inspector had pointed out earlier in the same paragraph that section 1(5) sets out that "listed building" means one which for the time being is included in the statutory list. This is before one even gets to what is set out later in that subsection and which gives an additional, extended meaning to the term.

49. In support of this ground of challenge Mr Harwood QC submits that the Inspector was wrong as a matter of law to state that he could not go behind the fact of listing. He submits that if, as a matter of law, the items were not ones that could properly be listed in the first place, it was incumbent upon the Inspector to go behind the fact that they were included in the statutory list. Mr Hunter, on behalf of the Secretary of State, submits that the Inspector was not entitled to go behind the list and was correct as a matter of law in saying what he did.

50. Mr Harwood QC points to the language of section 1(5). In particular it refers not to anything which is included in the statutory list but rather to "a building" which is on that list. He submits that if, as a matter of law, something is incapable of being a building, then it is unlawfully on the statutory list and the Inspector must say so. Mr Harwood QC submits that if the objects are not buildings under section 1(5), then their removal cannot be a breach of section 9. He submits therefore that this was an issue which arose properly under Ground (c) of section 39(1). As I have already mentioned, that ground of appeal is:

> "that those matters (if they occurred) do not constitute such a contravention [that is of section 9]".

As will be recalled, section 9 provides that, if a person contravenes section 7, he shall be guilty of an offence. That requires one therefore to turn back to section 7. That section provides that no person shall execute or cause to be executed any works for the demolition of a listed building or for its alteration or extension in any manner which would affect its character as a building of special architectural or historic interest, unless the works are authorised under section 8.

51. Mr Harwood QC reminds me that the validity of a listed building enforcement notice cannot be challenged in criminal proceedings for failing to comply with it: see section 64 of the Listed Building Act and R v Wicks [1998] AC 92, which was cited in Boddington v DPP [1999] 2 AC 143. He submits that, for that reason, it is all the more important that a person should be able to raise the validity issue at a prior stage, in an enforcement notice appeal under section 39.

52. In this context I agree with Mr Hunter that the authorities such as Boddington do not establish any universal rule that a person must be able to challenge the validity of administrative decisions by way of defence to proceedings. Indeed the decision of the House of Lords in Wicks makes it clear that there will be circumstances in which, even in the context of potential criminal penalties, a person is not able to do so. As the authorities, in particular Boddington, at p.160 (Lord Irvine of Lairg LC), make clear the question depends in every case upon a close examination of the particular statutory context.

53. I accept the submission by Mr Hunter that, in this particular statutory context, it was not the intention of Parliament to entitle a person to raise the validity of the fact of listing in an appeal under section 39), potentially many decades after the event. This is in essence for the reasons which Mr Hunter has advanced before this court and which I would summarise as follows.

54. First the grounds of appeal which are set out in section 39 are limited in their terms. It is notable that they include, under Ground (a), an argument that the building in question is not of special architectural or historic interest. In other words the grounds expressly permit an appellant to raise the merits of listing. As Mr Hunter submits, if it had been Parliament's intention that the grounds of appeal should cover the validity and not only the merits of that decision, the Act could easily have said so.

55. Secondly, the Inspector had no power to quash an entry on the list on the grounds of unlawfulness. That is a function of the courts. The suggested analogy with the "defence" context in cases such as Boddington or Wandworth LDC v Winder [1985] AC 461 is not an exact one. This is not a situation in which a person is seeking to raise validity arguments in court proceedings by way of defence to some action taken by the state against him, such as a criminal prosecution (as in Boddington) or a civil action for rent arrears and/or possession of premises (as in Winder). Rather it is a case of that person himself positively raising a ground of appeal, albeit against an enforcement notice issued by a planning authority.

56. It is also notable in this context that it would be open in principle to the landowner affected by the fact of listing to challenge that by way of judicial review. The legislation requires that notice of listing is required to be given to every owner and occupier: section 2(3). It also requires a copy of the listing to be treated as a local land charge: section 2(2), thus enabling future purchasers to know the restrictions which would apply to land that they intend to purchase.

57. Furthermore it is open to a person to ask the Secretary of State to remove a building from the list. It is important in this context to recall that the power to list or de-list is conferred by Parliament on the Secretary of State and not on his Inspectors. In principle it would be possible for a person who was dissatisfied by a decision by the Secretary of State not to de-list an item to challenge that decision by way of judicial review. If his argument were that the item in question could not as a matter of law be regarded as a "building" and therefore could not lawfully remain on the list, that would be a ground he could raise in such proceedings. Again, it is important to note that the legislative scheme has made provision for notice to be given of the fact of listing through a publicly available document. Whatever may have been the actual state of knowledge of Major Dill or his successors, in my view, the scheme as a whole has made reasonable provision for those affected by the statutory list to know of its

contents and, if so minded, to challenge a decision not to de-list an item by way of judicial review.

58. For similar reasons this situation is also different from that which has come before the courts when considering the validity of planning conditions. The power to grant planning permission expressly includes a power to impose conditions but it has long been established that that power is not unlimited. In Newbury DC v Secretary of State for the Environment [1981] AC 578, at 599, Viscount Dilhorne summarised the principles to be derived from earlier authorities in the following way:

> "the conditions imposed must be for a planning purpose and not for any ulterior one, and … they must fairly and reasonably relate to the development permitted. Also they must not be so unreasonable that no reasonable planning authority could have imposed them …"

59. However, Viscount Dilhorne went on to say later, at p. 601, that:

> "If in the circumstances of this case the condition imposed was not, in the Secretary of State's opinion, fairly and reasonably related to the permission granted, the courts cannot interfere with his conclusion unless it is established that he misdirected himself or reached a conclusion to which he could not reasonably have come …"

60. It is entirely understandable, in my view, why Parliament should have intended that, if a local planning authority imposes a condition when granting planning permission which is invalid, the Secretary of State (or, under delegated powers, his inspectors) should have the power on appeal to determine that question of validity. That situation is not the same as the present, where it is the Secretary of State who made the decision to include the items on the statutory list in the first place and where he has the power to de-list them.

61. Mr Harwood QC also relies on the decision of the Court of Appeal in Earthline Ltd v Secretary of State for Transport, Local Government and the Regions [2003] 1 P & CR 24, in which Boddington was distinguished in the context of challenges to planning conditions imposed by local authorities. At para. 22 Keene LJ said:

> "However comprehensive a code is achieved by the 1990 Act and its associated legislation, the fact remains that there is no equivalent to section 284 of that Act when one is dealing with a decision of a local planning authority or, as in this case, a mineral planning authority. It would take clear and express language to remove from the courts their power to strike down an ultra vires condition and such language does not exist in these circumstances."

62. However, in my view, there is an important point of distinction in the present case. Keene LJ was referring to the constitutional principle that it would require clear and

express language to oust the jurisdiction of the *courts* to review the lawfulness of administrative action. That principle has no bearing on what the powers of a planning inspector should be.

63. Finally, in this particular statutory context, it is important to recall the fundamental purpose of having the statutory list. It is to enable members of the public to inspect relatively quickly and easily the published list so they can see what is on it and so they can regulate their affairs accordingly. Although the issues were not the same as in the present case, useful guidance as to the general purpose of the statutory list is to be found in Barratt v Ashford DC [2011] 1 P & CR 21 at paras. 6 and 43 (Mummery LJ). As Mummery LJ put it at para. 43:

> "the basic framework of the 1990 Act is the compilation of an authoritative and publicly accessible list of buildings of special architectural and historic interest. The essential point is that it should be reasonably possible for the public to learn from an inspection of the list whether a particular building is listed or not."

64. As Mr Hunter submits, a listing decision may have been made many decades before an appeal: those are indeed the facts of the present case. In the meantime many third parties, as well as the local planning authority, will have relied on the fact of listing. In my judgement, if Mr Harwood were correct in his fundamental submission on this point, that would lead to unacceptable uncertainty in a context where Parliament has clearly thought it right that there should be clarity and certainty.

65. Accordingly, I conclude that the first issue must be decided in favour of the Secretary of State.

The Second Issue

66. The second issue is whether, even if it is open to the inspector to consider the validity of the listing in an appeal before him, it is any part of his role to question the correctness of the Secretary of State's earlier decision to list a building on the merits of that decision.

67. The second issue arises from paras. 26-31 of the Inspector's decision letter. In that passage the Inspector disagreed with the appellant's submission that the Secretary of State had not been entitled to regard the items as "buildings" when he listed them in 1986. Mr Hunter submits on behalf of the Secretary of State that the question whether the items were "buildings" was a matter of fact and degree for the decision maker (the Secretary of State) at the time of listing and not a matter for either the Inspector or this Court. He also reminds me that the definition of a building in this context is a wide enough and includes a structure or erection. It therefore goes beyond what might at first sight be regarded as a building.

68. I agree with Mr Hunter's submission that, even if an appellant is entitled to ask an Inspector to "go behind" the fact of listing in an appeal under section 39(1)(c), the most an Inspector could do is to consider the question whether the Secretary of State

acted reasonably in considering that an item was a "building". He cannot simply disagree with the merits of the Secretary of State's decision to list something. The most, in my judgement, an Inspector would be entitled to decide is that something was incapable reasonably of being considered to be a building at all.

69. Without wishing to give any exhaustive definition of such items, for example if the Secretary of State had placed a painting on the statutory list, an Inspector might well be entitled to conclude that no reasonable Secretary of State could have considered that to be a "building". However, those are not the facts of the present case. As Historic England noted in the correspondence before the Court (and which I quote below in addressing other grounds of challenge) there have been examples of structures such as statuary which have been included in the statutory list in the past. In my judgement, statuary is capable as a matter of law of falling within the wide definition of a building, which includes a structure or erection. The question then becomes one of fact and degree and, as Mr Hunter submits, that is a matter for the Secretary of State.

The Third Issue

70. The third issue raises a number of similar issues. The first is whether the Inspector erred in law in finding that the items concerned were buildings, or structures or erections, within the meaning of the Listed Buildings Act: this is the subject of Ground 1. Ground 2 raises the question whether the Inspector erred in law in finding that concepts of property law were irrelevant in this context. Ground 3 raises the question whether the Inspector erred in law in finding that the factors identified in Skerritts of Nottingham Limited v Secretary of State for the Environment, Transport and the Regions (No 2) [2000] JPL 1025 were irrelevant in this context. Ground 4 raises the question whether the Inspector erred in law in his consideration of the decision of Sullivan J in R (Judge) v First Secretary of State [2005] EWHC 887 (Admin).

71. Under Ground 1, Mr Harwood QC submits that the listed building regime deals only with the protection of buildings (including for this purpose structures and erections) but not with mere chattels. He submits that the items in the present case were merely chattels and not buildings. In this context he submits that section 1(5) of the Listed Buildings Act is applicable and required the Inspector to consider the question in accordance with the law of fixtures. He relies in particular on the decision of the House of Lords in Debenhams plc v Westminster City Council [1987] AC 396 and the decision of the Court of Appeal in Corthorn Land and Timber Co. Limited v Minister of Housing and Local Government (1966) 17 P & CR 210, which was a decision on section 30(1) of the Town and Country Planning Act 1962 and preceded the current listed building regime.

72. Mr Harwood QC submits that the Listed Buildings Act controls buildings, structures and erections which are part of the land rather than controlling chattels. He submits that, given the Inspector's finding that the items were chattels, they could not have been buildings or fixed to buildings under section 1(5). He submits that the Inspector erroneously treated an object which rested on another free-standing object as a single structure.

73. I do not accept those submissions. I accept the submissions made by Mr Hunter on behalf of the Secretary of State in this context. The fundamental difficulty with Mr Harwood QC's submissions is that they confuse different parts of the statutory definition of a listed building in section 1(5) of the Listed Buildings Act. There are three different ways in which something may qualify as a "listed building". The first is by being included on the statutory list maintained by the Secretary of State. The second is by being an object or structure fixed to a building which is on the list. The third is by being an object or structure which lies within the curtilage of a building which is on the list and has done so since 1 July 1948. Those are alternative methods of qualifying as a listed building and are not cumulative.

74. The decision of Russell LJ in Corthorn was explained by Lord Mackay of Clashfern in Debenhams at p. 408 in the following terms:

> "The statutory provision which is now the latter part of section 54(9) first appeared in the Town and Country Planning Act 1968. As an illustration of a question that had arisen prior to that statutory provision which might throw light on the reason for its insertion in legislation in 1968 your Lordships were referred to the decision of Russell LJ sitting as an additional judge in the Queen's Bench Division in *Corthorn Land and Timber Co. Ltd. V Minister of Housing and Local Government* (1965) 17 P & CR 210. In that case a building preservation order had been made in respect of a mansion of outstanding architectural merit. The building preservation order provided, inter alia, that the mansion should not, without the consent of the planning authority be demolished, altered or extended and that the following items, inter alia, should not be altered or removed:
>
> > "1.27 portrait panels in the King's room being 19th century copies of Tudor and Stuart Kinds and Queens. 2. Carved oak panels in the wall of the Oak Room dating from the 15th to mid 17th centuries. 3. A large wood carving in the Great Hall. 4. Large wooden medieval equestrian figures on the main landing. 5. A pair of painted wooden panels depicting the Hall in the ornate mantelpiece in one of the drawing rooms."
>
> The owner applied to quash the building preservation order on the ground that the above mentioned items were not properly included in it. It was held that any chattel which was affixed definitely to a building became part of the building; that there was no doubt that the items in dispute were all fixed and annexed in their places as part of an overall and permanent architectural scheme and were intended in every sense to be annexed to the freehold, and were accordingly part of the building; and that, in these circumstances, the restriction on their removal was properly made. Russell LJ after saying that he did not propose to detail the effect of the evidence laid before him as to the methods of fixing employed in relation to

> the various items in dispute said, at 17 P & CR 201, 213: "it suffices to say that all the items would properly be described as fixtures as that phrase is commonly applied in law." Russell LJ went on to quote from a number of authorities which can be summarised by saying that the ancient rule of the common law was that whatever is planted or built in the soil or freehold becomes part of the freehold or inheritance, thus a house becomes part of the land on which it stands and anything annexed or affixed to any building (not merely laid upon or brought into contact with the building) was treated as an addition to the property of the owner of the inheritance in the soil and was termed a "fixture." …"

75. As Lord Mackay explained at p. 409 that the amendment to the definition of "building", which was made by section 54(9) of the Town and Country Planning Act 1971 (and which remains the definition of that word in the present legislation) "put beyond question the matter that was decided by Russell LJ in the Corthorn case". However, in my judgement, none of that line of authority has any relevance to the present case. This is because the items in question were included in the statutory list in their own right. This was not a case where all that had been listed was the house itself; if it had been the question might have arisen whether the items could be regarded as part of that building as fixtures but that was not the basis on which they were regarded as buildings. Rather it was that they were listed in their own right.

76. Accordingly, in my judgement, the law of fixtures was not relevant to the issue which the Inspector had to decide in the present case. Of fundamental importance is the fact that the items in question in the present case were included on the statutory list in their own right in 1986. They were not regarded as listed buildings by reason of the fact that they were fixed to a building on the list nor because they lay within the curtilage of such a building. Rather they were "buildings" within the extended statutory definition of that term and were listed in their own right in 1986.

77. It is for this fundamental reason that I would reject Grounds 2, 3 and 4 in this context also.

78. Ground 2 raises the question whether the Inspector erred in law in finding that concepts of property law were irrelevant in the present context. In my judgement he was right to take that view, since the law of fixtures was not relevant. Furthermore property law concepts generally were not relevant in the sense that the mere fact that these items were chattels as a matter of property law did not prevent them being buildings in the present statutory context.

79. Ground 3 raises the question whether the Inspector erred in law in finding that the factors identified in the case of Skerritts were irrelevant in this context. That case confirms that a structure or erection does not have to be incorporated into the realty in order to constitute a "building" but is irrelevant in the present context.

80. Skerritts addressed the question whether the erection of a marquee was a "building operation" for the purposes of the definition of "development". The Court of Appeal

endorsed the test of consideration of size, permanence and degree of physical attachment. Mr Harwood QC submits that the approach in Skerritts is equally relevant in deciding whether an object is a "structure or erection" within the meaning of section 1(5).

81. However, I reject that submission. As Mr Hunter submits, the fact is that the items in the present case were included on the statutory list in their own right. The issue of whether they were structures or erections had already been considered by the Secretary of State. It was his view that they did qualify as "buildings" in their own right.

82. Ground 4 raises the question whether the Inspector erred in law in his consideration of the decision in the case of Judge. In my judgement he did not err in that way as suggested by Mr Harwood QC. The Inspector understood that case as firstly supporting the proposition that status of the items in property law was not relevant to whether they were listed buildings given that they were included in the statutory list in their own right. Secondly, he referred to the case in support of the proposition that listed building consent can be granted for the relocation of such a building. In reaching that view he was correct.

The Fourth Issue

83. The fourth issue concerns the approach which the Inspector took to the question of whether the items were of special architectural or historic interest. I will address Grounds 6, 7 and 8 under this general rubric.

84. Ground 6 raises the question whether the Inspector erred in law in failing to consider whether the items were of special historic or architectural interest as *buildings* rather than as *chattels*.

85. The Inspector addressed this issue at paras.38-40 of the decision letter. Mr Harwood QC submits that the Inspector's assessment of the items' historic or architectural interest was conducted simply in terms of their value as objects rather than as buildings or their location in a particular place. He submits that listing is not a mechanism for protecting chattels which are of historic interest but rather concerns preservation of the historic or architectural interest of buildings. He reminds this court that these items had not been present at Idlicote for most of their history and that there was no particular reason why they should be regarded as associated with this location. He also submits that their location within the site was chosen for the family's own appreciation rather than because of the design of the garden.

86. I do not accept those criticisms. In my judgement, as Mr Hunter submits, they amount in reality an invitation to this court to question the Inspector's views of the planning merits before him. Once it is accepted (as I have already held) that the items were "buildings" for the purpose of the relevant legislation, the merits of the issue of whether they had special architectural or historic interest would be conducted in the terms that the Inspector carried out. The distinction which Mr Harwood QC seeks to draw in this context, between buildings and chattels, is a false one, since as a matter of law these chattels were properly treated as buildings.

87. Furthermore the Inspector had before him the views of both Historic England and the SPAB in the letters to which I have referred earlier. They supported the inclusion of the items in the statutory list. Their professional advice was something which the Inspector was entitled to base himself upon. He could reasonably arrive at the planning judgment which he did as to the items' special architectural or historic interest.

88. The first is a letter from the SPAB dated 24 September 2015, which stated (so far as material):

> "The Society does not support the theory that because the urns are not original to Idlicote, … they do not have any value (financial or otherwise) in being there. Many objects and sculptures move throughout history; whole gateways, columns and other architectural features have historically been taken from one house and installed in another. However this past behaviour should not be seen as an endorsement for the present. The urns were recognised in 1986 as being of national interest and significance, and as such were listed to prevent them from being moved or altered without the knowledge of the State. The fact that they are on private ground and not visible to the general public is of no consequence in any discussion regarding designated heritage assets as the protection is there on behalf of the Nation to ensure our collective history remains in tact for future generations."

89. I also note that the letter from Historic England dated 13 December 2015 stated that:

> "Their significance as historic objects is high, recognised by the fact that they were sold for a substantial sum at a specialist auction house in 2009."

The letter also stated that:

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

90. I therefore reject Ground 6.

91. Ground 7 raises the question whether the Inspector acted without evidence in relying on what he believed to be the view of English Heritage in 1986. In particular complaint is made that it is simply not known what was thought in 1986 and whether English Heritage or the Secretary of State were then aware that the items had only been at Idlicote for 13 years and had been moved by the Dill family between various houses.

92. Ground 8 raises the question whether the Inspector erred in law in relying on what he called professional judgement when, submits Mr Harwood QC, the decision to list or de-list is an administrative one taken by a Minister.

93. In my judgement neither of these criticisms has any merit. It is reasonably likely that, when the items were listed in 1986, the Secretary of State at the time would have acted upon professional advice, including the opinion of English Heritage as the statutory consultee was at that time. Certainly no evidence has been adduced by the Claimant that he did not. Although the decision to list maybe described as being an administrative one, it was inevitably based on the professional judgment which needs to be formed about the merits of listing or de-listing. In any event, it is perfectly clear what the professional advice from Historic England and the SPAB was at the time when the issue was being considered by the Inspector. It was that items were worthy of being on the statutory list and should remain there.

94. As Mr Hunter submits, these are matters which are essentially ones of planning judgement and therefore are ones for the opinion of the Secretary of State rather than this Court, subject to the possibility of review on the ground of irrationality. The Inspector in the present case was reasonably entitled to come to the conclusion which he did.

The Fifth Issue

95. The fifth issue is whether the Inspector erred in law in considering that the listed building consent application was invalid because it did not say where the items would be removed to, as required by section 10(2)(b) of the Listed Buildings Act: this corresponds to Ground 9.

96. I have already set out the material terms of section 10(2)(b) of the Listed Buildings Act.

97. Mr Harwood QC reminds this Court that the application for listed building consent in this case was for the demolition of the peers and urns by their removal from the site. Consent was not sought for their placement elsewhere. He submits therefore that the application did not have to specify where the items would be removed to. He submits that the language of the relevant legislation simply does not require any works of relocation to be described in a case of this type.

98. Mr Harwood QC makes the point that, whilst an application for the relocation of a listed building may set out its new location, as was the case on the facts of Judge, there was no requirement for it to do so as a matter of statute.

99. Mr Harwood QC complains that the Inspector incorrectly referred to the decision of Mr Ian Dove QC (sitting as a Deputy High Court Judge) in Wilson Dyer Gough v Secretary of State for Communities and Local Government [2008] EWHC 3188 (Admin), which concerned a listed building application for the rebuilding of part of the front elevation for structural reasons and a replacement window. Mr Harwood QC submits that the Inspector misunderstood the effect of that decision. It was a case where, in the particular circumstances, the section 16(2) duty to have special regard to

certain matters could not discharged because there were no plans of how the building would be presented after the changes, alterations or additions had been carried out: see in particular para. 24 of the judgment. However, he submits, in the present case there was no such difficulty because the application was not for the relocation of the items to a particular place.

100. The Defendants have not sought to defend the Inspector's conclusion on this point on its merits. Nevertheless, Mr Hunter submits that the error by the Inspector in this regard was immaterial since the Inspector did in fact consider the merits of the appeal against the refusal of listed building consent.

101. In my judgement Mr Hunter is correct in that submission. Even if, strictly speaking, there was an error of law in this regard by the Inspector, I have come to the clear conclusion that the Court should exercise its discretion to refuse any remedy. After the hearing in the present case the parties provided a helpful "Agreed Note on Remedies". They are agreed that the Court has a discretion to withhold relief in a section 65 appeal, which should be approached on the same basis as an application under section 63. In practical terms that means that the Court should exercise its discretion in accordance with the well-known principle set out by the Court of Appeal in Simplex GE (Holdings) v Secretary of State for the Environment (1989) 57 P & CR 306 and refuse a remedy only if it is satisfied that the outcome would inevitably have been the same even if the error had not occurred.

102. That approach has been applied in the context of enforcement notice appeals: see e.g. Kestral Hydro v Secretary of State for Communities and Local Government [2015] EWHC 1654 (Admin) [2015] LLR 522, at para. 69 (Holgate J).

103. In my judgement it is clear that the Inspector would have reached the decision that he did in any event. That was inevitable since he did in fact consider the merits of the section 20 appeal before him despite his view that the application for listed building consent had not been made in the proper form. Accordingly I reject Ground 9.

The Sixth Issue

104. The sixth issue, which corresponds to Ground 10, is whether the Inspector acted unfairly in raising new issues and citing new decisions of the courts without giving an opportunity to the parties to make representations about them. Particular complaint is made about the following four matters:

(a) citing the Judge case;

(b) asserting that the listing was conclusive as to the status of the items;

(c) asserting that the degree and purpose of annexation was irrelevant in this context;

(d) considering that the listed building consent application was invalid because no destination for the items was specified and citing the decision in Wilson Dyer Gough.

105. Mr Harwood QC relies on the decision of the Court of Appeal in Hopkins Developments Limited v Secretary of State for Communities and Local Government [2014] EWCA Civ 470 [2014] JPL 1000, at para. 62, where Jackson LJ set out a helpful summary of the principles to be derived from authority. As Jackson LJ pithily put it in para. 61:

> "It remains the duty of the inspector to conduct the proceedings so that each party has a reasonable opportunity to adduce evidence and make submissions on the material issues, whether identified at the outset or emerging during the course of the hearing."

106. Mr Harwood QC also relies on the decision of Mr Nigel Macleod QC (sitting as a Deputy High Court Judge) in Ball v Secretary of State for the Environment, Transport and the Regions [2000] PLCR 299, at 309-10. In that passage the court recognised that there may be cases where, even though a planning inspector has not erred as a matter of substantive law, he may have acted unfairly in doing his own research on the law after the proceedings have concluded and before giving his decision. It was said that:

> "There will … be cases where the Inspector's case law, not referred to by the parties, does not give rise to illegality but still gives rise to a legitimate complaint. Such a case would be one where the Inspector's correct understanding of the law, based on his own researches, indicates that *an issue, not treated by the parties as a principal one* to which they devoted significant weight in their representations, is in fact a decisive issue in the appeal. In such a case, there is a real risk that the parties would have more to draw to the Inspector's attention *in respect of the facts and circumstances relevant to the issue*; and that a failure to give them the opportunity to do would cause substantial prejudice. In such a case, therefore, the Inspector's correct reliance upon the relevant case law would not of itself give grounds for review by the court; but his decision based upon analysis of the *facts and circumstances* of the appeal in the light of that case law would be open to challenge unless he gave the parties an opportunity to address him further on the consequences of his understanding of the law in the circumstances of the instant appeal." (Emphasis added)

107. As the words which I have emphasised in that passage make clear, in such a case it will not be the mere fact that an inspector has conducted his own research on legal matters which will render the process unfair. If he gets the law wrong that will give rise to grounds for review as a matter of substantive law. But, if he gets the law right, it may still be procedurally unfair if the parties have not had a reasonable opportunity to address an issue either because they had not previously appreciated that it was an issue or if they have not had a reasonable opportunity to comment on the facts and circumstances of the case in the light of the relevant legal framework.

108. I did not understand there to be any dispute between the parties as to the relevant principles which are applicable. However, fairness is ultimately a highly fact-sensitive issue. As I have said it may be unfair for an inspector to take a point in his decision which has not been raised by the parties or drawn to their attention with an opportunity for comment. This may be applicable to legal matters as well as to other matters going to the merits of the appeal before the Inspector.

109. Mr Harwood QC submits (at para. 76 of his skeleton argument) that: "if the Inspector's approach to these issues was not legally defective, then they raised matters which Mr Dill would have wished to comment on and could have done so usefully, but was not asked about." However, no particulars have been given of such matters going to the merits as opposed to matters of pure law.

110. In my judgement there was no unfairness on the facts of the present case. The issues about which specific complaint is made were all matters of law. In relation to the first three of the four matters, I have already held that the Inspector did not err in law as complained. The issues which were covered by those matters were known to the parties and they did have a fair opportunity to make representations about them. This is so even if the specific case law (for example the case of Judge) was not mentioned before the Inspector's decision letter.

111. So far as the fourth specific complaint is concerned, I have already held that, even if the Inspector did err as a matter of substantive law, this was immaterial to the outcome and the Court would not grant any remedy in its discretion in any event.

112. Accordingly I reject Ground 10.

The Seventh Issue

113. The final issue, which corresponds to Ground 11, concerns remedies and is whether an error on the question of the status of the items as "buildings" undermines the Inspector's conclusions on the whole of the appeal. Mr Harwood submits that it does and that, accordingly, the court should remit the entirety of the appeal with all issues to be re-determined in accordance with law.

114. This issue would have arisen only if the errors identified in Mr Harwood QC's earlier grounds had been made out. Since I have rejected the earlier grounds (in particular Ground 5 and Grounds 1-4), this issue does not arise.

Conclusion

115. For the reasons which I have given the application under section 63 of the Listed Buildings Act is refused and the appeal under section 65 of that Act is dismissed.