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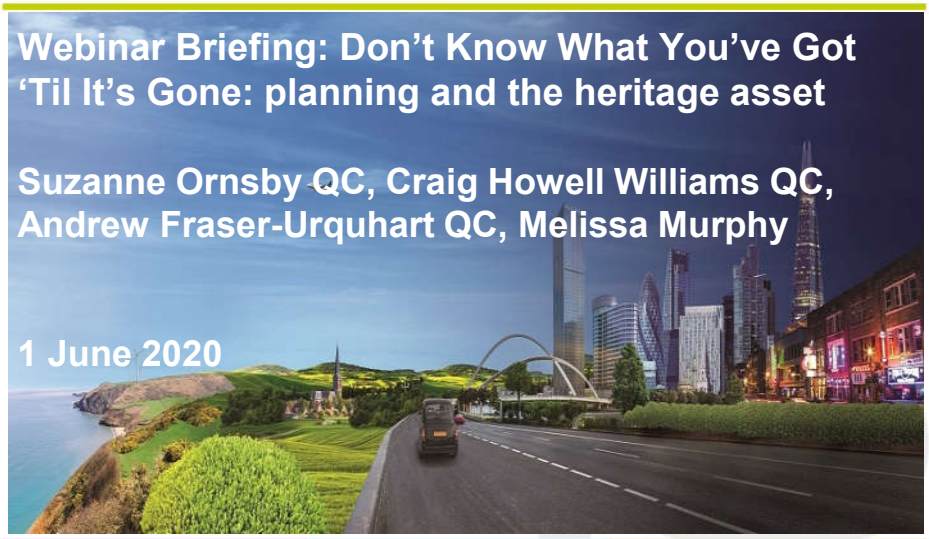
Webinar Briefing: Don't Know What You've Got 'Til It's Gone: planning and the heritage asset

Suzanne Ornsby QC, Craig Howell Williams QC, Andrew Fraser-Urquhart QC, Melissa Murphy

1 June 2020



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Hampshire County Council v SSEFRA [2020] EWHC 959 (Admin) and the meaning of "curtilage"

Craig Howell Williams QC

1 July 2020

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Introduction

- "Curtilage" is not simply an English word
- The OED describes it as "A small court, yard, garth or piece of ground attached to a dwelling-house, and forming one enclosure with it, or so regarded by law…Now mostly a legal or formal term…"
- "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* , a question of fact and degree. " (Robert Walker LJ in *Skerritts")*

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Blackbushe Airport

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Yateley Common

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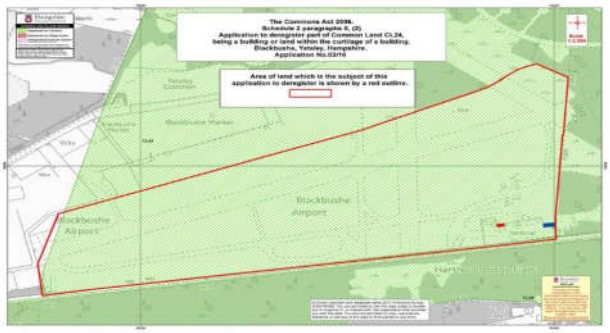
The application



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Paragraph 6 of Sch 2 Commons Act 2006

A commons registration authority shall remove land from the register if satisfied that:

"…

(b) on the date of the provisional registration the land was covered by a building or was within the curtilage of a building;

…

(d) since the date of the provisional registration the land has at all times been, and still is, covered by a building or within the curtilage of a building"

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The Inspector's decision

- "curtilage" is a matter of fact and degree
- Applied the "three Stephenson" factors from *Calderdale*
- Concluded:

"…the operational area of the airport was and is associated with the Terminal Building to such an extent that the operational area was and is part and parcel with the building and an integral part of the same unit; that it forms one enclosure with the building and serves the purposes of the building in some necessary or reasonably useful way."

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The arguments in court

- Central issue: "whether the Inspector erred in law in deciding that the whole of the operational land of the airport (which included the application land) fell within "the curtilage of a building", namely the terminal building, at all material times"
- HCC argued that Inspector had misunderstood concept of "ancillariness" and failed to apply "largeness" test derived from *Skerritts of Nottingham*
- Open Space Society argued for "strict" approach to interpretation so that "curtilage" was confined to an area which would pass on conveyance without being expressly mentioned in deed
- SoS and BAL argued for "neutral" approach to interpretation with reference to legislation itself
- BAL also argued that Inspector was correct in asking "is the land and building associated in such a way that *they* comprise part and parcel of the same entity, a single unit, or an integral whole"

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The statutory framework

- Holgat J considered CRA 1965, CA 2006 and CRR 2014. With specific regard to registration and non-registration requirements and absence of rights to compensation
- Concluded that Parliament had carefully balanced interests of landowners of common land with interests of those with rights to use common land
- Rejected OSS argument that s.3 HRA 1998 requires restrictive interpretation to accord with Art 1 First Protocol
- Rejected OSS argument that "curtilage" should be interpreted narrowly on basis that legislation has dispropriatory effect
- Noted authorities state that use of "curtilage" is sensitive to language used by Parliament, the context and purpose of legislation.
- Words "the curtilage of a building" in paragraph 6 "of critical importance"

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Landlord and tenant cases – *Methuen-Campbell v Walters* CA (1967)

- Lease demised a dwelling together with garden and paddock. Held paddock not an appurtenance of house
- Buckley LJ said:

  "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"

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Holgate J said this in relation to the *Methuen-Campbell* case:

- "Buckley LJ did not decide that an area of land is within the curtilage of a building if it is associated with a building in such as way that the *land and building* comprise part and parcel *of the same entity, a single unit, or an integral whole"*
- *"*Instead, the issue is whether an area of land is so intimately associated with a building that that land forms part and parcel *of the building*"
- This would be consistent with the ordinary English meaning of "curtilage" and "appurtenance" as explained in the dictionaries

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Landlord and tenant cases – *Dyer v Dorset CC CA (1989)*

- The Housing Act 1980 gave LA tenant a right to buy home except where house lay within "the curtilage of a building" held mainly for non housing purposes
- CA held that Mr D's house did not fall within curtilage of any of the college's buildings and so not excluded from right to buy provisions
- Ld Donaldson MR's judgment based on Buckley LJ's judgment in *Methuen-Campbell*
- "an area of land cannot properly be described as a curtilage unless if forms part and parcel *of the house or building* which it contains or to which it is added" (emphasis added)

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The Listed Building Act 1990

"5. 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, subject to subsection (5A)(a), be treated as part of the building"

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The LBA 1990 – *Calderdale* CA (1982) and *Debenhams HL* (1987)

- The CA in *Calderdale* held that a terrace of cottages attached to a mill included on the list was part of the listed building because it was a "structure" fixed to it or if not was within its curtilage
- The HL in *Debenhams* critical of wide reasoning and considered decision correct on basis that "structures" must be "ancillary" to the listed building to qualify under limbs (a) and (b).
- However, there is no legal requirement for land to be ancillary to a building in order to form its curtilage, although ancillariness may be taken into account as a relevant factor

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The LBA 1990 – Holgate J, Calderdale, curtilage (1)

- Stephenson LJ's 3 factors re curtilage confirmed:
  - The physical layout of the building and structure
  - Their ownership, past and present
  - Their use and function, past and present
- Nb also:
  - Relative size (*Skerritts)*
  - Ancillariness (*Skerritts)*

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The LBA 1990 – Holgate J, *Calderdale*, curtilage (2)

- Statutory words important. LBA protects building itself together with objects and structures that are not actually part of building but so closely related to it that they are worth preserving because of their effect on it. A broad approach to interpretation is justified.
- CA endorsed Skinner J: ""I have to ask…whether the buildings within the alleged curtilage form a single residential or industrial unit and…whether *the mill and the terrace for part of an integral whole."* (Holgate J emphasis)
- Holgate J: "There is no disguising the fact that the "single unit" or "integral whole" approach of Skinner J for the purposes of listed building control, apparently endorsed on appeal, is very different from that of Buckley LJ in *Methuen-Campbell* and of the Court of Appeal in *Dyer*…the "integral whole" referred to by Buckley LJ related to land which was "so intimately associated" with the relevant building as to form "part and parcel of the building". He did not suggest that the relevant question was that posed by Skinner J, namely whether the land and the building, or in *Calderdale* the mill and the terrace, together formed part of an integral whole"
- Holgate concluded that the Inspector had erred in applying the broad approach to the meaning of "curtilage" which could not be justified by reference to the statute or case law.

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Conclusions re Hampshire and "curtilage"

- Approach to "curtilage" will depend on statutory words and context
- Case law has indicated two broad approaches
  - narrow – whether the land is "so intimately associated" with the building that it forms "part and parcel *of the building*"
  - Broad – whether the land is "so closely related" to the building "as to constitute with it a single unit" or "an integral whole"
- The LBA 1990 justifies the broad approach
- Nb broad approach not justified under planning legislation eg s55(2)(3) TCPA 1990 or PD rights
- Permission to appeal to CA has been given

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What's a Grecian Urn?
Dill in the Supreme Court

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Dill v SSCHLG & Stratford-on-Avon DC [2020] UKSC 20

- Two c18 lead urns by Flemish sculptor John van Nost
- Each rested by gravity on limestone plinth
- 1725 at Wrest Park, Bedfordshire – Duke of Kent
- Undoubted artistic value
- Removed in 1939 and eventually ended up at Idlicote House, inherited by Appellant

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- Urns sold at auction in 2009 and removed overseas

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- Idlicote House listed in 1966
- Items added to List in 1986
- Listing decision not found
- No notice of listing sent to owner
- English Heritage sent notice of sale in advance

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- Piers consisted of limestone pedestals of a slab rather than solid construction
- Pedestals rested on concrete slabs which were on the ground
- Urns sitting on the pedestals without any attachment
- When removed the urns and the top of the peers were lifted together, then the remaining part of each peer
- Urn and pier together 247 cm high

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- 2015 LPA writes to Dill requiring LB consent app
- LB consent applied for and refused; LB enf notice issued
- Appeal dismissed – Insp concluded that status of items as buildings had been settled by fact of listing and could not be considered again
- High Court and CA upheld that view – both accepted that issue of whether building could not be re-opened and so no consideration of it
- Appeal to Supreme Court

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SC identified two issues (but decided three)

- Whether Insp can consider issue of whether building
- If yes, what are correct criteria
- Also considered the "extended definition" of listed building definition in section 1(5)

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Legislation – LBA 1990

- s1(5) LB a building included in a list AND "object or structure fixed to the building" or "within curtilage … which form part of the land and has done so since before 1 July 1948" [the extended definition]
- "building" definition from s336 TCPA 1990 "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"

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- LB consent applications and appeals
- Consent appeals may include claim building not of special interest
- LB EN and appeals
- EN appeal may include claim building not of special interest
- SofS may remove "building" from list

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First Issue – Can status as building be raised?

Lord Carnwath –

- Deals with "relatively shortly"
- Based on individuals' "fair opportunity" to challenge legal measures taken against them (*Boddington* [1999] 2 AC 143
- SofS argued ability to judicially review listing decision was sufficient protection – cited *Wicks* [1998] AC 92 which held wrt planning enforcement notice that statutory scheme had to be considered.

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Two reasons to reject

- Wicks based on planning EN and explicitly said statutory grounds of appeal "*are so wide that they include every aspect of the merits of the decision to serve*"
- Statutory definition of LB includes both inclusion in the list and fact of being a building; in the absence of explicit statutory exclusion (which does not exist) no reason not to be able to argue that not a building
- Appeal allowed on first issue

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The extended definition

- Carnwath refs the wide range of items which might be listed which are contained within this issue and refs Historic England garden and park structures listing selection guide December 2017
- Notes the absence of any clear criteria for the selection/ decision to consider as buildings

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- Important to note that extended definition does not result in the object becoming a building in its own right – it is simply treated as part of the building to which it is attached, or in whose curtilage it stands
- This distinction blurred in official publications
- Authorities found in the law of real property concerning fixture to the land
- Some non-attached objects may be considered as "fixed" if they are an essential part of the design of the house and grounds

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Extended Definition

- *Berkley v Poulett* [1977] 1 EGLR 86
- Statue and sundial in gardens
- Tests (1) method and degree of annexation and (2) object and purpose of the annexation
- In this case, not fixed to land and, as brought on after construction of house, not for object and design of house/gardens
- Not within extended definiton

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Second Issue – Proper test for building

- Analyses line of authority from *Cardiff* [1949] 1 KB 385 (rating case) through *Barvis* (1971) 22 P&CR 710 (incorporates principles into planning) to *Skerritts* [2000] JPL 1025 (first CA consideration)
- References marquee erected for season in hotel grounds
- No reason not to use *Skerritts* tests for whether an object is building (para 52)

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Skerritts three-fold test

- (1) Size – with some reference to whether it would ordinarily be brought to site assembled
- (2) Permanence – 5 month summer season was enough
- (3) Degree of physical attachment – spikes into ground for marquee
- Some degree of movement permitted – mobile crane in *Barvis*
- Policy objectives… see Barvis – LPA should have control

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This case

- Remitted for re-hearing
- Sympathy for Mr Dill that still can't get decision
- Factors in both directions
- Strong suggestion that no longer expedient to pursue….

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Takeaways

- Hard cases/bad law? A potentially wide ranging adaptation of the grounds of appeal – will it be applied in other circumstances?
- Strong note to heritage authorities to clarify guidance/criteria
- Clear guidance on principle to apply
- Recognition a very fact based exercise

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FTB Webinar
Heritage Planning: Enforcement

Melissa Murphy

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OUTLINE

(i) Development in Conservation Areas: ***LB Tower Hamlets v. SSCLG*** & ***Spitfire Bespoke Homes***.

(ii) Prosecutions: the Proceeds of Crime Act 2002 – the ***R. v. Owadally*** example.

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Development in Conservation Areas: demolition

- Planning permission is required for demolition in a Conservation Area (s.55 TCPA 1990; Town and Country Planning (Demolition – Description of Buildings) Direction 2014).
- It is an offence to carry out or cause or permit to be carried out relevant demolition without the required planning permission (s.196D TCPA 1990).

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LB Tower Hamlets v. Secretary of State

Not that one…

Cabinet minister Robert Jenrick who is accused of bias in £1billion planning row was lobbied by the developer at a Tory fundraising dinner just weeks before approving the luxury housing project

By Harry Cole For The Mail On Sunday
00:24 31 May 2020, updated 01:27 31 May 2020

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LB Tower Hamlets v. Secretary of State

- This one: [2019] EWHC 2219 (Admin)

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Tower Hamlets

- 2, 4 and 6 East Ferry Road were cottages, the last remaining dwellings from the Victorian workers' district of Cubitt Town which formed the south eastern side of the Isle of Dogs.
- Within the designated Coldharbour Conservation Area.
- Demolished without planning permission. No prosecution (dispute re ownership?)
- Enforcement notices required rebuilding. Ground (a) appeals.

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Tower Hamlets **ctd**

- Less than substantial harm arose from the demolition.
- It was argued that the "public benefits of the proposal" included likely future development, as a public benefit flowing from the demolition, although the only evidence was of a scheme called the "Turner scheme" prepared by architects as "a suggestion of the kind of scheme that can and should come forward for this site".
- Appeal was allowed: notices quashed & PP for demolition only granted.

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Tower Hamlets ctd

- In the DL, the Inspector said that as there was no current planning application for replacement development, the benefits were "speculative"; but it was "highly likely" a suitable proposal could be found [24].
- Court found that the Inspector had been entitled to take into account likely future benefits (bearing in mind the particular circumstances of the case) [63-67].
- Essentially, prospect of redetermination was a material consideration & the fact that it was not a certainty affected weight.

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Spitfire Bespoke Homes Limited v. Secretary of State
[2020] EWHC 958 (Admin)

- Attempt in that case to have the DL quashed on the basis that the Inspector ought to have followed the approach in ***Bohm v Secretary of State for Communities and Local Government*** [2017] EWHC 3217 (Admin) (at [33]):
  - when considering the impact of the proposal on the conservation area under s.72 it is the impact of the entire proposal which is in issue. In other words, the decision maker must consider not merely the removal of the building which made a positive contribution, but also the impact on the conservation area of the building which replaced it. She must then make a judgment on the overall impact on the conservation area of the entire proposal before her.

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Spitfire ctd

- Spitfire Inspector treated the loss of the positive attributes of the building as harmful & as that was "less than substantial harm to a heritage asset" it was a factor which he weighed heavily in the balance.
- Detailed design criticisms:
  - Proposed buildings would appear tall and bulky
  - They did not follow one of the prevailing design characteristics in the area.
  - Dormer windows would detract from the current sense of space between buildings.

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Spitfire ctd

- Claimant's claim (in a nutshell) was that the Inspector had approached the decision on the basis that the harmful loss of the positive attributes of the building + harm arising from the proposed buildings = refusal of PP [eg 27].
- Court rejected the Claimant's criticisms and its "prescriptive" approach [31] & found that the Inspector had in fact reached an overall judgment about the effect on the CA [46].
- Clear that the positive attributes of the existing building counted against the grant of PP.

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The link?

- Does the approach taken in these cases create a perverse incentive to adopt a staged approach to securing consent for redevelopment in Conservation Areas?
  - ➢ It may well be more straightforward to secure permission for demolition, weighing harm against the benefit arising from the prospect of redevelopment, without risking criticism of a detailed scheme.
  - ➢ Next stage would be to have the scheme assessed against a blank slate, a cleared site, where there is likely to be local pressure to get some replacement.

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Need for Government to state a preference?

- NB the context is that it is a criminal offence to demolish a building within a CA, under s.196D of the TCPA 1990, unlike other breaches of planning control.
- A staged approach for proposals may result in sites sitting vacant. In a period of economic uncertainty that becomes a more pressing issue.
- If it is undesirable for applications for PP for demolition alone to be made & instead, redevelopment proposals should be considered at the same time, then Government should say so.

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Prosecutions

RTPI Enforcement Handbook
Useful guide
(Not legal advice.)
(Not a substitute for
in depth research.)

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Proceeds of Crime Act 2002

- A rather esoteric subject?
- For local authorities – important tool in the kit.
- For those advising developers responsible for heritage assets, it is necessary to appreciate the gravity of risks arising from offences in this area.

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R v. Owadally [2020] EWCA Crim 391

- Planning case: prosecution by Southwark Council.
- Three offences of breaches of enforcement notices contrary to section 179(2).
- Breach of planning control was the conversion of a single building to 8 flats.
- Benefit arising from the offences was declared to be £400,000 (rent on 8 flats).
- "Available amount" was £3.7 million based upon equity in various properties.
- Confiscation order was made in the sum of £400,000.

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R v. Owadally ctd

- Home Office Asset Recovery Incentivisation Scheme (ARIS) applies to sums ordered to be payable under confiscation orders: LPA investigator & prosecutor will keep 37.5%.
- = £150,000?

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Caution!

- Financial benefit is not a reason to prosecute. See ***R. v. Knightland Foundation*** [2018] EWCA Crim 1860 confirmed in ***Wokingham BC v. Scott*** [2019] EWCA Crim 205:
  - The possibility of a POCA order being made in the prosecutor's favour should play no part in the determination of the evidential and public interest test within the Code for Crown Prosecutors.

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R v. Owadally ctd

CofA reviewed authorities relating to fines & confiscation orders at [20]. It said:

- Each case is fact specific.
- The purposes of sentence in such cases are coercion to comply with planning regulations, punishment and deterrence.
- An offender must not be permitted to profit from their offending.
- In setting the fine the court should have regard to the level of the confiscation order and ensure that the fines are just and proportionate.

NB the earlier case of ***R. v. Kohali*** [2015] EWCA Crim 1757 made clear that although financial benefit is a matter to which the court is directed in setting the fine – double counting is not permitted & if the confiscation order has addressed this it must not increase the amount of the fine.

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Fines

- No sentencing guidelines.
- Previous cases are fact sensitive.
- Fine levels vary considerably.

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POCA confiscation orders

- Calculated by reference to gross benefit (see e.g. ***R v. Evangelou*** [2019] EWCA Crim 1414).
- There is a statutory process for the assessment of the "available amount" i.e. how much can be paid.
- Retention by the local authority.

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ANY QUESTIONS?

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Heritage planning & the law; Viability

Melissa Murphy

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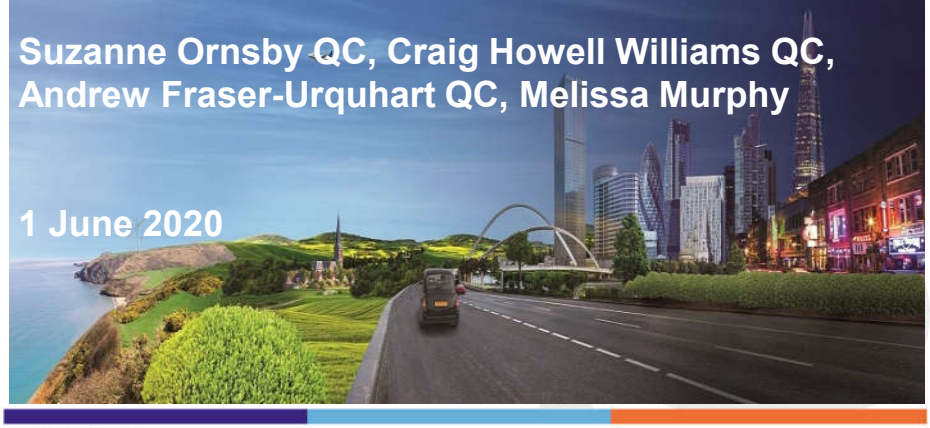
Webinar Briefing: Don't Know What You've Got 'Til It's Gone: planning and the heritage asset

Suzanne Ornsby QC, Craig Howell Williams QC, Andrew Fraser-Urquhart QC, Melissa Murphy

1 June 2020



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