HOUSE OF LORDS

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Judgments - Shimizu (U.K.) Ltd. v. Westminster City Council

HOUSE OF LORDS

Lord Browne-Wilkinson Lord Griffiths Lord Lloyd of Berwick
Lord Cooke of Thorndon Lord Hope of Craighead

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

SHIMIZU (U.K.) LIMITED
(APPELLANTS)

v.

WESTMINSTER CITY COUNCIL

(RESPONDENTS)

ON 6 FEBRUARY 1997

LORD BROWNE-WILKINSON

My Lords,

I have had the benefit of reading in draft the speech to be given by my noble and learned friend Lord Hope of Craighead. I agree with it and for the reasons which he gives I would allow this appeal and restore the decision of the Lands Tribunal.

LORD GRIFFITHS

My Lords,

I have the misfortune to differ from the majority of your Lordships and will therefore express my opinion shortly. I gratefully adopt the history and citation of the relevant sections of the Planning (Listed Buildings and Conservation Areas) Act 1990 set out in the speech of my noble and learned friend Lord Hope of Craighead.

The Prudential Assurance Company owned a block of buildings on the corner of Bond Street and Piccadilly. Part of the block, known as Qantas House, was a listed building. The obvious reason for the listing was the elegance of the façade of this building; a less obvious reason was apparently the importance of the chimney breasts and chimney stacks contiguous with the façade.

On the 6th July 1988 the Prudential obtained listed building consent and planning permission to demolish the entire block with the exception of the façade and the chimney breasts and chimney stacks of Qantas House.

If the Prudential had applied to demolish the whole building including the chimney stacks and chimney breasts retaining only the façade and this had been refused they would not have been entitled to compensation. The Prudential might well have wished for permission to demolish the chimney stacks and breasts because by doing so extra floor space would be available in the new building to be erected behind the façade. However although refusal would have resulted in loss of valuable floor space they would not have been entitled to compensation.

The building then changed hands and the appellants became the owners. The appellants proceeded to demolish the building in accordance with the listed building consent and by June 1990 all that remained were the façade and the chimney breasts and chimney stacks supported by temporary steel work. The appellants then applied for listed building consent to demolish the internal chimney breasts which was refused on appeal by the Secretary of State. The reason why the appellants wished to demolish the chimney breasts was to provide more floor space which they value at £1,800,000.

In order to entitle themselves to claim this £1,800,000 of compensation the appellants argue that the demolition of the chimney breasts and the infilling of the voids thereby created in the floors should be regarded not as a demolition of part of a listed building but as an alteration to a listed building the refusal of which entitles them to compensation of £1,800,000.

Demolition and alteration in the context of this Act are overlapping concepts which must be applied with common sense to the facts of each particular case. In each case it will be a question of fact whether the work in question is to be regarded as demolition or alteration, and it will generally be inappropriate for an Appellate Court to interfere with the finding of fact of the Tribunal. In this case, however, I am unable to accept the finding of the Tribunal that the removal of the chimney breasts was an alteration rather than a demolition.

If the chimney breasts had been removed as part of the original site clearance they would unarguably have been "demolished". If the appellants had been refused leave to demolish them at that stage, as events prove they would have been, the appellants would have been entitled to no compensation, even though the only reason for wishing to demolish them would be to increase floor space to the value of £1,800,000. Now for the same reason, extra floor space, the appellants wish to remove the chimney stacks at a later stage of the construction. In my view it is divorced from reality to regard what would have been demolition in the original site clearance as converted to an "alteration" if carried out at a later stage.

I would stress that there is no alteration to the new building that was not necessarily involved in the demolition of the chimney breasts, namely extending the floor to the façade to cover the voids left by demolition of the chimney breasts.

Test the matter this way. The appellants acquired the building [on 2 November] 1989 before any demolition had commenced. They could before starting demolition have applied for the planning consent to be varied to enable them to demolish the chimney breasts. This we know would have been refused. The appellants would have been thereby deprived of additional floor space, but would not have been entitled to compensation.

In fact they chose to demolish the building and then to apply to demolish the chimney breasts. And it is said that by making the application later rather than earlier they turn demolition into alteration and hey presto are entitled to £1,800,000. My Lords, that does not seem right to me. Taking down and destroying the chimney breasts was part and parcel of the demolition of the old listed building whether it took place before or during the construction of the new building and I would dismiss the appeal.

The view I take does not depend on the construction of "listed building." But like Lord Cooke I am not persuaded that the statutory definition of "building" should be excluded from the phrase "listed building." I certainly would not wish to decide the point without hearing argument from English Heritage and other bodies likely to be affected by a fundamental change to the basis upon which the legislation has hitherto been administered.

LORD LLOYD OF BERWICK

My Lords,

I have had the benefit of reading in draft the speech to be given by my noble and learned friend Lord Hope of Craighead. I agree with it and for the reasons which he gives I too would allow this appeal and restore the decision of the Lands Tribunal.

LORD COOKE OF THORNDON

My Lords,

The appellant, having become the owner of the listed building then known as Qantas House, on the western corner of Piccadilly and Old Bond Street, wished to enlarge the floor space by removing old chimney breasts, extending the existing flooring and making it load bearing for the support of the chimney stacks. Listed building consent under the Planning (Listed Buildings and Conservation Areas) Act 1990 was sought, but refused because the chimney breasts were considered of special architectural or historical interest. The application had been made in June 1990 and subsequently amended.

Section 27 of the Act of 1990 made the provision for compensation on which this appeal turns. The section was repealed in 1991 in relation to applications for listed building consent made on or after 16 November 1990, but remains in force for the purposes of the appellant's claim to compensation.

Prima facie the appellant is entitled to compensation, as each of the three conditions in section 27(1) is satisfied. The application can naturally be seen as being in essence for the alteration of a listed building. This is the only point in contention. It is common ground that the works do not constitute development and that the Secretary of State has refused consent.

The policy embodied in section 27 appears to have been in part that an applicant could not obtain compensation for mere refusal of consent to demolition. That is readily intelligible. It was for the refusal of consent to the constructional work of alteration or extension that compensation was to be available. Subject to the *de minimis* principle, it seems to me reasonably clear on the natural and ordinary reading of the section that an applicant refused permission under the Act to carry out such work of construction had a valid claim to compensation. A refusal would normally be for the reason that the project would involve the demolition or impairment of, or a threat to, features of special architectural or historic interest; but such reasons, while explaining the refusal, did not eliminate the former right of compensation. There was nothing in section 27 to cut down the meaning of "alteration or extension."

On that short ground I would allow the appeal and restore the preliminary decision of the Lands Tribunal.

My Lords, I must own to experiencing some difficulty in adopting in the route to that result an interpretation which involves treating the expression "listed building" in sections 7 and 8 and elsewhere as not including part of a listed building. I should have thought that, in combination, the relevant definitions in section 91(1) and (2) of the Planning (Listed Building and Conservation Areas) Act 1990 and section 336 of the Town and Country Planning Act 1990 have the *prima facie* meaning that "listed building" includes a part thereof; and it is at least doubtful whether the various reasons which can be put forward to the contrary are strong enough to enable one to say that the context *requires* the apparent combined effect of the definitions to be rejected.

Merely arguable suggestions, or a limited degree of surplusage (possibly for clarity), seem grounds too slight to justify such a rejection, as does the fact that the discretionary powers in s.17(3) to impose a condition relating to works on "the site" could not be exercised if there were no site. On the other hand, if a proposed alteration or extension will involve demolition of a part of a listed building it is understandable, albeit sometimes no doubt inconvenient, that notice of the proposal should be required to be given to the Royal Commission under s.8(2). Moreover, the Government Departments concerned in the administration of the Act, the Member of the Lands Tribunal, the Court of Appeal and a High Court Judge, and also perhaps learned counsel who appeared before your Lordships, had all understood the definitions to apply and so had regarded "listed building" as including part thereof.

In these circumstances it does not seem to me easy to say that the context speaks with such clarity as to require a different meaning. In general those who draft legislation and those who are affected by it are entitled to assume that the courts will apply apparently relevant definitions unless they are clearly excluded. But, on the view which I have taken, a definite opinion on the point as to demolition of part of a listed building need not be expressed.

For the reason that the claim to compensation fell within s.27, I too would allow this appeal.

LORD HOPE OF CRAIGHEAD

My Lords,

The question at issue in this case is whether the appellants' application for listed building consent for the removal of certain structures within a listed building was an application for the alteration or extension of that building within the meaning of section 27(1)(*a*) of the Planning (Listed Buildings and Conservation Areas) Act 1990. If it was, the appellants are entitled under section 27(2) to compensation from the respondents, who are the local planning authority, as listed building consent for the removal of these structures was refused. Section 27 of the 1990 Act was repealed by section 84(6) of and schedule 19 to the Planning and Compensation Act 1991, so compensation under that section for the refusal of listed building consent is no longer available. But it will be necessary in order to decide this appeal to deal with some questions of more general interest about the structure of the legislation relating to the control of listed buildings.

THE FACTS

The appellants are the owners of a site on the corner of Old Bond Street and Piccadilly in London. The site extends from 56-60 Piccadilly to 45-50 Old Bond Street. The building at 56-60 Piccadilly and 48-50 Old Bond Street, which was known originally as "The Corner" and more recently as Qantas House, is a listed building. The remainder of the site at 45, 46 and 47 Old Bond Street is not listed. The building which is listed comprises a corner block of offices and shops. It is regarded as a fine example of the Edwardian Baroque with Dutch influences. It was erected in 1905, to a design by Herbert Read and Robert Faulkner Macdonald, for Callard Stewart & Watt who operated tea rooms popular with visitors to the Royal Academy. From the 1960's it was occupied by Qantas Airways, who carried out various works of modernisation and alteration to the interior and significant works of alteration to the ground floor frontages.

On 6 July 1988 Prudential Assurance, who then owned the site, were granted listed building consent and planning permission for

the demolition of everything except the façades facing Piccadilly and Old Bond Street and the chimney breasts and chimney stacks of the listed building, and for the redevelopment of the whole site to provide shops, a wine bar and restaurant and offices. On 2 November 1989 the appellants became the freehold owners of the site. Demolition began in March 1990. By June 1990 the building consisted only of the façades, chimney breasts and chimney stacks supported by temporary steelwork.

On 22 June 1990 the appellants applied to the respondents for listed building consent for the removal of the chimney breasts at first, second, third and fourth floor levels behind the Old Bond Street façade. On 2 July 1990 the application was amended to include the chimney breasts at fifth floor level. On 3 August 1990 a further amendment was made to the application to include temporary and permanent support to the chimney stacks. The respondents failed to determine the application within the statutory eight week period. The appellants then appealed against the deemed refusal to the Secretary of State of the Environment. On 4 June 1991, after considering representations made by the appellants, by the respondents and by English Heritage, the Secretary of State's Inspector dismissed the appeal. By that date the approved scheme of redevelopment was at an advanced stage. Although the new fabric was incomplete internally, the roof and all the floors were in place and the temporary steelwork within the building had all been removed.

A dispute then arose between the appellants and the respondents as to whether the appellants were entitled to compensation for the refusal of listed building consent for the removal of the internal chimney breasts. The appellants referred their claim to the Lands Tribunal. On 8 July 1992 it was ordered that the following preliminary issues be determined at a preliminary hearing on a date to be fixed:

> "(*a*) Whether the works which were the subject matter of the application for listed building consent which was refused by the Secretary of State for the Environment in his decision letter dated 4 June 1991 constitute alterations to or extensions of a listed building under section 27(1)(*a*) of the Planning (Listed Buildings and Conservation Areas) Act 1990, with the result that compensation is accordingly payable by the Compensating Authority to the Claimant;
>
> (*b*) If compensation is payable, the date at which the amount of compensation is to be assessed."

On 21 May 1993 the Lands Tribunal determined the first preliminary issue in the appellants' favour. In respect of the second preliminary issue it was agreed that the relevant date for the assessment of the amount of compensation was 4 June 1991.

The issue which the member was asked to decide was one of fact, namely whether the removal of the chimney breasts constituted the demolition or the alteration of a listed building within the meaning of the Act. It was accepted that, if their removal was an alteration of the listed building, compensation under section 27 would be payable. This was because subsection (1)(*a*) of that section provided that the section was to have effect where "an application is made for listed building consent for the alteration or extension of a listed building." It was also accepted that if their removal amounted to the demolition of a listed building or part of a listed building, compensation under that section would not be payable. After reviewing the facts which had been established by the evidence, the member (T Hoyes Esq., FRICS) reached the conclusion that the works constituted an alteration to a listed building rather than the demolition of a part of a listed building. The respondents then appealed by way of case stated to the Court of Appeal.

On 20 December 1994 the Court of Appeal (Millett L.J. and Sir Ralph Gibson, Russell L.J. dissenting) allowed the appeal and set aside the decision of the Lands Tribunal. In his dissenting judgment Russell L.J. said that the question whether a particular activity was "demolition" or "alteration" of a building was essentially a question of fact to be determined in the light of all the relevant circumstances, that the court should not interfere in the finding of the Lands Tribunal if the member was entitled on the material before him to reach he conclusion that he did and that, as he was entitled to reach that conclusion, his decision should not be disturbed. The majority reached the opposite conclusion after a careful review of the relevant provisions of the Act. They held that, when section 27(1)(*a*) referred to "an application for . . . consent for the alteration . . . of a listed building", the words in their context did not include an application for consent for works which consisted of or included demolition of part of a building. In their view the concepts of "demolition" and "alteration" were mutually exclusive, to the extent of precluding the demolition of a part of the building from amounting to an alteration of the whole. Millett L.J. made it clear that he reached this decision with reluctance and regret, but he said that he was persuaded that the opposite view could not be maintained in view of the provisions of section 8 of the Act, as they dealt separately with the authorisation of works of alteration or extension on the one hand and works of demolition on the other.

It should be noted that the discussion in the Court of Appeal was conducted throughout on the assumption that the statutory definition of the word "building" in section 336(1) of the Town and Country Planning Act 1990, which is extended to the Planning (Listed Buildings and Conservation Areas) Act 1990 by section 91(2) of that Act--namely that the expression "building", except insofar as the context otherwise requires, includes "any part of a building"--applies to the word "building" where it appears in the phrase "listed building" as used in the relevant sections of the Listed Buildings and Conservation Areas Act. It was assumed not only that the expression "listed building" includes any part of a listed building whenever that expression is used in the Act, but also that the system of control which the Act provides can be applied to any part of the listed building in the same way as it applies to the whole.

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