Neutral Citation Number: **[2020] EWHC 959 (Admin)**

Case No: CO/3493/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/04/2020

Before :

THE HON. MR JUSTICE HOLGATE

- -

Between :

Hampshire County Council	**Claimant**
- and -	
Secretary of State for Environment, Food and Rural Affairs	**Defendant**
(1) Blackbushe Airport Limited	**First Interested Party**
(2) The Open Spaces Society	**Second Interested Party**
(3) Mr Peter Tipton	**Third Interested Party**
(4) Mr David Simpson	**Fourth Interest Party**
(5) Adrian Collett	**Fifth Interested Party**

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Mr George Laurence QC and Mr Simon Adamyk (instructed by **Hampshire County Council**) for the **Claimant**
Mr Ned Westaway (instructed by **Government Legal Department**) for the **Defendant**
Mr Douglas Edwards QC and Mr George Mackenzie (instructed by **Burges Salmon LLP**) for the **First Interested Party**
Mr Philip Petchey (instructed by **Richard Buxton Solicitors**) for the **Second Interested Party**
Dr Ashley Bowes (instructed by **Richard Buxton Solicitors**) for the **Third Interested Party**
The Fourth and Fifth Interested Parties were not represented and did not appear.

Hearing dates: 11 & 12 February 2020

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, released to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:00 on the 23rd April 2020.

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Mr Justice Holgate :

Introduction

1. Yateley Common was registered as common land under the Commons Registration Act 1965 ("the 1965 Act"). It was entered on the register kept by the Claimant, Hampshire County Council ("HCC"). Blackbushe Airport is operated by the First Interested Party, Blackbushe Airport Limited ("BAL"). Most of the airport lies within the area of the common.

2. On 1 November 2016 BAL made an application to HCC under paragraph 6 of schedule 2 to the Commons Act 2006 ("the 2006 Act") to remove from the register that part of the airport which had been included as common land, referred to as an application for de-registration. HCC then referred the application to the Defendant, the Secretary of State for Environment, Food and Rural Affairs for determination, pursuant to regulation 26 of the Commons Registration (England) Regulations 2014 (SI 2014 No. 3038) ("the 2014 Regulations").

3. The application land comprised some 46.5 hectares (or 115 acres) of operational land which included the runway, taxiways, fuel storage depot and in the south-eastern part of the site, the terminal building (including control tower), the Bushe Café and car parking. The terminal building has a footprint of about 360 sq m and an overall floor area of about 760 sq m. It is a two-storey building.

4. The Defendant's Inspector held a public inquiry on 2 to 5 April 2019. The application was opposed by HCC. The Open Spaces Society ("The OSS"), the Second Interested Party, also appeared at the inquiry to oppose the application along with other objectors notably Mr. Peter Tipton (an individual with commoners' rights over Yateley Common including the site of the application for de-registration), Councillor David Simpson and Councillor Adrian Collett (respectively the Third, Fourth and Fifth Interested Parties).

5. In his decision letter dated 12 June 2019 the Inspector determined that the statutory requirements for the removal of the land from the register were satisfied and so he allowed BAL's application.

6. HCC (represented by Mr. George Laurence QC and Mr. Simon Adamyk) apply by way of judicial review to quash the Inspector's decision. They are supported by the OSS (represented by Mr. Philip Petchey) and by Mr. Tipton (represented by Dr. Ashley Bowes). The Defendant (represented by Mr. Ned Westaway) opposes the application supported by BAL (represented by Mr. Douglas Edwards QC and Mr. George Mackenzie). I am very grateful to them for their detailed submissions, both written and oral, and for the additional research which they undertook at the court's request during the hearing.

7. Paragraph 6 of schedule 2 to the 2006 Act provides that:-

> "(1) If a commons registration authority is satisfied that any land registered as common land is land to which this paragraph applies, the authority shall, subject to this paragraph, remove that land from its register of common land.
>
> (2) This paragraph applies to land where–

> (a) the land was provisionally registered as common land under section 4 of the 1965 Act;
> (b) on the date of the provisional registration the land was covered by a building or was within the curtilage of a building;
> (c) the provisional registration became final; and
> (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.
>
> (3) A commons registration authority may only remove land under subparagraph (1) acting on–
>
> (a) the application of any person made before such date as regulations may specify; or
> (b) a proposal made and published by the authority before such date as regulations may specify."

8. In order for the land to be de-registered the Inspector had to be satisfied of all four requirements in paragraph 6(2). It was common ground that requirements (a) and (c) were satisfied. The land had been provisionally registered as part of Yateley Common on 16 May 1967 and that registration became final on 26 March 1975. Those opposing the application raised a number of other issues which were resolved by the Inspector and are not in contention in these proceedings. Accordingly, there is no longer any dispute before the court that the land covered by the terminal building and café satisfied requirements (b) and (d) continuously from 16 May 1967.

The main issues

9. The central issue for the court is 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 (DL 2 and 39).

10. The Inspector had the benefit of detailed submissions from the parties at the inquiry. In these proceedings they have maintained their respective contentions on the correct approach to identifying the curtilage of a building under the 2006 Act.

11. The Inspector addressed those submissions in a careful decision letter ("DL"). In DL 43 the Inspector referred to the judgment of Lieven J in Challenge Fencing Limited v Secretary of State for Housing Communities and Local Government [2019] EWHC 553 (Admin) for the helpful summary at [18] of several factors which he said "may inform a decision on the existence and extent of curtilage in any given case": -

> "(i) The extent of the curtilage of a building is a question of fact and degree, and therefore it must be a matter for the decision-maker, subject to normal principles of public law;
>
> (ii) The three Stephenson factors must be taken into account:
>
> a) Physical layout;

b) The ownership, past and present;

c) The use or function of the land or buildings, past and present.

(iii) A curtilage does not have to be small, but that does not mean that the relative size between the building and its claimed curtilage is not a relevant consideration *Skerritts* p. 67;

(iv) Whether the building or land within the claimed curtilage is ancillary to the main building will be a relevant consideration, but it is not a legal requirement that the claimed curtilage should be ancillary *Skerritts* p.67C;

(v) The degree to which the building and the claimed curtilage fall within one enclosure is relevant, *Sumption* at para 17 and the quotation from the OED of curtilage as "*A small court, yard or piece of ground attached to a dwelling house and forming one enclosure with it*". In my view this will be one aspect of the physical layout, being the first of the *Calderdale* factors."

The Inspector sought to apply these "factors" in his decision letter. For the purposes of the application to de-register under the 2006 Act it was unnecessary for him to refer to or apply principle (vi) in the judgment of Lieven J.

12. BAL submitted at the inquiry that it was appropriate for this list of factors drawn from Challenge Fencing to be applied by the Inspector. HCC did not argue otherwise, so far as the list goes, either at the inquiry or in this court. Instead, HCC has raised two specific grounds of challenge: -

(i) The Inspector failed to apply an additional test said to be derived from the decision of the Court of Appeal in Skerritts of Nottingham Ltd v Secretary of State for Environment, Transport and the Regions [2001] QB 54, namely whether the size of the land exceeds anything which could properly be described as the curtilage of the relevant building, in this case the terminal building;

(ii) The Inspector misunderstood the concept of "ancillariness" by deciding that both the land was ancillary to the terminal building and that the building was ancillary to the land at one and the same time.

13. The OSS's submissions raised broader, rather more fundamental questions. There was no objection to their entitlement to do so in these proceedings. Although The OSS acknowledged that the criteria in Challenge Fencing at [18] were relevant factors to be taken into account, they submit that by themselves they were insufficient for the purposes of identifying the curtilage of a building under paragraph 6 to schedule 2 to the 2006 Act. De-registration of an area of common land results in the extinguishment of any rights of common over that land without any compensation. The OSS recognises that the word "curtilage" has not been defined by Parliament and is generally treated as not being a term of art, but they submit that the court should nevertheless grapple with the issues raised by the present case and with the risk of applications being made to deregister extensive areas of common land. They submit that if the Inspector's approach in the present case is permissible, then de-registration might follow for more familiar examples of large open space uses, such as sport or recreation, occupying common land and making use of buildings (e.g. a golf course with its club house and training facilities). The OSS therefore

asks the court to identify the "concept" of "curtilage" adopted in the 2006 Act. They contend that it should be a stricter approach associated with conveyancing practice, the effect of which would be to confine the curtilage of a building to an area which would pass under a conveyance of that building without being expressly mentioned in the deed or transfer.

14. Mr Tipton made submissions in support of the grounds of challenge advanced by HCC and the broader case of The OSS.

15. Both the Secretary of State and BAL submit that there is no justification for adopting a stricter approach to the concept of "curtilage" than set out in Challenge Fencing at [18]. Instead, they contend that the 2006 Act itself strikes a balance between the competing interests of landowners holding property rights in or over a common and that the interpretative approach of the court to the language used by Parliament should be neutral. In their oral submissions they advanced the following overarching principle for determining whether under this legislation an area of land lies within the curtilage of a building: 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 (see also paragraphs 13, 16-17 and 36 of the Defendant's skeleton and paragraph 12 of BAL's skeleton). They say that this was the test applied by the Inspector in his decision.

16. Mr. Westaway and Mr. Edwards QC also claim that the Inspector identified the test they propound at DL 54 where he said as follows: -

> "The guidance which appears to be given in the above cases is that land which may form the curtilage of a building is land which is part and parcel of the building (*Trim*), or forms one enclosure with the building (*Dyer*) which serves the purposes of the building in some necessary or reasonably useful way (*Sinclair-Lockhart*) or is intimately associated with the building such that the land is part and parcel of the building and an integral part of the same unit (*Methuen-Campbell*) and does not have to be small but relative size is a relevant consideration (*Skerritts*)."

But it will be apparent that that passage identifies a very different test for identifying the curtilage of a building, namely whether *the land* in question forms *part and parcel of that building* and, as we shall see, that test was also laid down in Dyer and Sinclair-Lockhart.

17. The Secretary of State and BAL submit that the principles in Challenge Fencing at [18] are relevant to the application of the overarching principle for which they contend. They say that the Inspector has lawfully applied that approach and they resist the criticisms made in HCC's two grounds of challenge.

18. It will be necessary to see whether the overarching principle suggested by counsel is supported by the authorities. For example, it does not appear in the list of principles at [18] of Challenge Fencing or elsewhere in that decision.

19. In view of the issues raised by the parties, I think it is convenient to deal with matters in the following order: -

> The statutory framework;
>
> The decision letter;

Curtilage;

HCC's grounds of challenge.

20. It is necessary for the court to deal with the broader issues raised by The OSS, the Secretary of State and BAL on the concept of "curtilage". They affect HCC's grounds of challenge. Furthermore, if either or both of those grounds succeed, BAL's application will fall to be redetermined. In that event, it will be necessary for any future determination to approach the matter on the correct legal basis.

The statutory framework

21. Part of the background to the legislation was helpfully summarised by Carnwath J (as he then was) in R v Suffolk County Council ex parte Steed (1996) 71 P & CR 463 and by Lord Hoffmann in Oxfordshire County Council v Oxford City Council [2006] 2 AC 674.

22. The Royal Commission on Common Land reported in 1958 (Cmnd. 462). It recommended firstly the drawing up of a register, maintained by local authorities, to provide a definitive record of all commons, town and village greens, and rights of common. Secondly, they made recommendations for the management and improvement of such land and for a general right of public access.

23. Parliament enacted the 1965 Act to give effect to the first part of the Royal Commission's recommendations. Section 1(1) provided for the registration of common land, town or village greens, and rights of common. An application for provisional registration generally had to be made by 2 January 1970. The provisional registration which followed had to be notified publicly. If that did not attract any objections, the registration became "final". In the event of objections being made, the disputes were determined by Commons Commissioners. If the provisional registration was confirmed by a Commissioner it became final. But if confirmation was refused the registration became void and was cancelled.

24. By section 10 of the 1965 Act the registration of land as a common, or as a town or village green, was to be conclusive evidence of the matters registered, as at the date of registration. The register was to be definitive, both positively and negatively: registration was conclusive evidence that on that date land was a common or a town or village green or subject to rights of common, and non-registration was conclusive evidence that it was not.

25. Section 13 of the 1965 Act, together with the relevant secondary legislation, provided for subsequent changes in the status of land, such as land becoming common land or a town or village green after 2 January 1970 (the cut-off date for making an application for registration in relation to land then qualifying), or land ceasing to be common land or a town or village green, or the extinguishment, alteration or transfer of rights of common.

26. It is important to note that s. 22(1) of the 1965 Act defined land qualifying for registration as "common land" as land subject to rights of common (whether exercisable at all times or only during limited periods) or the waste land of a manor not subject to rights of common. Accordingly, land "covered by a building" or land "within the curtilage of a building" was not excluded from the definition of common land or from registration under that Act.

27. Section 193 of the Law of Property Act 1925 provides a public right of access to certain commons for "air and exercise". Section 194 prohibited the erection of any building or

fence, or the construction of any other work, preventing or impeding access to land subject to rights of common, without the consent of the relevant Minister (see now Part 3 of the 2006 Act).

28. The second stage envisaged by the Royal Commission was not achieved until the passing of the 2006 Act. In 1983 the Countryside Commission had set up the Common Land Forum as an initial step. The Forum published a report in 1986 which identified errors in the way in which common land had been registered under the 1965 Act, because the legislation had not provided for the notification of an application for provisional registration to each individual landowner affected. Some provisional registrations had become final through the absence of any objections by landowners. For example, houses and their gardens on the fringes of a common had sometimes been included inappropriately within the area registered.

29. A private member's bill became enacted as the Common Land (Rectification of Registers) Act 1989. This allowed a 3 year period during which a landowner could notify the registration authority of his objection to the continued inclusion in the register of a dwelling-house and/or any land ancillary to that house provided that the property had satisfied that description at all times since 5 August 1945. By s.1(3) "land ancillary to a dwelling-house" was defined so as to mean "a garden, private garage, or outbuildings used and enjoyed with the dwelling-house". The notice was then referred to a Commons Commissioner for determination. Unlike paragraph 6 of schedule 2 to the 2006 Act, this provision was limited firstly to dwelling-houses, rather than all types of building, and secondly to land defined as "ancillary", rather than land "within the curtilage" of a building.

30. Following public consultation, the Government announced in 2002 that wider legislation would be brought forward to remove from registers of common land and town or village greens land which had been wrongly registered. This became the 2006 Act.

31. In fact, s. 22 and schedule 2 deal with non-registration as well as mistaken registration of land under the 1965 Act. Broadly, I accept the helpful analysis of the scheme given by Mr. Westaway and Mr. Edwards QC. Paragraphs 2 and 3 of schedule 2 deal with non-registration under the 1965 Act of respectively common land and a town or village green. Paragraph 4 deals with non-registration of waste land of a manor as common land. Paragraph 5 addresses the incorrect registration of a town or village green as common land. Paragraph 6 then deals with an application to remove land covered by a building or within the curtilage of a building from the register of common land. Paragraph 8 is a parallel provision for the removal of a building or its curtilage from the register of town or village greens. Paragraphs 7 and 9 are parallel provisions for the removal from the registers of common land and town or village greens respectively of other land which should not have been registered because it did not properly qualify for registration under the 1965 Act.

32. Each of these paragraphs in schedule 2 is only engaged if, before a date specified in regulations, an application is made by a person, or a proposal made by the registration authority, for the relevant alteration. The relevant provisions of the 2006 Act have been rolled out in two stages. They were initially introduced on 1 October 2008 as a pilot scheme in the areas of seven registration authorities (The Commons Registration (England) Regulations 2008 – SI 2008 No. 1961). The 2014 Regulations (see paragraph 2 above) came into force on 15 December 2014. They brought two further registration authorities within the scheme. The 2014 Regulations also apply to any application to amend a register kept by *any* authority under paragraphs 6 to 9 of schedule 2 (see Regulation 1(3)).

Paragraph 14(1) of schedule 4 to the 2014 Regulations sets deadlines for the making of an application to alter a register under schedule 2, namely 31 December 2020 for authorities to which the 2008 Regulations applied and 15 March 2027 for the remaining authorities, including HCC (see also schedule 8 to the 2014 Regulations). The same deadlines apply to proposals made by a registration authority (Regulation 18(2)).

33. There is therefore a finite period of time within which action may be taken under schedule 2 to the 2006 Act to remove land from a register. Those who benefit from rights of common or who enjoy access to common land or to a town or village green are not at risk of de-registration at any time in the future. The legislation has struck this balance between competing interests and in the interests of legal certainty.

34. The scheme requires applications to be publicised and provides for public participation, as occurred in the present case (regulations 21 to 24). Representations may be made (regulation 25). Certain applications have to be determined by the Planning Inspectorate (regulation 26). A public inquiry or a hearing may be held with the various procedural safeguards that they provide (regulations 27 to 34). There is therefore a full opportunity for representations from all relevant interests to be taken into account and evaluated.

35. For an application made under paragraphs 6 or 8 to succeed it must be shown that the land to be de-registered has been covered by a building, or fallen within the curtilage of a building, continuously since the date of provisional registration under the 1965 Act, which is likely to be a period of some 50 years or more. Save for fairly straightforward or obvious cases, that is likely to be a challenging requirement to satisfy, particularly in relation to the "curtilage" limb where the area of land is substantial. The various factors which may affect the decision-maker's judgment on the extent of the curtilage will have to be considered throughout that lengthy period of time.

36. If a building has existed for 50 years or so it will have been impossible in practice for any rights of common to have been exercised over that area. It is also unlikely that such rights will in practice have been exercised over the curtilage of most buildings. In any event, remedies would certainly have been available during that period to enable such rights to be asserted and protected if that had been thought appropriate. Thus, in a case to which the de-registration provisions in paragraphs 6 or 8 of schedule 2 apply, it is unlikely that there would be any significant value attributable to rights of common theoretically exercisable, but not in practice exercised for a long period of time, over the area to be de-registered. It is therefore understandable that Parliament did not providea right to compensation for the extinguishment of rights of common under those provisions.

37. Indeed, the argument put forward by The OSS cuts both ways. The registration of a right of common under the 1965 Act over land covered by a building or over the curtilage of a building interferes with the property rights of that landowner. But the legislation has never provided any compensation for that dispropriatory effect.

38. This last point is reflected in paragraph 14(3) of schedule 4 to the 2014 Regulations. An application to correct the non-registration of common land or a town or village green under paragraphs 2 or 3 of schedule 2 may "only include land that is covered by a building or which is within the curtilage of a building if the owner of that land consents to its registration". By this provision Parliament has avoided the interference with the property rights of landowners which the 1965 Act omitted to address and which has required correction through paragraphs 6 and 8 of schedule 2 to the 2006 Act. Paragraph 14(3) has

made it unnecessary for the 2006 Act to provide compensation for landowners affected by applications to correct non-registration under the 1965 Act.

39. Plainly, in the 2006 Act Parliament has carefully balanced the interests of the owners of rights of common and the users of commons (or town or village greens) and the interests of landowners. I do not accept Mr. Petchey's submission that s.3 of the Human Rights Act 1998 would require the term "curtilage" in the 2006 Act (and the related regulations) to be interpreted restrictively so as to be compatible with Article 1 of the First Protocol. The merits of the argument under A1P1 pull in opposite directions because of the competing property rights of landowners and owners of rights of common. I do not accept that s.3 would entitle the court to adopt an interpretation which would favour one group of A1P1 rights rather than another. Certainly, Mr. Petchey did not show the court an authority which would allow the court to make that sort of choice, even assuming that it was able to do so on the material before it.

40. The sensitivity of this issue extends to other legislation providing for public access to open spaces. The Countryside and Rights of Way Act 2000 provides for public access to the countryside, more particularly to "access land" as defined in s.1. There is excluded from such land (inter alia): -

> "land covered by buildings or the curtilage of such land."

The OSS's narrower approach to the concept of the "curtilage" of a building would potentially broaden the extent to which the right of access under the 2000 Act could adversely affect the position of landowners.

41. Because the 2006 Act recognises that land within the curtilage of a building should not be registered without the owner's consent, and has inappropriately been registered in the past under the 1965 Act without that consent, I do not accept the submission of Dr Bowes that s.16 of the 2006 Act affects the approach to be taken to the concept of "curtilage" in the de-registration provisions. Section 16 enables the owner of land registered as common land or as a town or village green to apply for de-registration subject to (1) providing replacement land where the area of the application site is greater than 200 sq m and (2) consideration of the rights of others over the land, the interests of the neighbourhood and the public interest. He suggested that giving too wide an ambit to "curtilage" in paragraphs 6 and 8 of schedule 2 to the Act would undermine the operation of s. 16. But that argument begs the question whether land was appropriately registered in the first place. Parliament's view expressed through the 2006 Act is that a building and its curtilage (if any) ought not to have been so registered. The operation of s.16 does not affect the question whether a wide or narrow, strict or less strict, approach should be taken to the concept of curtilage.

42. In my judgment, the balance between interests of landowners on the one hand and the interests of owners of rights of common and the users of commons or town or village greens on the other, has been set by Parliament and it is not for the court to adopt an approach to "curtilage" which reflects its perception of where that balance should lie. That is a matter for Parliament. I agree with Mr Edwards QC that that was the approach recently taken by the Supreme Court when it examined another part of the 2006 Act (R (Lancashire County Council) v Secretary of State for the Environment, Food and Rural Affairs [2020] 2 WLR 1 at [11]).

43. Mr. Petchey based his contention that a narrower approach to "curtilage" should be adopted where legislation has an expropriatory or dispropriatory effect upon authorities dealing with leasehold enfranchisement, notably Methuen-Campbell. However, Mr. Petchey, commendably, discharging his duty to the court, subsequently discovered and referred to Cadogan v McGirk [1996] 4 All ER 643 where the Court of Appeal rejected the submission that enfranchisement legislation, specifically the Leasehold Reform, Housing and Urban Development Act 1993, should be treated as expropriatory in nature and thus strictly construed (citing Jones v Wrotham Park Settled Estates [1980] AC 74, 113; Manson v Duke of Westminster [1981] QB 323, 332). Although the legislation might be expropriatory of the landlord's interest to some extent, it was also passed in order to confer certain advantages on tenants. It was the court's duty to construe the legislation fairly and, where possible, to give effect to those advantages which Parliament intended tenants to enjoy (pp. 647-8). Cadogan also shows that the legal approach in that case to "appurtenance" may be highly sensitive to the specific provisions enacted by Parliament (pp. 651d to 652a).

44. For all these reasons, I do not consider that the potential effects on property rights would justify taking either a wider or narrower approach to "curtilage" as that term is used in the 2006 Act. This factor has an entirely neutral effect on the approach which should be adopted by the court. Furthermore, it will be seen below that dispropriatory or expropriatory considerations have not had a substantial influence on the decisions in relevant authorities on what legal principles should be adopted.

The decision letter

45. The Inspector summarised the history of the airport at DL 6 to 15. The current airport forms only part of a much larger area of land requisitioned during World War II for use as an RAF airfield. There were then three runways orientated to allow take-off and landing in all wind directions, hangars and other facilities.

46. In 1947 RAF Blackbushe was taken over by the Ministry of Civil Aviation and became Blackbushe Airport. In 1952 the eastern part of Yateley Common was sold to the Parish Council for use as recreational open space. In 1953 the Ministry built a terminal building in what is now the south-eastern corner of the airport. In 1958 a new arrivals hall was added to the eastern end of that building.

47. In 1960 the Airport was closed and the land was derequisitioned, but the runways and terminal building remained *in situ*.

48. In 1962 the airfield was reopened for general aviation purposes and a clubhouse erected, which subsequently became the Bushe Café. The sections of runway in the eastern part of the site ceased to be used in about 1964. The terminal building and the café were present when the common was provisionally registered on 16 May 1967.

49. The ownership of the airport changed hands in 1973 and the new owner erected hangars in the north-western part of the site. They were used to provide maintenance facilities and parking for aircraft using the airport as a home base.

50. In 1985 the airport was sold to a new owner. The use of the two northern runways ceased pursuant to the terms of an agreement under s.52 of the Town and Country Planning Act 1971. Thus, the operational area of the airport was reduced, although some of the hangars

to the north-west continued to be used in connection with the airport until 2015. At that stage the operational area of the airport was reduced again, this time to its current area.

51. In 1996 the eastern end of the terminal building had been demolished. That part of the terminal building which remains has always been present since 1953 and within the operational area of the airport, albeit that that area has contracted over time.

52. The Inspector considered the meaning of curtilage in DL 41 to 55. He identified many of the authorities to which he had been referred and said that none of them provided a definition of "curtilage"; rather they provided guidance on factors which may be relevant in determining what does or does not form the curtilage of a building (DL 41). As I have mentioned, the Inspector identified relevant factors from the judgment in Challenge Fencing at [18] (DL 43).

53. The Inspector summarised the submissions of The OSS at DL 44 to 46. They contended that for the 2006 Act "curtilage" should be taken to have a conveyancing meaning, a "part and parcel test" which requires a curtilage to be a small area of land. The broader approach to curtilage in listed building control, based on a functional relationship between the listed building and adjacent land should not be adopted.

54. The Inspector summarised BAL's case at DL 47 to 48. They submitted that the authorities do not provide two meanings of curtilage. Instead: -

> "In the Applicant's view, land lies within the curtilage of a building where the relationship is such that they can be said to be '*part and parcel'* of the same entity or an '*integral whole'* or where they are so inter-related to form a single unit. 'Smallness' was not a requirement for curtilage and a primary/ancillary relationship between the building and land was not a legal requirement. Consideration should be given to various factors including the functional relationship of the land to the building, physical layout and ownership."

55. Thus a key part of BAL's case was that land lies within the curtilage of a building where they, that is the land *and* the building, can be said to be part and parcel of the *same entity* or so inter-related as to form a single unit. That submission was maintained before this court. It was the approach which the Inspector decided to adopt.

56. The Inspector noted at DL 49 the absence of a statutory definition of "curtilage" and the statement of Robert Walker LJ (as he then was) in Skerritts (at p.676) that lawyers themselves do not have a precise idea of what "curtilage" means; it is a question of fact and degree. In DL 50 the Inspector noted certain passages from Methuen-Campbell.

57. The Inspector referred to Challenge Fencing as having decided that the factors set out in [18] apply to commercial premises as well as to dwellings and listed buildings (DL 51).

58. The Inspector concluded that the authorities do not suggest that there are separate "conveyancing" and "listed building" meanings of "curtilage" (DL 52). "Smallness" is a relative concept, so that the curtilage of a modest house may itself be of a modest size, whereas the curtilage of an industrial or commercial building may or may not be so (DL 53).

59. Although in DL 54 the Inspector summarised guidance given in several cases (quoted in paragraph 16 above), in DL 55 he stated that he thought it appropriate to determine the issue of curtilage in the present case by reference to the factors cited in DL 43 from Challenge Fencing. The Inspector then proceeded to apply those factors one by one.

60. In DL 56 to 64 the Inspector considered "physical layout", including fencing and boundary treatments. He concluded that the terminal building and the operational land of the airport (including the application land) had remained one enclosure within which the physical layout had not changed materially over the relevant period.

61. In DL 65 to 66 the Inspector found that both the airport and the application land had been owned as a single entity at all material times.

62. In DL 67 to 71 the Inspector addressed "the use or function of the land and buildings past and present". The terminal building formed the hub of the operation of the airport as it housed the administrative and support facilities of the airport together with the control tower from which aircraft movements were controlled. The terminal building had provided a base for the airport's own staff and other aviation interests. The terminal building has provided accommodation for airport reception, passengers, airport operations management, and air navigation services for the airport. The Bushe Café had formed an essential part of the airport. The use of the terminal building and the application land had remained unchanged over the relevant period.

63. The Inspector considered "relative size" in DL 72 to 76. He noted at DL 74 HCC's submission that there must come a point when the land said to comprise the curtilage of a building is too large to be treated as its curtilage and that on any reasonable view the application land was too big to be the curtilage of the small building located in its south-eastern corner.

64. The Inspector's conclusions on this issue were as follows: -

> "75. The size of the curtilage in relation to the building of which it forms part is a relevant matter, but so too is the purpose to which the building and land are put. In this case the operational area of the airport may appear excessive given the relatively small size of the Terminal Building, but in the context of the purposes to which the building and land are put I do not consider that to be the case. The building and land form part of a general aviation airport. A functioning airport (even a relatively small one such as Blackbushe) will by its nature require a significant quantity of land for the provision of runways, taxiways, hangarage or storage, fire and rescue services, fuel storage and dispensing facilities, customs and quarantine facilities and so forth.
>
> 76. The evidence before me is that the operation of the airport and the use of the facilities on its land is and has been controlled and directed from the Terminal Building which is, as the OSS point out, a relatively small building on the south-eastern side of the Application Land. Although the claimed curtilage may appear wholly disproportionate to the physical size of the Terminal Building, when consideration is given to the land and the building in the context of an operational airport, the relative size of the application land to the Terminal Building is proportionate to the function and purpose to which the building and land are put."

65. In this part of the decision the Inspector assessed the relative size of the application land by taking into account the purpose to which both the land and the building were put. It is also significant that he considered "the land and the building in the context of an operational airport" and "the function and purpose to which the building and land are put", confirming that he was applying the approach which had been suggested by BAL (DL 47). He took the same approach when expressing his final conclusions on curtilage at DL 87 (see paragraph 70 below).

66. The Inspector addressed the "ancillary" factor at DL 77 to 82. BAL's case was that the terminal building was at the heart of the operations carried on at the airport and that the aviation related infrastructure (runways, taxiways, aircraft parking areas, hangars, and public car parks) "had a functional relationship to the terminal building and operated by virtue of the activities which took place within" that building (DL 78). The objectors submitted that the use of the terminal building was ancillary to the use of the airfield and not the other way round (DL 79).

67. It is necessary to set out the Inspector's conclusions on this issue in full as it is apparent that this formed a key part of his overall reasoning on "curtilage":-

> "80. The Council submitted that the land and the building may each serve the other's purpose in some necessary or reasonably useful way, although such functional equivalence would not give rise to the application land being the curtilage of the Terminal Building. The applicant's response was that there was no difference between 'functional equivalence' and the land being said to be 'part and parcel' of the same unit; if there was 'functional equivalence' between the operational land and the Terminal Building, it demonstrated that the land and the building formed an integral part of the same unit.
>
> 81. In addition to co-ordinating the safe arrival and departure of aircraft it is evident that the Terminal Building provides administrative and technical support to the various activities at the airport. Those functions performed within the Terminal Building (the co-ordination of on-site fire and safety provision, the medical assessment of airport staff, customs and quarantine services for international flights for example) which are not directly related to the safe take-off and landing of aircraft are nonetheless part and parcel of the safe and efficient operation of the airport.
>
> 82. Although the Council described this state of affairs as a *'functional equivalence*' and that as such the land could not be curtilage and the objectors described the land and buildings as having a '*symbiotic relationship'*, such relationships indicate that whilst there may be an ancillary relationship of the building to the land, there is also an ancillary relationship of the land to the building. As set out in *Challenge Fencing*, it is not a legal requirement for there to be an ancillary relationship although such a relationship exists in this case. I consider that the operational land of the airport and the Terminal Building are part and parcel of the same unit and that they are integral parts of the same unit."

68. Thus, the Inspector adopted once again the approach which had been put forward by BAL (summarised at DL 47). He considered whether the land *and the building* formed part and parcel of the same unit. He considered that both the building was ancillary to the land and the land was ancillary to the building. He referred to this "functional equivalence" as

demonstrating that the land and building formed an integral part of the same unit. As when he was dealing with "relative size", the Inspector considered the functional equivalence of the land and building to relate to an operational airport.

69. The Inspector summarised his overall conclusions on the curtilage issue in DL 83:-

> "Taking all of the above into account, I find that 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. I consider that the operational area of the airport formed and forms the curtilage of the Terminal Building. It follows that I conclude that the Application Land, which has at all material times been part of the operational area of the airport, can be properly described as being within the curtilage of the Terminal Building."

70. The Inspector's final conclusion on the status of the application land appears in DL 87:-

> "The assessment of curtilage is a matter of fact and degree and the relative size of the land claimed as curtilage has to been seen in the context of the use to which the building and land is put. An operational general aviation airport will occupy a significant area of land and that land is likely to dwarf the size of the Terminal Building associated with it; such is the nature of airports. At the time of provisional registration in 1967, the operational area of the airport was much greater than that which is operational today. For the reasons set out above, I consider that the Application Land was within the operational area of the airport in 1967 which at that time was the curtilage of the Terminal Building such that paragraph 6(2)(b) is satisfied."

Curtilage

71. As a starting point it is helpful to have in mind Parliament's decision to take a different approach in the 2006 Act from the temporary provisions of the 1989 Act (see paragraph 29 above). First, it made de-registration available not only for dwelling-houses but also buildings generally. Second, de-registration is available for land within the curtilage of a building. Parliament chose not to repeat the approach in the 1989 Act which had referred to land "ancillary to" a dwelling-house, meaning a garden, private garage or outbuildings "used and enjoyed" with the dwelling-house. The mere fact that land is "used and enjoyed" with a building does not suffice to make it part of the curtilage of that building (see e.g. Methuen-Campbell).

Parliamentary material

72. In R v Secretary of State for the Environment ex parte Spath Holme Ltd [2001] 2 AC 349 the House of Lords emphasised the need to adhere to the "stringent" conditions laid down in Pepper v Hart [1993] AC 593 for the admissibility of ministerial statements in Parliament as an aid to construing legislation. None of the material placed before the court in this case satisfies those tests. It provides no real assistance at all.

Ordinary English meaning

73. It was submitted that "curtilage" is not a term of art; rather it is a word which should be given its "ordinary meaning". The Oxford English Dictionary gives this definition:-

> "A small court, yard, garth, or piece of ground attached to a dwelling-house, and forming one enclosure with it, or so regarded by the law; the area attached to and containing a dwelling-house and its out-buildings. Now mostly a legal or formal term, but in popular use in the south-west, where it is pronounced, and often written, *courtledge*."

74. This provides only some help because the definition recognises that to an extent "curtilage" is a legal expression. It is not simply an ordinary English word. Some legislation requires the concept to be applied not just to dwelling-houses but to buildings of all kinds. Case law has established that the curtilage of a building need not be confined to a small area of land. I also note that the curtilage of a building is land which is attached to, and forms one enclosure with, that building, but that concept needs to be understood by examining the case law carefully.

75. The related terms "messuage" and "appurtenance" cast further light on the meaning of "curtilage". A "messuage" means the land occupied by a dwelling-house and *its* appurtenances, or a dwelling-house together with *its* outbuildings and the adjacent land assigned to *its* use, the emphasis being on the appurtenances, outbuildings and use *of* the dwelling-house (or building). Likewise, "appurtenance" denotes something *belonging to* another, or a minor property or right *belonging to* another more important property or right.

76. Legal dictionaries provide a similar explanation. So, for example, Jowitt's Dictionary of English Law 5th ed. explains that by a grant by deed of a messuage, the curtilage passes without being expressly mentioned.

Statutory context

77. A number of authorities state that the sense in which "curtilage" is used is sensitive to the language used by Parliament and the context or purpose of the legislation (e.g. Roskill LJ in Methuen-Campbell [1979] QB at 539E).

78. For example, Pilbrow v Vestry of St. Leonard, Shoreditch [1895] 1 QB 433 was cited for the proposition that an area of land must be relatively small in extent for it to qualify as curtilage land (p. 438). But there the court was concerned with the distinction under public health legislation between a "drain" and a "sewer" for the purposes of deciding whether expenses were to be borne by the owners of buildings or by local ratepayers. The statute defined "sewer" in part by excluding anything falling within the definition of a "drain". A "drain" referred to any drain for the drainage of only one building or "premises within the same curtilage". The majority of the Court of Appeal decided that in this context "curtilage" had not been used in a conveyancing law sense. It was not limited to a single building with its outbuildings. It could also include several buildings which have a curtilage which was common to all. In that context it was necessary to consider the mode of building, the purpose for which the buildings had been erected and how they were used. It was held that the drains in question serving two blocks of flats separated by a relatively small yard related to "premises within the same curtilage". On the other hand, drainage serving a large number of buildings erected around a square would not relate to "premises within the same curtilage".

79. Pilbrow does not assist in the present case because the language used in the 2006 Act is so very different. Here the issue is whether land qualifies as forming the curtilage *of a building*, not drainage serving "premises [comprising more than one building] within the same curtilage". As the cases show, the words chosen by Parliament, "the curtilage of a building", are of critical importance.

Landlord and tenant cases

Methuen-Campbell v Walters

80. The Leasehold Reform Act 1967 gave certain lessees the right to acquire the freehold or an extended lease of the "house and premises" they occupied. "Premises" referred to "any garage, outhouse, garden, yard and appurtenances" let with the house (s.2(3)).

81. The lease in Methuen-Campbell v Walters [1979] QB 525 demised a dwelling together with a garden of 0.5 acre and an area of rough pasture, a paddock, of 1.6 acres. The landlord appealed against the decision in the County Court that the paddock should be included in the claim to enfranchise because it was an appurtenance of the house ([1979] QB at 532A). The Court of Appeal held that the paddock was not an appurtenance.

82. Goff LJ pointed out that originally land could not be an appurtenance to other land; only an incorporeal hereditament could be an appurtenance. However, by the time of Evans v Angell (1858) 26 Beav. 202 an appurtenance to a property was treated as anything, including land, which would pass under a conveyance of that property without being expressly mentioned. By the time of Trim v Sturminster District Council [1938] 2 QB 508 it was settled that an appurtenance was confined to the curtilage of the property (1979 QB at 533-5). Relying upon the dictionary definition of "curtilage", and treating its application as a question of fact, Goff LJ decided that the "comparatively extensive" area of pasture which had been divided from the house and garden, could not be treated as part of the curtilage of the house. The paddock was no more than a valuable amenity for the occupier. The fact that it had been let together with the house and garden as one unit, albeit relevant, was not of much weight. These factors were insufficient for the paddock to form part of the curtilage of the dwelling ([1979] QB at 536-8).

83. Roskill LJ took essentially the same approach as Goff LJ ([1979] QB at 540-1).

84. Buckley LJ agreed that although "appurtenance" may include land, it may not include anything which would not pass on a conveyance of the principal subject matter without being specifically mentioned, and therefore could only extend to land or buildings within the curtilage of the principal subject-matter (p.543A). This approach has sometimes been referred to as the "conveyancing approach" to curtilage. But I do not think that that label is a helpful way to understand the principles in Methuen-Campbell and similar authorities for identifying the curtilage of a building. Buckley LJ pointed out that the fact that a conveyance of a parcel of land described in general terms will pass all the component parts of its curtilage without express mention is simply the legal *consequence* of those parts falling within that curtilage. That conveyancing consequence is not a criterion by which the extent of the curtilage should be identified (544C-D).

85. Instead, the correct approach is set out in the following oft-cited passage from the judgment of Buckley LJ (543F to 544D). This is also one of the key passages upon which Mr Westaway and Mr Edwards QC sought to base their overarching principle:-

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

86. When this passage is read properly and as a whole it is impossible to derive the overarching principle for which the Defendant and BAL contend, and which the Inspector applied at DL 75-6, 82-3 and 87. 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 a way that the *land and building* comprise part and parcel *of the same entity*, a single unit, or an integral whole. Nor did he suggest that "part and parcel", "single unit" and "integral whole" were synonymous terms to be used in that manner (see para. 22 of BAL's opening submissions at the inquiry; paras. 86-90 of BAL's closing submissions and para. 12 of BAL's skeleton).

87. 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*. That is consistent with the ordinary English meaning of "curtilage" and "appurtenance" as explained in the dictionaries. In the same vein, I note from another of its decisions cited by the Court of Appeal, Clymo v Shell-Mex & BP Limited (1963) 10 RRC 85; [1963] RVR 471, that the legal concept of

"appurtenance" is something *belonging to* a house or building, although not necessarily used for the purposes of that house or building (pp. 473 and 474).

88. Buckley LJ went on at p. 544 to address ancillary buildings, structures or areas, such as outhouses, a garage, a driveway or a garden and said that *in so far as* they fall within one messuage or parcel, they would fall within one curtilage or would constitute an integral whole. But that passage cannot be taken as departing from the clear test he had already laid down, namely whether land is so intimately associated with a building as to form *part and parcel of that building*. That was the test to which Buckley LJ returned at p. 545A when, acknowledging that the paddock provided an amenity for and enhanced the value of the house, he added the key words "but the paddock can serve that purpose perfectly well without being part and parcel of the house".

89. In the present case the relevant question posed by the judgment of Buckley LJ ought to have been whether the application land was so intimately associated with the terminal building as to form part and parcel of that building, not whether that land and building together formed *part and parcel of the same entity.* That seemingly slight change in language introduced in BAL's submissions, and applied by the Inspector, would produce a very different outcome in cases like Methuen-Campbell and, indeed, generally.

90. I note that Buckley LJ regarded the 1967 Act as having a dispropriatory, although not confiscatory, approach and so any doubt in the construction of the legislation should be resolved in favour of "the party to be dispropriated", i.e. landlords (p. 542F). But there is nothing in his subsequent reasoning to suggest that he in fact applied that approach. There is no reference to any doubt or ambiguity needing to be resolved in this way.

91. Goff LJ accepted that the 1967 Act was expropriatory, but he said that not too much weight should be given to that factor; simply that the court should "not be ready to give too liberal a construction to the words defining what the tenant is given a right to purchase." He returned to that theme at p.536F-G when he rejected the wide approach to "appurtenance" for which the tenant had contended ("any land used and occupied with, or to the benefit of, the house, either as a matter of convenience or as an amenity" – p 535G). He held that that approach was inconsistent with the law on "appurtenance" previously laid down by the Court of Appeal in Trim v Sturminster Rural District Council [1938] 2 KB 508. In that case a wide interpretation could only have assisted the landowner to resist the interference with his property rights by the statutory demolition order served by the local authority, but the court nevertheless gave the term its "ordinary meaning". Goff LJ continued at p. 536G by referring to cases where the concept of "curtilage" has been used when applying legislation for protecting landowners faced with the expropriation of part of their land (i.e s. 92 of the Lands Clauses Consolidation Act 1845, now s. 8 of the Compulsory Purchase Act 1965), but they did not support a wider approach to that term.

Dyer v Dorset County Council

92. The Housing Act 1980 gave a tenant of a local authority's dwelling-house a right to buy his home except where (inter alia) the house lay within "the curtilage of a building" held by the authority mainly for purposes other than housing. In Dyer v Dorset County Council [1989] QB 346 the County Council's "building" (or collection of buildings) formed an agricultural college. The house let to Mr Dyer by the authority was located on the edge of the college grounds. The Court of Appeal upheld the judge's decision that the house did not fall within the curtilage of any of the college's buildings (whether taken individually or

as a whole) and so was not excluded from the tenant's right to buy. The judge added that he would have reached the opposite conclusion if the exclusion had been expressed by Parliament so as to refer to the curtilage of the college or institution (i.e. the overall site used for that purpose or function) rather than the curtilage of a college "building" ([1989] QB at p. 353F).

93. Lord Donaldson MR based his decision on Methuen-Campbell, in particular the passage cited from the judgment of Buckley LJ. He emphasised that the question was whether Mr. Dyer's house was within the curtilage of the *buildings* of the college, not the curtilage of the *college* (p.357G). Mann LJ took the same approach, adding that the exclusion from the right to buy had not been phrased so as to relate to the grounds of an institution (p.359D).

94. Nourse LJ also regarded the exposition by Buckley LJ in Methuen as authoritative (p.358D-E). He stated that "an area of land cannot properly be described as a curtilage unless it forms part and parcel *of the house or building* which it contains or to which it is added" (emphasis added).

95. Thus, the overarching principle applied by the Inspector, and for which the Defendant and BAL contend, is inconsistent with the test laid down in Dyer.

96. In Skerritts the Court of Appeal decided that the reasoning in Dyer had gone further than was necessary in so far as the court suggested "that the curtilage of a building must always be small or that the notion of smallness is inherent in the expression" ([2001] QB at 67A). But that does not in any way detract from the principles in Dyer set out above, and which were applied in Barwick (see below).

97. In Dyer the statutory provision which used the term "curtilage of a building" was inserted to provide protection to a local authority facing the compulsory sale of its property under the right to buy legislation. So it was Dorset County Council which urged the court to give a broader scope to "curtilage" than would otherwise be the case (p. 357C-D, 359A). The court refused to do this. So it cannot be said that in Dyer, or indeed in Barwick, dispropriatory considerations were relied upon by the court in support of its decision to follow the principles laid down by Buckley LJ in Methuen-Campbell.

Barwick and Barwick v Kent County Council

98. Barwick and Barwick v Kent County Council (1992) 24 HLR 341 considered essentially the same statutory provision as in Dyer, although at that stage it was contained in the Housing Act 1985. The issue was whether the appellant's dwelling was excluded from the statutory right to buy because it lay within the curtilage of a building held by the local authority for the purposes of a fire station. The station building had a large yard to the rear, beyond which there was a row of garages. It was surrounded by a high wall, with a gate which led on to a path to which ten houses had access. This housing had been built around the same time as the fire station to provide accommodation for the firemen working there. Each of the houses had a garden and its own clearly defined curtilage. The Court of Appeal allowed an appeal by the tenant, holding that his dwelling did not lie within the curtilage of the fire station building and so was not excluded from the right to buy.

99. Giving the leading judgment of the court, Parker LJ referred to the judge's finding that the group of houses, the fire station and its yard formed a "functionally single unit" (p.344), meaning that the fire station could operate functionally with the housing to provide a fire

service. But he held that that was not the relevant question, which was whether the houses (or any of them) could be regarded as falling within the curtilage of "the fire station building" (p.344). Thus, the court explicitly rejected the overarching principle for which the Defendant and BAL contend.

100. The court then followed the relevant passages in Methuen-Campbell and Dyer to which I have referred. The true issue was whether the appellant's house fell within the curtilage of the fire station *building*, not the curtilage of the *fire station* (p.346). The latter and wider approach involved an irrelevancy, namely the curtilage of all areas of land devoted to the purposes or functions of a fire station. On the facts of that case, and applying the ratio in Dyer, it was held that the dwelling was not within the curtilage of the fire station *building*.

Listed building control

101. The definition of a listed building is a term of art. It is not simply a building included in the list of buildings of special architectural or historic interest under s.1(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the Listed Building Act 1990"). Instead, s.1(5) provides an extended definition:-

> "In this Act "listed building" means a building which 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."

That extended definition applies in the context of the controls applied by the Listed Building Act 1990 to, for example, the demolition, alteration or extension of listed buildings (ss.7-9).

Debenhams plc v Westminster City Council

102. In Debenhams plc v Westminster City Council [1987] AC 396 the House of Lords held that "structure" in limbs (a) and (b) of the definition of "listed building" must be restricted "to such structures as are ancillary to the listed building itself, for example the stable block of a mansion house, or the steading of a farmhouse, either fixed to the main building or within its curtilage" (p. 403F-G). It adopted this "ancillary test" in order to avoid the inclusion of a building in the statutory list from having too wide an effect, for example, by bringing within the scope of the listing another building complete in its own right, which is not subordinate to the listed building. The House of Lords gave the example of a terrace of houses only one of which is listed for historical interest.

103. It is common ground that according to Methuen-Campbell, in particular the judgment of Buckley LJ, there is no legal requirement for land to be ancillary to a building in order to form part of its curtilage. Ancillariness may be taken into account as a relevant factor, but it is not a pre-requisite for land to qualify as falling within a curtilage. In Debenhams the

House of Lords only decided that objects or structures cannot fall within the extended definition of a listed building unless they are ancillary to that building. It did not lay down an "ancillariness" criterion for the concept of "curtilage". Indeed, the ancillariness criterion applies to both limbs (a) and (b) of s. 1(5). It qualifies the structures or objects which are either fixed to or within the curtilage of the building entered in the statutory list.

The Calderdale case

104. In Attorney General ex rel. Sutcliffe v Calderdale Borough Council (1982) 46 P & CR 399 the Court of Appeal decided that a terrace of cottages attached to a mill included on the statutory list of buildings of special architectural or historic interest formed part of that listed building, either because the terrace was a structure "fixed" to the mill or, if not so fixed, was a structure within the curtilage of the mill. In Debenhams the House of Lords was not prepared to accept the width of the reasoning in Calderdale. They considered the decision to have been correct solely on the basis that the terrace of cottages was ancillary to the mill, thereby satisfying the additional test which they held should qualify "structures" ([1987] AC at 403G and 411C).

105. Delivering the leading judgment in the Court of Appeal (with which the other members of the court concurred), Stephenson LJ said at (1982) 46 P & CR 399, 405:-

> "I would approach section 54(9) [of the Town and Country Planning Act 1971, now s.1(5) of the Listed Building Act 1990], its construction and application, and both its limbs with the obvious reflection that the preservation of a building of architectural or historic interest cannot be considered or decided, either by the Secretary of State or by those specialists he is required by section 54(3) to consult, in isolation. The building has to be considered in its setting, as is made clear by the amendment to section 56(3), and by paragraph 25 of circular no. 23/77, as well as with any features of special architectural or historic interest which it possesses. The setting of a building may consist of much more than man-made objects or structures, but there may be objects or structures which would not naturally or certainly be regarded as part of a building or features of it, but which nevertheless are so closely related to it that they enhance it aesthetically and their removal would adversely affect it. Such objects or structures may or may not be intrinsically of architectural or historic interest, or worth preserving but for their effect on a building which is of such interest. But if the building itself is to be preserved unless the Secretary of State consents to its demolition, so also should those objects and structures be. That object is achieved by section 54(9) requiring them to be treated as part of the listed building. They do not thereby become absolutely immune from demolition, but the power is there to give or withhold consent to the demolition of all or some of them. If that is the right approach, it indicates a broad approach to the subsection as a whole and a construction of it which will enable the Secretary of State to exercise his discretion to grant or withhold listed building consent over a wide rather than a narrow field."

106. Thus, the Court of Appeal held that a structure or object which is so clearly related to a listed building that its removal would adversely affect the interest of that building, should be treated as falling within the extended definition of "listed building", even if that item would not otherwise be regarded as part of, or one of the features of, that building (subject now to the "ancillary" test laid down in Debenhams). The object was to promote the

preservation of listed buildings. That was said by the Court of Appeal to justify a broad approach to s. 1(5) as a whole.

107. However, I note that the extended definition of "listed building" only brings "structures" or "objects" within the scope of the listing, not, for example, a garden or open land. In other words, s. 1(5) does not treat every aspect of the curtilage of a listed building as falling within that definition. Consequently, the controls in ss. 7 to 9 do not apply to any item of work carried out anywhere within the curtilage of a listed building (notwithstanding s. 66(1)). Those controls are specifically targeted at works to a listed building, or other qualifying structures or objects, because of their effect on the special architectural or historic interest of that building.

108. By contrast, the non-registration and de-registration provisions in the 2006 Act are not concerned with the preservation or protection of a building located on a common (or the ancillary objects or structures within its curtilage). Self-evidently, such a building may have no architectural or historic interest. For the same reasons the 2006 Act refers to the "curtilage of a building" without concentrating solely on any "objects" or "structures" it may contain. These differences in language, context and statutory purpose are so substantial that the listed building code is not truly analogous to the provisions in the 2006 Act dealing with de-registration, or correcting the non-registration, of common land or towns or village greens. It follows that care must be taken to see whether any principle laid down on "curtilage" specifically in the context of listed building control can be read across to these provisions, particularly if the approach for that control differs from the approach generally adopted in other authorities.

109. On the subject of "curtilage" Skinner J had said at first instance:-

> " In my judgment, the word curtilage has to be construed having regard to the fact that the 1971 Act as a whole deals with town and country planning and that the part of the Act we are concerned with deals with buildings of architectural or historical interest. I have to ask myself, from a planning rather than a strict conveyancing viewpoint, whether the buildings within the alleged curtilage form a single residential or industrial unit and, in this instance, whether *the mill and the terrace form part of an integral whole*. I reject the strict conveyancing viewpoint because, if it were adopted, evasion of the Act would be easy to achieve." (emphasis added)

110. At pp. 406-7 Stephenson LJ stated:-

> "There was, I think, at the end of the argument before us agreement that three factors have to be taken into account in deciding whether a structure (or object) is within the curtilage of a listed building within the meaning of section 54(9), whatever may be the strict conveyancing interpretation of the ancient and somewhat obscure word "curtilage." They are (1) the physical "layout" of the listed building and the structure, (2) their ownership, past and present, (3) their use or function, past and present. Where they are in common ownership and one is used in connection with the other, there is little difficulty in putting a structure near a building or even some distance from it into its curtilage."

111. At pp.407-8 Stephenson LJ cited nearly the whole of the passage from the judgment of Buckley LJ in Methuen-Campbell, set out in paragraph 85 above and continued:-

> "Buckley L.J. does not refer to Skinner J.'s "single unit," but he does refer to his "integral whole." And he is of course dealing with a house and premises in common ownership."

The Court of Appeal apparently endorsed the approach taken by Skinner J cited in paragraph 109 above.

112. Stephenson LJ then summarised the rival arguments of the parties on the curtilage issue and said at p. 409:-

> "I have found this question difficult to answer, but I have ultimately come to the conclusion, not without doubt, that the terrace has not been taken out of the curtilage by the changes which have taken place, and remains so closely related physically or geographically to the mill as to constitute with it a single unit and to be comprised within its curtilage in the sense that those words are used in this subsection."

Plainly, the two other members of the court arrived at the same conclusion but also shared the same doubts.

113. 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 (notably Nourse LJ) and Barwick. As I have already explained, 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.

114. On analysis, it can be seen that the only authority which might support the overarching principle for which the Defendant and BAL contend is the Calderdale case and not the approach laid down by Buckley LJ in Methuen-Campbell or by the Court of Appeal in Dyer and in Barwick. The latter two authorities clearly decided that where Parliament has chosen to refer to property within "the curtilage of a building", it is necessary for the decision-maker to consider whether the property in question falls within the curtilage of the relevant building and not whether it falls within the curtilage of all the buildings and land devoted to that institution, function or use. The object of the legislation considered in Dyer and Barwick was to define the scope of local authority housing to which a tenant's right to buy applied. It was not to do with conveyancing as such. It cannot be said that the "part and parcel of the building" test was a strict conveyancer's approach. Instead, it represents the correct interpretation of the language used by Parliament in legislation which balances competing property interests, a context which is truly analogous to the non-registration and de-registration provisions of the Commons Act 2006.

Skerritts

115. In Skerritts of Nottingham Limited v Secretary of State for Environment, Transport and the Regions [2001] QB 59 the judge at first instance had held that the Inspector had failed to consider the concept of a curtilage as a small area around a building, when deciding that a stable block fell within the curtilage of a listed building (a hotel converted from a country house). The Court of Appeal reversed the decision of the High Court, holding that there was no requirement for a curtilage to be "small". Robert Walker LJ stated that in the context of Part I of the Listed Building Act 1990, "the curtilage of a substantial listed building is likely to extend to what are or have been, in terms of ownership and function, ancillary buildings". He noted that "physical layout" is also relevant and added that "the curtilage within which a mansion's satellite buildings are found is bound to be relatively limited", although the concept of "smallness" is an unhelpful criterion. I agree with Lieven J that "relative size" remains a relevant consideration ([18(iii)] and [28-30] of Challenge Fencing).

116. There is nothing in the *ratio* of Skerritts which detracts from, or modifies, the other principles laid down in Methuen-Campbell, Dyer and Barwick. True enough, Robert Walker LJ referred at p. 65C to Stephenson LJ's focus in Calderdale on Buckley LJ's reference to "integral whole", without elaborating on the approach actually taken by Skinner J in that case. But he also cited the judgment of Buckley LJ in Methuen-Campbell at [1979] QB 543-4, including the critical "part and parcel of the latter [i.e. the building]" test. The argument in Skerritts did not involve any exploration of the difference between these two tests, it was not a matter for the Court of Appeal to resolve, and they did not address it.

Development control

117. The planning system is based upon the control of "development" as defined in s.55(1) of the Town and Country Planning Act 1990 ("TCPA 1990"). There is excluded from that control "the use of any buildings or other land within the curtilage of a dwellinghouse for any purposes incidental to the enjoyment of the dwellinghouse as such" (s.55(2)(e)). The concept of "the curtilage of a building" is also used in the definitions of various permitted development rights granted by the Town and Country Planning (General Permitted Development) (England) Order 2015 (SI 2015 No. 596) (for example in Parts 1, 3, 4, 6 and 7).

118. A case which is often cited in the context of planning legislation is Sinclair Lockhart's Trustees v Central Land Board (1950) 1 P & CR 195. It was not concerned with development control but with the approach which should be taken by the Board to determining the amount of the then development charge under the Scottish equivalent of s. 70(2) of the Town and Country Planning Act 1947. That provision referred to the amount by which the "value of land with the benefit of planning permission … exceeds the value which it would have without the benefit of such permission". The issue was whether "the land" was confined to the area which would itself be developed under the planning permission or whether it also included other land belonging to the landowner that would benefit from the construction of that development (p. 202).

119. Lord Mackintosh held in the Outer House of the Court of Session that "land" meant such part of the applicant's land as would benefit in value from the planning permission for the relevant development. He then went on to arrive at the same result by treating "land" as

meaning the land upon which the permitted development would stand and such other land as would in law be regarded as "an integral part" of that building and hence its curtilage (pp. 203-4). He based that principle on the decision of the House of Lords in Caledonian Railway Company v Turcan [1898] AC 256 at 263, 266. The decision does not contain a list of the various factors which might be taken into account in defining a curtilage in a particular case, for example those summarised by Buckley LJ in Methuen-Campbell or by Lieven J in Challenge Fencing. But the key point is that the principle identified by Lord Mackintosh, that the curtilage of a building must form an integral part of that building, is the same as that laid down by Buckley LJ and also by Nourse LJ in Dyer ([1989] QB at p 358D), and not the test given by Skinner J in Calderdale. That principle was approved by the Inner House in Paul v Ayrshire County Council [1964] SLT 207, 209, 212, a case which did relate to development control.

120. The statutory purposes of the Listed Building Act 1990 which justified the broad definition of "curtilage" by Skinner J in Calderdale, do not apply to development control under planning legislation, for example the exemption from development control of the use of the curtilage of a dwelling-house for incidental purposes (s.55(2)(e) of TCPA 1990) or the ambit of permitted development rights. Those provisions do not form a statutory code for the protection of heritage or other assets. Permitted development rights are generally to be interpreted in accordance with the ordinary meaning of the language used (English Clays Lovering Pochin & Co. Ltd v Plymouth Corporation [1973] 1 WLR 1346). There is therefore no justification for importing the definition adopted by Skinner J for listed building control into that exercise. That definition goes substantially beyond the sense in which "curtilage" is generally used.

121. The decision of Lieven J in Challenge Fencing is entirely consistent with this analysis. Although the principles set out in [18] include the three "Stephenson factors" taken from Calderdale at p.407 (see also [11]), the judge did not adopt the broad approach elsewhere stated in Calderdale, for example by Skinner J at first instance and by the Court of Appeal at pp. 405 and 408. She did not adopt the overarching principle for which the Defendant and BAL contend in this case. Instead, at [14] Lieven J referred to the key statement of Nourse LJ in Dyer (at p.358D) that "an area of land cannot properly be described as a curtilage unless it forms part and parcel of the house or building which it contains or to which it is attached." That is the same approach as Buckley LJ laid down in Methuen-Campbell (pp.543-4).

122. Furthermore, in none of the general planning law cases cited did the court rely upon the broad approach to "curtilage" which was adopted in Calderdale for the very specific and different purposes of listed building control. Instead, the court has relied upon the three "Stephenson factors" taken from Calderdale and the same principle stated by Nourse LJ in Dyer [1989] QB at p. 358D (see Supperstone J in Burford v Secretary of State for Communities and Local Government [2017] EWHC 1493 (Admin) [32] and [35] and Sir Richard Tucker in Lowe v First Secretary of State [2003] P & CR 24 [14] and [21]).

123. On the authorities as they stand, the broad approach to "curtilage" identified in Calderdale should only be applied to listed building control, but not development control. In general planning cases, it will be necessary in future for practitioners to read the judgment in Challenge Fencing as a whole, and to have also in mind those other authorities which lay down key principles. The guidance in [18], although very helpful, was plainly sufficient for the purposes of that case, but it did not purport to be exhaustive on the approach to identifying a "curtilage". For example, it will also be necessary to apply the

fundamental principle stated in [14] of Challenge Fencing, and, as appropriate, to refer to the decisions in, for example, Methuen-Campbell, Dyer, and Barwick.

Conclusions

124. The only support for the overarching principle advanced by the Defendant and by BAL, namely that the land and building should comprise part and parcel of the same entity, or are so inter-related as to constitute a single unit or integral whole, comes from the Calderdale case. That principle does not accord with Methuen-Campbell, Dyer, or Barwick, where, in a statutory context analogous to the present one, the correct question to ask is whether the land in question forms part and parcel of the relevant building. The latter approach reflects the ordinary meaning of "curtilage" and is not driven by any expropriatory considerations. That last point is reinforced by the fact that the key test laid down in those cases has been adopted in authorities dealing with general planning law.

125. The wider approach to curtilage in Calderdale is justified for listed building control, which is concerned to bring within its ambit structures or objects which are closely related to the building which has been listed such that their removal or alteration could adversely affect its interest. Even so, the approach in Calderdale was qualified in Debenhams by the addition of a test which requires those additional structures or objects to be ancillary to the building identified in the statutory list.

126. For the reasons I have already given, I do not consider that the use of "curtilage" in the extended definition of "listed building" is analogous to its use in the de-registration and non-registration provisions in schedule 2 to the 2006 Act. The 2006 Act takes a balanced approach to the protection of, on the one hand, rights of common and public access to commons and town or village greens and, on the other, the interests of the owners of buildings on such land. There is no justification for adopting for the 2006 Act the "broad approach" to defining curtilage which the court expressly employed in Calderdale in order to promote the efficacy of listed building control.

127. For all these reasons, I reject the overarching principle for which the Defendant and BAL contend for interpreting and applying the term "curtilage" in the 2006 Act. In my judgment the phrase "the curtilage of a building" in that legislation requires the land in question to form part and parcel of the building to which it is related. The correct question is whether the land falls within the curtilage of the *building* and not whether the land together with the building fall within, or comprise, a unit devoted to the same or equivalent function or purpose.

HCC's Grounds of Challenge

Ground 2

128. It is convenient to deal with ground 2 first. This challenges the Inspector's reasoning in DL 80 to 82 on the subject of ancillariness.

129. HCC raises two points. First, it submits that the Inspector erred in law by holding that the application land is ancillary to the terminal building. The terminal building is ancillary to the application land and not the other way round because the building exists only to serve the activities taking place on the airport land and the requirements which they give rise to. Second, HCC submits that the Inspector erred in holding that at one and the same time the

application land was ancillary to the terminal building and the terminal building was ancillary to the application land. Those findings are inconsistent with the very essence of one thing being ancillary to another.

130. The Defendant responds that it is not a legal requirement that land be ancillary to a building in order to fall within its curtilage. On the first point the Defendant relies upon the fact that the Inspector also made a finding that the application land was ancillary to the terminal building, because the latter acted as "the hub" for the airport, containing the control tower from which all aircraft movements were controlled and the administration and support facilities (DL 68, 77 and 81). On the second point, the Defendant submits that the word "ancillary" is not a term of art. It simply means subservient or subordinate. Property A may be subservient to property B in some respects and property B may be subservient to property A in others. That is effectively how the Inspector treated the application land and the terminal building. He regarded the two as being mutually supportive. This is what HCC had described as "functional equivalence" in order to support their case that the application land could not be within the curtilage of the terminal building. But the Inspector adopted the response advanced by BAL, namely that the functional equivalence demonstrated that the land *and* the building formed an integral part of the same unit (DL 80-82). That is a reference to the overarching principle for defining a curtilage for which both the Defendant and BAL have contended in this court. The Defendant submitted in writing that if nonetheless the Inspector's reasoning on the "ancillary" issue involved an error of law, the court should refuse relief on the basis that it is highly likely that the outcome for HCC would not have been substantially different if the conduct complained of, that is the reasoning in the decision letter, had not occurred (s.31(2A) of the Senior Courts Act 1981). That contention was not pursued at the hearing. Instead, Mr. Westaway submitted that the reasoning criticised by HCC was not material to the Inspector's conclusion.

131. BAL made submissions similar to those of the Defendant.

Discussion of ground 2

132. It is well established that there is no legal requirement for land to be ancillary to a building in order to fall within the curtilage of that building. But whether the land in question is ancillary to the relevant building is a material consideration which the decision-maker may take into account. If that factor is taken into account, then the decision-maker must understand the concept correctly.

133. In this case, the terms "primary" and "ancillary" were applied to the function or use of different areas of land. In relation to the *same* function or use carried out on two areas of land, I do not see how, as a matter of ordinary English, each area of land can be said to be ancillary to the other. That formulation does not allow any room for one of the two areas of land to have "primary" status. The notion of something being "ancillary" is meaningless unless that can be related to something else with a primary role.

134. Furthermore, in this case the "ancillary" factor should have been applied in order to help decide whether the operational land was within the curtilage of the terminal building, not whether the terminal building was within the curtilage of the operational land. So, the only question on "ancillariness" which could support the proposition that the operational land was within that curtilage was whether the operational land was ancillary to the terminal building, and not the other way round. If the answer to that particular question was "yes", then that would lend support to that proposition, albeit that would not be conclusive. But if

the answer was "no", then that would be a pointer against the operational land being within the curtilage of the terminal building. Not surprisingly, neither the Defendant nor BAL referred to any authority in which a finding that the use of a building was ancillary to the use of other land was relied upon to support a conclusion that the land lay within the curtilage of the building.

135. I acknowledge that the correct "ancillary" question cannot be divorced from the way in which a use or function is described, or the level of abstraction involved. In a typical case there is no difficulty in describing, for example, the use of a dwelling-house as residential and then going on to consider whether the use of an area of land is ancillary to that purpose. The primary purpose is carried on in the building for which the curtilage is being identified.

136. In the present case, the function of the relevant building was to co-ordinate the safe arrival and departure of aircraft at the airport and to provide "administrative and technical *support*" for the activities at the airport (emphasis added) (DL 81 quoted at paragraph 67 above). No doubt most of that function could be described as important or even essential to the running of the airport. Without that control and support it is doubtful whether the airport could be operated, at least in its current format. But I do not see how rationally it could be said that the use of the operational land for aircraft movements, storage and maintenance could be said to be ancillary to the function of the terminal building. Aircraft movements are the raison-d'être of the airport. Without them the terminal building would be pointless. It is illogical to suggest that the use of the operational land is ancillary to the building the purpose of which is to facilitate and support, even control, those movements. For these reasons I conclude that the Inspector, having decided to take the "ancillariness" criterion into account as a relevant factor, misunderstood what is meant by "ancillary" when he came to apply it.

137. Thus far, I accept both criticisms made by HCC. But the submission of the Defendant and BAL is that they do not matter, because (i) the answer to the ancillary question cannot be conclusive and (ii) the Inspector used his findings to answer an additional question which represents the correct test for identifying curtilage land, at least in a case such as the present one. He agreed with BAL that functional equivalence between the operational land and the terminal building demonstrated that both the land and the building formed an integral part of the same unit.

138. According to my analysis of the case law on curtilage, that line of reasoning involves a fundamental error of law. The correct principle is that for property to qualify as falling within the curtilage of a building, it must form part and parcel of that building. The question is not whether the building forms part and parcel of some unit which includes that land, or whether those two items taken together form part and parcel of an entity or an integral unit. The fact that in DL 54 the Inspector did summarise case law setting out the correct principle (see paragraph 16 above) is nothing to the point. The simple fact is that by the time he came to express his conclusions in DL 80-82 he adopted the fundamentally different and incorrect test which had been advanced by BAL.

139. That incorrect test is little different in effect from the approach used in development control to identify, not a "curtilage" but a completely different concept, a "planning unit", and to test whether a material change of use has occurred within that unit (Burdle v Secretary of State for Environment [1972] 1 WLR 1207, 1212). Here the planning unit would comprise the operational land and the building within which, either there is a single main purpose, namely that of an airport, to which the various activities are incidental, or

else it is not possible to say that one activity is incidental to another. The flaw in BAL's approach is that it asks whether the building in question forms part of some larger unit. That is impermissible when the question posed by the statute is whether land forms part of the relevant building, and thus falls within its curtilage. The "curtilage" question is not correctly addressed by asking what is the curtilage of an institution or use which occupies some larger area than the building itself (Dyer and Barwick).

140. The legal errors I have identified cannot be described as non-material to the Inspector's reasoning. Plainly they were fundamental. Furthermore, it would be impossible for the court to say that if these errors had not been committed then it is highly likely that the outcome would have been the same, that is that the application for de-registration of the land outside the terminal building would still have been granted. Indeed, if the law had been correctly applied, it seems to me that, on the material before the court, there is at least a real likelihood that the application to de-register anything other than the terminal building and the Bushe Café would have been rejected.

141. For these reasons I uphold ground 2, which is sufficient in itself to require the decision to be quashed.

Ground 1

142. In ground 1 HCC criticised the manner in which the Inspector applied the "relative size" criterion in DL 75 and 76. He said that although the claimed curtilage land might appear "excessive" compared to the relatively small size of the terminal building, in the context of the purposes to which the *building and land* are put that was not the case (DL 75). According to the Inspector the context was that the operational land and the terminal building formed part of a general aviation airport. Likewise, in DL 76 he concluded that "the relative size of the application land to the terminal building is proportionate to the function and purpose to which *the building and land* are put" (emphasis added).

143. Mr. Laurence QC submitted that in Skerritts the Court of Appeal not only rejected a "smallness" criterion but, in endorsing part of the judgment of Nourse LJ in Dyer, by implication required a "largeness" test to be applied, or at least considered. In other words, the Inspector ought to have asked himself the question whether the 115 acres of operational land was "altogether in excess of anything that could be described as curtilage".

Discussion of ground 1

144. I do not accept that the Court of Appeal in Skerritts was purporting to lay down a new criterion of "largeness" which falls to be applied in any case where a decision-maker has to consider whether land falls within the curtilage of a building. Instead, the passage upon which Mr. Laurence QC relies was simply expressing its agreement with the conclusion in Dyer that it would be irrational or perverse to treat the 100 acre park as forming the curtilage of the former mansion house or any of the college buildings.

145. However, DL 75 and 76 are flawed for the same reasons as those already identified under ground 2. The Inspector applied the "relative size" criterion by considering the purpose to which the land *and* the building were both put. The true question is whether the land qualified as the "curtilage of the building" and thus the focus should have been on the size of the land relative to that of the building. On the Inspector's approach the whole of a golf course could be said to fall within the curtilage of the clubhouse because the relative size

of the open land used for the course and its setting is proportionate to the functions and purpose for which both the land and the building are used. This approach would not accord with the law laid down in authorities such as Dyer and Barwick.

146. The facts of this case illustrate why the overarching principle put forward by the Defendant and BAL cannot be correct. Where land does truly form part and parcel of a building, it makes sense and it is appropriate to speak of the combination of that building and its curtilage as a messuage, or an integral whole, or a unit and, of course, a conveyance or transfer need only refer to the building in order to transfer that whole entity. But those phrases merely describe the consequence of having applied the correct legal approach for identifying the curtilage of the building. They do not supply a test for identifying a curtilage.

147. If on the other hand it were to be permissible to identify a curtilage by asking whether the building and claimed curtilage land formed a single unit with "functional equivalence", or in effect were used for the same overall purpose, other factors which have until now been treated as relevant considerations would have a much reduced, or even possibly no, significance. It would not matter whether the land serves any ancillary function. Equivalence of function, or being "mutually supportive", would suffice. As this case amply demonstrates, "relative size" would have much less or possibly no significant effect in restraining the extent of a curtilage. Even if the size of the alleged curtilage land would appear to be "grossly disproportionate" to the size of the relevant building (or buildings), that could be overcome merely by the fact that that size is proportionate to the purposes by which the building *and land* are put. It would also make it difficult to say, as in Dyer and Skerritts, that the area of land was altogether in excess of anything that could be described as the curtilage of the building. The same reasoning as the Inspector adopted in the present case could be replicated for an even larger airfield with a single building, or for a golf course or other open air recreational facility occupied with a club house. This approach goes way beyond any reasonable meaning that could be given to the phrase "the curtilage of a building".

148. To summarise, DL 75 and 76 are legally flawed for the reasons I have given, but not for the reasons currently pleaded under ground 1. However, because these reasons were argued under ground 2, there is no prejudice to the Defendant or BAL in the court recognising that they obviously apply also to DL 75 and 76. The error in those paragraphs clearly tainted the overall conclusions in DL 82 and 87. It is not possible for the court to uphold the decision letter on the ground that this error is non-material or by the application of s.31(2A). The decision ought to be quashed on this freestanding ground as well as ground 2. It is appropriate that the Statement of Facts and Grounds be amended to include this basis of challenge.

Conclusion

149. For the reasons set out above the decision dated 12 June 2019 on the application for de-registration of part of Yateley Common must be quashed.