R. (on the application of Hampshire CC) v Blackbushe Airport Ltd


No Substantial Judicial Treatment

Court
Court of Appeal (Civil Division)

2021 WL 01027493

Neutral Citation Number: [2021] EWCA Civ 398

Case No: C1/2020/0882

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT (PLANNING COURT)

The Honourable Mr Justice Holgate

[2020] EWHC 959 (Admin)

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 18/03/2021

Before:

LADY JUSTICE KING DBE

LADY JUSTICE ANDREWS DBE and

LORD JUSTICE NUGEE

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Between:

BLACKBUSHE AIRPORT LIMITED	**Appellant**
- and -	
(1) THE QUEEN (on the application of HAMPSHIRE COUNTY COUNCIL **(2) SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS** **-and-** **(1) THE OPEN SPACES SOCIETY** **(2) PETER JOHN TIPTON** **(3) DAVID EDWIN SIMPSON** **(4) ADRIAN COLLETT**	**Respondents** **Interested Parties**

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Douglas Edwards QC and George Mackenzie (instructed by **Burges Salmon LLP**) for the **Appellant**

George Laurence QC and Simon Adamyk (instructed by **Hampshire County Council**) for the **First Respondent**

Philip Petchey (instructed by **Richard Buxton Solicitors**) for the **Open Spaces Society**

Ashley Bowes (instructed by **Richard Buxton Solicitors)** for **Mr Peter Tipton**

The Second Respondent and the Third and Fourth Interested Parties took no part in the appeal and were not represented.

Hearing dates: 23 and 24 February 2021

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Approved Judgment

Lady Justice Andrews:

Introduction

1.This case concerns approximately 115 acres of land ("the Application Land"), which was registered with the First Respondent, Hampshire County Council ("HCC") as common land under the Commons Registration Act 1965 ("the 1965 Act"). The key issue is whether the Application Land met the statutory criteria for deregistration under paragraph 6 of schedule 2 to the Commons Act 2006 ("the 2006 Act"). An Inspector appointed by the Second Respondent ("the Secretary of State") to determine the Appellant's application for deregistration decided that it did, and allowed the application. Holgate J quashed the Inspector's decision. In my judgment he was right to do so.

2.Section 22 of the 2006 Act, which gives effect to schedule 2, is entitled: "Non registration or mistaken registration under the 1965 Act." Paragraph 6 of schedule 2 is entitled: "Buildings registered as common land". The material provisions of that paragraph are as follows:

"(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 –

i.a)the land was provisionally registered as common land under section 4 of the 1965 Act;

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

i.c)the provisional registration became final; and

i.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.All four of the requirements in paragraph 6(2) must be satisfied in order for the land to be deregistered. If they are, and the application is made within the prescribed time limits, deregistration is mandatory.

4.The issue turns on whether the Application Land, which forms the operational part of an airport, was "within the curtilage of a building" at and since the time when it was provisionally registered as common land. The building in question is a two-storey terminal building, with a footprint of about 360 m^2 and an overall floor area of about 760 m^2, which serves as the airport's operational hub.

5.If what is meant by "the curtilage of a building" is understood correctly, and all relevant factors are taken into account when determining whether the statutory requirements were satisfied in this case, the answer is no. This extensive area of operational airfield cannot properly be described as falling within the curtilage of the relatively small terminal building.

6.That common sense conclusion flows inexorably from the correct interpretation of the relevant provisions of the 2006 Act set out above, and their application to the facts. It is also consistent with the approach taken in the authorities in which the question of what falls "within the curtilage of a building" has been considered in other contexts, although none of them was directly concerned with this statute.

7.In deciding that the statutory criteria were met, the Inspector applied the wrong test by asking himself whether the land and building together "formed an integral part of the same unit" because he found that there was "functional equivalence" between them. That error is perhaps best demonstrated in paragraph 83 of his decision letter, where he described the operational area as "part and parcel *with* the building and an integral part of the same unit" instead of asking whether the land should be treated as if it were "part and parcel *of* the building". The difference is

critical, and it led to the Inspector addressing the wrong question, namely, whether the land and building together fell within the curtilage of the *airport*, rather than whether the land fell within the curtilage of the building.

Factual background

8.Blackbushe Airport, operated by the Appellant ("BAL") under a long lease, occupies part of a much larger site in rural Hampshire to the north of the A30, including part of Yateley Common, that was requisitioned during World War II and used as an RAF base. After the war, RAF Blackbushe was used by the Ministry of Civil Aviation until 1960 when the site was de-requisitioned.

9.In 1953, a terminal building with a control tower was constructed by the Ministry in what is now the south-eastern corner of the airfield. This building was subsequently enlarged on its eastern side. The whole of the terminal building was erected on common land, but its eastern extension was on land belonging to Yateley Parish Council, whereas the land on which the original terminal building was built was in private ownership.

10.The conditions of requisition required common land to be restored and buildings on the common removed when the land was de-requisitioned. Despite this, when this site was de-requisitioned, although much of the airport infrastructure was dismantled and removed, the terminal building and the three original runways remained. In 1961, the part of the site in private ownership was sold. The new owner re-opened the airfield for general aviation purposes in October 1962.

11.The part of the site belonging to Yateley Parish Council was sold to HCC in 1964. When HCC acquired that parcel of common land, the runways on the eastern part of the site ceased to be used. However, the eastern extension of the terminal building remained, and continued in service for over 30 years.

12.On 16 May 1967, despite being in operational use as part of an airport, the Application Land was provisionally registered as common land under the 1965 Act as part of Yateley Common (registered unit CL 24). That registration became final on 26 March 1975, following a public inquiry at which the then owner unsuccessfully contested the status of the Application Land. He then brought (and lost) a claim for judicial review. There is now no doubt that the land that was registered, including the Application Land, was subject to rights of common at all material times.

13.The terminal building, configured exactly as it was in 1960, was on the Application Land and in use both at the time of its provisional and final registration as common land. So too was a smaller building that had been erected in 1963 as a clubhouse for the members of an aviation club. This had been built on common land without obtaining the requisite consent of the relevant Minister. HCC took enforcement action under s.194 of the Law of Property Act 1925, but the County Court refused to make an order for its demolition. That building subsequently became the Bushe Café.

14.Over time, and following various changes in ownership, the operational part of the airport contracted. In 1953, when the terminal building was first erected, it occupied approximately 365 acres. In 1967 and 1975 it occupied around 224 acres, (and so was roughly double the size of the Application Land), but in 1985 both northern runways ceased to be operational. In 1996 the eastern part of the terminal building, on the land belonging to HCC, was demolished. The new owner of the Application Land refurbished the remainder of the building. The control tower to the west of the building was replaced. The terminal building was thereby reduced to its original footprint, approximately one-third of its size at the time of registration. In 2015, some hangars to the north-west ceased to be used in connection with the airport.

15.Since then, the Application Land has covered almost all of what remains of the operational area, including the runway, taxiways, fuel storage depot, some car parking, the terminal building, and the Bushe Café. It is not disputed that the part of the terminal building that remains was present on the land at the time of provisional and final registration, and has been there ever since.

Procedural history

16.It was against that background that on 1 November 2016, BAL made an application to HCC for the Application Land to be deregistered as common land. HCC referred the matter to the Secretary of State for determination under

the Commons Registration (England) Regulations 2014. The Secretary of State appointed the Inspector, who held a public inquiry on 2 to 5 April 2019. He heard objections to the application from, among others, HCC; two local councillors, Mr Simpson and Mr Collett; Mr Peter Tipton (an individual with commoner's rights over Yateley Common); and the Open Spaces Society ("the OSS").

17.In a decision letter dated 12 June 2019, the Inspector held that the statutory requirements for the removal of the land from the register were satisfied and allowed BAL's application. HCC sought judicial review of that decision. BAL and all the objectors identified above were joined as interested parties, though Mr Simpson and Mr Collett have never taken an active part in the proceedings.

18.In a conspicuously thorough, considered and carefully reasoned judgment *[2020] EWHC 959 (Admin)*; *[2021] QB 89*, Holgate J held that the Inspector had erred in law in two material respects. First, his conclusions were tainted by misdirecting himself on the question whether the Application Land was ancillary to the terminal building (a relevant, though not necessarily conclusive, factor). Secondly, he applied the wrong legal test by asking whether the land and building together formed part of a single unit or integral whole. The Judge therefore allowed the claim and quashed the decision.

19.The Judge himself granted BAL permission to appeal, on the basis that, irrespective of the merits, there was a compelling reason for the matter to be considered by this Court. Despite supporting BAL's case before the Judge, the Secretary of State did not seek permission to appeal, and has taken no further part in the proceedings.

An overview of the parties' submissions

20.On behalf of BAL, Mr Edwards QC and Mr Mackenzie contended that the Inspector applied the correct legal test to determine curtilage, namely:

"*If land is sufficiently closely related to a building, such that together the land and the building form part and parcel of an integral whole or single unit, that is sufficient for the land to be comprised within the curtilage of the building."*

They submitted that this test (which Mr Edwards dubbed the "integral whole" test) is derived from the authorities, which are consistent when properly understood, and that the Judge fell into error in treating it as different from the test articulated by Buckley LJ in *Methuen-Campbell v Walters [1979] 2 QB 525* ("*Methuen-Campbell"*) namely, that the land must be:

"*so intimately connected with [the building] as to lead to the conclusion that the former forms part and parcel of the latter.*"

21.BAL submitted in the alternative that if Holgate J was correct in identifying a divergence of approach between the test adopted in the planning cases, (or at least in those concerned with listed buildings), and the test adopted in other cases, it would be in accordance with the purpose of the 2006 Act for the Court to adopt the wider meaning of "curtilage".

22.HCC (represented by Mr Laurence QC and Mr Adamyk) and Mr Tipton (represented by Dr Bowes) supported the conclusion and the reasoning of the Judge, including his view that a different, wider test was adopted in the listed building cases and should be confined to that context.

23.As HCC pointed out, if the test propounded by BAL and adopted by the Inspector were the correct one, then the whole of the 365 acres used for operational purposes at the time when the terminal building was erected in 1953, and the whole of the 224 acres of land which was used for operational purposes at the time of registration, would have been treated as falling within the curtilage of the terminal building. Mr Laurence also submitted that,

however one approached the concept of "curtilage", in the context of the 2006 Act there comes a point where the area of the claimed curtilage is simply too great to count as curtilage without in effect robbing the word of all proper meaning, and that point was plainly exceeded here.

24.The OSS, represented by Mr Petchey, also supported the Judge's conclusion that the requirements for deregistration were not met, but served a Respondent's Notice seeking to uphold that conclusion for additional or different reasons. Mr Petchey submitted that there were two plainly conflicting lines of authority at Court of Appeal level on the test to be applied. He urged us to grasp the nettle and decide between them.

25.For reasons that will appear, I do not consider that is a choice we have to make. The curtilage of a building is a single concept, and Mr Edwards is right that it does not have different meanings in different statutory contexts. There is in truth only one test, and that is the test articulated by Buckley LJ in *Methuen-Campbell*, but that is not the same as BAL's "integral whole" test. The question whether the test is satisfied in any given case will depend on the facts and circumstances of that case.

26.The ambit (or physical extent) of the curtilage of a building in any given case will be a question of fact and degree. Various factors may be helpful in resolving that question, including, where relevant, a consideration of the statutory consequences of a finding that land (or a building or other structure or object on it) falls within or outside of the curtilage of a building. In certain contexts, the Court may be slightly more generous in its application of the relevant factors to reach a particular result, bearing in mind the purposes of the governing statute; for example, when determining whether an ancillary structure falls within the curtilage of a listed building. But that does not mean that the concept of curtilage is different in listed building cases.

The 2006 Act

27.When construing the provisions of an Act of Parliament, it is always a useful starting point to consider the history behind the statute and what purpose or purposes the relevant provisions were designed to serve. Holgate J addressed the background to the 2006 Act in some detail at [21] to [44] of his judgment. For the purposes of this judgment it is unnecessary to repeat that detailed account. No-one has taken issue with its accuracy. The following summary should suffice to highlight the aspects of importance.

28.The purpose of the 1965 Act was to create a definitive record, maintained by local authorities, of all commons, town or village greens, and rights of common then in existence. Registration (or non-registration) conclusively determined the status of the land in this regard, though the 1965 Act also made provision for subsequent changes to the status of land (e.g. by the extinguishment of rights of common over it).

29.The 1965 Act permitted registration of land over which rights of common existed irrespective of whether there was a building on the land, and irrespective of the nature of that building, the purpose which it served, or whether it was lawfully there. Thus land which was "covered by a building" or "within the curtilage of a building" was not excluded from registration.

30.That is not particularly surprising, as section 194 of the Law of Property Act 1925 prohibited the erection of any building or fence on land subject to rights of common, (or any other structure preventing or impeding public access to such land) without the consent of the Minister. In the light of that prohibition, when the 1965 Act came into effect, one would not have expected buildings or other significant structures to be present on land over which rights of common existed (apart perhaps from small buildings serving the purposes of the common land). On the face of it, there was a fundamental incompatibility between land being subject to rights of common, and having a building on it.

31.The unusual situation which had arisen in this case was unlikely to have been considered. Apart from the café, the terminal and other structural impediments to public rights of access in the operational part of the airport which fell on common land were only there because they had been lawfully constructed after the land was requisitioned, and were not removed when they should have been. Whilst in practical terms the use of the Application Land meant that the public were precluded from exercising commoners' rights over it, they had never relinquished them.

32.The 1965 Act set a deadline of 2 January 1970 for making an application for the provisional registration of land then qualifying. If the land met the requirements for provisional registration, then the registration would be published and an opportunity would be given for objections to be raised. If they were raised within the prescribed deadline, a Commons Commissioner would hold a public inquiry, consider the objections, and decide whether to uphold them or, as in the case of the land at Blackbushe Airport, rule that the registration be made final.

33.Unfortunately, because there was no requirement that provisional registration be notified to individual landowners whose land might be affected, but only that it be more widely published, errors were made. Land which was not common land was registered as common land, often in circumstances in which its owners were unaware of the provisional registration until after it was too late to object. This included dwelling-houses or their gardens situated on or close to the boundaries of common land. Conversely, land which ought to have been registered as common land was omitted from the register. In some cases the land was rightly registered, but in the wrong category, e.g. a village green was registered as common land.

34.The first step towards redressing these errors came with the Common Land (Rectification of Registers) Act 1989, which gave a landowner three years in which to raise an objection to the inclusion of certain land in the register. However that statute was limited to dwelling-houses and "land ancillary to a dwelling-house" which was expressly defined as "a garden, private garage, or outbuildings used and enjoyed with the dwelling house". In order to qualify, the property had to have satisfied that description continuously since 1945.

35.In 2002, following a public consultation, the Government announced that wider legislation would be brought forward that would, among other things, remove from registers of common land and town or village greens, land which had been wrongly registered. This became the 2006 Act.

36.Holgate J described the function of the different paragraphs of schedule 2 at [31]. Paragraphs 2 and 3 are concerned with non-registration of land which should have been registered as common land or as a town or village green. Paragraph 4 addresses the special situation of waste land of a manor which had ceased to be connected with the manor, and for that reason was thought (erroneously) to be incapable of being registered as common land. Paragraph 5 concerns land that was incorrectly registered as common land when it should have been registered as a town or village green. Paragraphs 6 and 8 concern buildings registered as common land, and buildings registered as a town or village green. Paragraphs 7 and 9 concern "other land wrongly registered" as, respectively, common land or a town or village green.

37.As Holgate J pointed out at [32] and [33] of his judgment, there is a finite period of time within which action may be taken under schedule 2 to the 2006 Act to remove land from a register.

38.The 2006 Act makes separate provision (in section 16) for the owner of land that was registered as common land (or as a town or village green) to make an application to the Secretary of State for its deregistration in circumstances other than those covered by schedule 2. That section sets out some fairly onerous conditions, which, if the land is any larger than $200m^2$, must include a proposal for the provision of land to be registered as common land (or as a town or village green) in place of the deregistered land.

39.Whereas deregistration is mandatory if the requirements of the relevant paragraph of schedule 2 are met, deregistration under s.16 is a matter of discretion. The Secretary of State must consider the rights of commoners and other matters listed in that section, which specifically include important matters of public interest (including nature and landscape conservation, and the protection of archaeological remains and features of historic interest).

40.Counsel referred the Court to the explanatory notes to the 2006 Act, and to guidance issued by the Department for Environment, Food and Rural Affairs ("DEFRA") in December 2014, when the statutory provisions began to be applied outside the initial pilot areas. The relevant provisions of schedule 2 are addressed in paragraphs 126-128 of the explanatory notes. Paragraph 126 begins with the statement that paragraphs 6 to 9 of schedule 2 "make provision for the deregistration of certain land wrongly registered as common land or village green". The notes then go on to refer to the errors arising from the absence of any requirement in the 1965 Act to give individual notice of provisional registration to affected landowners, and to the limited opportunity for rectification provided by the 1989 Act.

41.Paragraph 128 says this about paragraph 6 of Schedule 2:

"Paragraph 6 deals with the removal of certain buildings from the register of common land. Some common land may have been registered so as to mistakenly include (typically) cottages or gardens on or abutting the common. The error may have gone unnoticed, or [it may be] that the Commons Commissioner felt unable to correct the error if no timely objection had been made. The paragraph enables the deregistration of common land registered under section 4 of the 1965 Act, which is covered by buildings or within the curtilage of buildings. The land must have been covered by buildings or have been within the curtilage of buildings at the time of the original provisional registration, and continuously up to the date of determination of the application of proposal. It is immaterial for the purposes of paragraph 6 whether the building was lawfully present on the land at the date of registration."

A footnote to that paragraph states:

"so this paragraph will not enable the deregistration of land where, for example, a garden has been extended onto, and encroached upon, a common after the date on which the common was provisionally registered."

That illustrates that paragraph 6 will apply to land within the curtilage of a building which encroaches on the common land, even though the building itself is outside the common land.

42.Schedule 2 of the 2006 Act is addressed in Part 7 of the DEFRA guidance. Paragraph 7.1.4 provides a possible explanation of why there is no reference in the body of the text to the land being "mistakenly" registered. It points to the practical difficulties of demonstrating that land was or was not properly registered over 40 years previously. Paragraphs 6 to 9 of schedule 2:

"therefore do not simply provide for a "retrial" of the registration of any land; instead, they ensure that certain registrations *may be treated as having been wrongly registered* if they meet the tests laid down in the 2006 Act." [Emphasis supplied].

43.Mr Petchey also sought to rely upon an extract from Hansard of 29 June 2006. It records the explanation given by the Minister, Barry Gardiner MP, for introducing certain amendments to schedule 2 including, among other matters, what became paragraph 6. We read it *de bene esse*, the Judge having refused to admit it into evidence on the basis that it did not meet the requirements of *Pepper v Hart [1993] AC 593* . In my view, it is unnecessary to embark upon consideration of its admissibility, because what the Minister said about the reasons for introducing provisions enabling the deregistration of buildings and the curtilage of buildings present before the land was registered, takes matters no further than the explanatory notes and the guidance.

44.It seems to me to be plain that the purpose of schedule 2 was to cure errors and omissions in the register, and that the particular purpose of paragraph 6 was to rectify the situation in which a building (or land within its curtilage) which should not have been registered as common land under the 1965 Act was so registered, even if there had been an inquiry before the registration became final. Parliament's aim was to put right mistakes, not, as Mr Edwards submitted, to cure anomalies.

45.Despite this, Parliament deliberately chose to make it unnecessary for the applicant to prove that an error was made. The effect of this was that if a building (or land falling within its curtilage) met the requirements of paragraph 6, it would be treated as if it had been wrongly registered, even if that were not the case, and even if the landowner had taken the opportunity to object to registration and had (rightly) failed. That situation was unlikely to arise very often, although it did arise in the present case.

46.What Parliament plainly did not intend was that landowners should be able to use paragraph 6 of schedule 2 to remove large parcels of common land from the register, bypassing the stringent requirements of s.16.

Land within the curtilage of a building

47.I turn to consider the language of the statute. I have already referred to the title of paragraph 6 of schedule 2: "Buildings registered as common land". The text refers to land "covered by a building" (which is self-explanatory) or land "within the curtilage of a building". The focus is therefore on the *building* which is deemed to have been wrongly registered as common land, and not the land, let alone some other unit of which the land and building together form an integral part. Therefore, simply looking at this as a matter of construction of the language used by Parliament, "functional equivalence" is irrelevant, as is the question whether the land and building together form part of some residential or industrial or operational unit. If a building is to be deregistered, the common land under or adjacent to it only qualifies for deregistration if and to the extent that it has a defined relationship with that building. It must be covered by the building or within that building's curtilage. However, Parliament chose not to adopt the language of the 1989 Act, which confined the other land to land that was *ancillary* to the building.

48.Since it is the building which is to be treated as wrongly registered, the inference can be drawn that the relationship of the land to the building must be sufficiently proximate that a reference to that building – in this case, the terminal building – could be treated, without artifice, as including the land as well. So, for example, a reference to "Keeper's Cottage" would naturally be taken to include a reference to the cottage garden. A reference to the terminal building at Blackbushe Airport would not be naturally understood as referring to the whole airport, or to 115 acres of operational land of which the terminal building occupies a very small part.

49.Looking at the matter from another perspective, in order to achieve the deregistration of the terminal building which is deemed by Parliament to have been wrongly registered as common land, whilst it would be reasonable and appropriate to include some of the surrounding land that might be referred to figuratively as "part and parcel of" the building, or "belonging to" the building, it is plainly unnecessary to deregister the whole of the rest of the operational area of the airport.

50.There are some words or expressions which are like an elephant; its essence is difficult to put into words, but you know it when you see it. "Curtilage" is a word of that nature. In *Barwick & Barwick v Kent County Council (1992) 24 HLR 341* , (*"Barwick")* Sir David Croom-Johnson made the following pertinent observation (at p.346) with which I respectfully agree:

"It is not possible to give a comprehensive definition of a curtilage. Indeed it would be most inadvisable. One can only describe a curtilage when one sees it and decides whether it was a curtilage, or not….."

51.In *Clymo v Shell-Mex & BP Ltd (1963) 10 RRC 85* ("*Clymo")* at pp. 93 and 99, Upjohn LJ took a similar approach to the word "appurtenance." The dictionary definition of "appurtenance" denotes something belonging to another, or a minor property or right belonging to another more important property or right. In certain statutory contexts it has been treated as synonymous with land falling within the curtilage of a building. Upjohn LJ said:

"the word "appurtenance" is one of the oldest words in use in the history of English law and we would not attempt to define it in any way; whether land is properly described as an appurtenance to one or more buildings must depend very much on the particular facts and circumstances of each case, and it does not seem possible to try to lay down any tests to determine whether land ought to be regarded as an appurtenance to one or more buildings or as "other land" for the purposes of [section 22(1)(a) of the Rating and Valuation Act 1925 as amended]. Each case must be decided entirely on its own facts, and no doubt there may be in practice a number of difficult and borderline cases…

…the whole problem is a question of mixed fact and law but depends very largely on the facts. Provided a piece of land satisfies the concept of being an appurtenance, it is a question of fact and circumstance whether it is an appurtenance."

52.As Upjohn LJ said, there may be difficult and borderline cases. However, just as one can tell immediately that a giraffe is not an elephant, it is probably far easier to recognise that something is not within the curtilage of a building than it is to say how far the curtilage extends. The present case is a good illustration.

53.It is noteworthy that in none of the statutes in which the word "curtilage" or the expression "within the curtilage of" has been used, has Parliament attempted to define them. There is nothing in the 2006 Act itself containing a definition, or setting out the factors which assist in identifying the curtilage of a building for the purposes of that Act. Nor is there any case in which that question has been directly considered.

54.As Holgate J recognised in his judgment at [73] to [76], although "curtilage" is not a term of art, but is to be given its ordinary and natural meaning, its meaning is not completely provided by the dictionary. The concept has its origins in a small piece of land attached to a dwelling-house. Holgate J quoted the Oxford English Dictionary ("OED") 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."

That definition begs the question of what the law would regard as "forming one enclosure" with a dwelling-house, or what is the ambit of the "area" in question.

55.In any event, as the Judge pointed out, in the 2006 Act (as in other legislation in which the expression is used) the "building" whose curtilage is being considered does not have to be a dwelling-house. Moreover, as will be seen, although the size of the land will be a relevant consideration, the extent of the curtilage of a building may vary with the nature and size of the building. To refer to the area as "small" (or conversely "large") is not particularly helpful in a context where size is relative. What falls within the curtilage of a manor house, or a large industrial mill, or a factory, may not be the same as what falls within the curtilage of a dwelling house. What falls within the curtilage of a dwelling-house may depend on the size and configuration of the dwelling-house. Even so, proportionality, whilst relevant, may not be definitive; a small cottage will sometimes have a large garden, whereas a large townhouse may have a tiny terrace.

The authorities

56.As they did in the Court below, Counsel referred to a plethora of cases decided in a wide variety of other contexts, including landlord and tenant cases relating to the acquisition of land under the Leasehold Reform Act 1967 and the Housing Act 1980; cases relating to listed building control under the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the Listed Buildings Act") and its predecessor; and planning cases concerned with more general issues of development control. In their oral submissions, however, they concentrated on six authorities, five decided in the Court of Appeal and one more recently by Lieven J in the Planning Court. In chronological order these are:

Methuen-Campbell (above);

Attorney-General ex rel Sutcliffe v Calderdale BC (1983) 46 P&CR 399 ("*Calderdale"*);

Dyer v Dorset County Council [1989] 1 QB 346 ("*Dyer*");

Barwick (above);

Skerritts of Nottingham Ltd v Secretary of State for the Environment, Transport and the Regions [2001] QB 59 ("*Skerritts*"); and

Challenge Fencing Ltd v Secretary of State for Housing Communities and Local Government [2019] EWHC 553 (Admin) ("*Challenge Fencing").*

57.*Methuen-Campbell* is the authority in which the concept of curtilage is most clearly explained, and its correctness has never been called into question; on the contrary, it has been followed in numerous subsequent cases. It was a case about leasehold enfranchisement under the Leasehold Reform Act 1967. The relevant provisions gave the tenant a right to acquire on fair terms the freehold or an extended lease of "the house and premises" where certain conditions were fulfilled. "Premises" were defined as "any garage, outhouse, garden, yard and appurtenances" which were let to the tenant with the house, and occupied and used for the purposes of the house or any part of it by the tenant or another occupant. The issue was whether a paddock which was let to the tenant with the house and its garden fell within that description. The size of the paddock was bigger than the house and garden put together.

58.The Court of Appeal decided that in this particular statute, the expression "appurtenances" meant land falling within the curtilage of the house, following the decision in *Trim v Sturminster Rural District Council [1938] 2 KB 508* , which had been approved by Upjohn LJ in *Clymo* (above). They rejected the argument that it extended to anything used and occupied with or to the benefit of the house (see the judgment of Goff LJ at p.535G-H).

59.Counsel for the tenant then sought to argue that in any event, the paddock fell within the curtilage of the house. He submitted that the paddock was "all part of the residential unit" and that therefore it should be considered to be part of the house. However, that submission was rejected. As Goff LJ observed at p.536E, the Act was not one dealing with residential units. It was giving people whose houses are held on long leases at a low rent security of tenure in their homes, and it specified what was meant by "house and premises". Having referred to the dictionary definition of curtilage at p.538E, he said that what is within the curtilage is a question of fact in each case, and that he could not feel that this "comparatively extensive" piece of pasture ought to be so regarded, particularly where it was clearly divided off physically from the house and garden at all material times.

60.In his concurring judgment, Roskill LJ said that the question whether the paddock could be said to be within the curtilage of the house was a mixed question of fact and law. The paddock was well apart from the house physically, though contiguous with the garden. Giving the word "curtilage" its ordinary meaning, he did not think that "by any possible legitimate construction" it could be extended so as to include the paddock which the tenant was seeking to enfranchise.

61.Buckley LJ said that the word "premises" must be interpreted in relation to the house in accordance with the definition contained in section 2(3) of the 1967 Act. Having rejected the view of the judge below that the paddock was "a parcel of the house" merely because it had been both let and occupied with it, he then said this (at pp. 543F-544G):

"What then is meant by the curtilage of the 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, garage, driveway, 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." [Emphasis supplied.]

62.Although the case was specifically concerned with a dwelling-house, this is as good an expression of the concept of curtilage as one is likely to find.

63.Mr Edwards focused upon the final sentence in the passage quoted, which he contended set out an "integral whole" test which was the same as the "part and parcel" test. However, that ignores the fact that Buckley LJ's test requires the land to be so intimately associated with the building (in this case a dwelling-house) to lead to the reasonable conclusion that the former is part and parcel *of the latter.* He went on to give specific examples of areas of land that, on a reasonable view, could *only* be regarded as part of the messuage, and other types of land or buildings which, depending on the circumstances, *might* be so regarded. That approach is not the same as treating the land and building together as forming part of a single unit, residential or otherwise. Buckley LJ agreed that the "residential unit" test should be rejected, see p. 347H.

64.On a proper reading of that passage, the conclusion that the land and building together constitute an integral whole is the consequence of applying the intimate association/part and parcel test articulated earlier, and not another way of articulating that test. It will be seen that that was the way in which it was understood by Nourse LJ in *Dyer*. The fact that the result of concluding that the land forms part and parcel of the building is that the land and building are to be treated in law as an integral whole (or as one parcel or messuage) does not mean that the converse is true. I respectfully agree with Holgate J's analysis at [88] and [89] of the judgment below, and with his view that the test propounded by BAL would have led to a very different outcome in *Methuen-Campbell*. Indeed it comes close to the "residential unit" test that the Court of Appeal unanimously rejected.

65.I have quoted the entirety of the relevant passage in Buckley LJ's judgment because the introductory paragraph illustrates that the test is not whether the terminal building could function without an operational airport, nor whether the Application Land was *necessary* for the functioning of the airport. Nor is the test whether the Application Land and the terminal building together form one part of an operational unit or whether they fall within a single enclosure. The question whether, by reason of the association between them, the law would treat them as if they formed one parcel, or as an integral whole, depends on the application of the "part and parcel" test to the facts of the particular case.

66.I do not accept Mr Edwards' criticism that the "part and parcel" test is unworkable in practice and linguistically unsound. Of course it does not mean that the yard or garden is literally to be regarded as part of the physical structure of the building. The expression is figurative and means that a reference to that building would be understood to include, or extend to, that other land. In *Caledonian Railway Co. v Turcan [1898] AC 256* Lord Halsbury, referring to 232 square yards of land within the curtilage of a warehouse which provided the means of access to it, said the curtilage was "just as much part of the house as if it were a separate room in the house."

67.If the building is a dwelling-house, then in most cases a reference to the house without more would reasonably be understood to include its yard or garden, or a structure on the adjacent land such as a garage or garden shed. As My Lord, Nugee LJ, pointed out during the course of argument, it would not be linguistically inaccurate to say that somebody "came round to my house", if in fact they only came to the garden or to a garage at the end of the driveway. Matters would be different, of course, if the garage were located some distance from the house on a different plot of land, as the garages were in the case of *Barwick*.

68.There is no separate "conveyancing meaning" of curtilage, but the Court is not helped in ascertaining the curtilage in a given case by consideration of what conveyancers would understand by that term. The consequence of the close association between the building and the land within its curtilage is that on a conveyance of the building, there is no need for there to be separate identification of the land within its curtilage in order for that land to pass to the new owner. They are treated as one parcel of land. However, in *Methuen-Campbell* Buckley LJ explained the futility of seeking to ascertain what falls within the curtilage of a building from looking at a conveyance of a parcel of land comprising the building and its appurtenances (i.e. the messuage). As he said, that is to confuse cause with effect. The fact that the conveyance will pass everything within the curtilage to which the description of the property or land conveyed applies, does not help one to identify what falls within the curtilage in the first place.

69.The importance of focusing upon whether it is a specific building or something else (such as an institution) whose curtilage is to be ascertained was illustrated in a number of the subsequent cases in which the "part and parcel" test in *Methuen-Campbell* was adopted, including *Dyer* and *Barwick*, both of which were also concerned with a statutory right to buy leasehold property.

70.*Dyer* was a case about a house on the edge of the grounds of an agricultural college. The college comprised a manor house on a 100 acre estate, with extensive pleasure gardens, a park, and a mass of outbuildings including stables, a subsidiary manor house, and a lodge at the entrance to the park. The house was one of a number built for staff at the college. It was fenced off from the rest of the college grounds (though with pedestrian access to them) and located some distance from any of the college buildings.

71.the question whether the tenant had the right to buy the house under the relevant provisions of the Housing Act 1980 (as amended) turned on whether it was "within the curtilage of a building used for purposes other than housing". The Court of Appeal rejected an argument by the landowner that the "curtilage of the building" was the curtilage of the whole college as a single identifiable unit, extending to the boundaries of the college grounds and including the property occupied by the tenant. It was also contended, unsuccessfully, that the grounds were essential to the functioning of the college, and therefore logically the house should be treated as falling within the relevant curtilage. That argument was similar to the argument made by BAL, recorded in paragraph 80 of the Inspector's decision letter, that if there was "functional equivalence" in the sense that the Application Land and terminal building served each other's purposes in some necessary or reasonably useful way, this demonstrated that the land and the building formed an integral part of one unit.

72.The judge at first instance decided that irrespective of whether the relevant building was the manor house, or the manor house together with associated college buildings, the house was not within the curtilage of a building. He said that if the question had been whether it was within the curtilage of the college or institution, he would have reached the opposite conclusion. Donaldson LJ, having quoted the key passage in Buckley LJ's judgment in *Methuen-Campbell* and considered some of the earlier cases, agreed with that distinction. He observed that "curtilage seems always to involve some small and necessary extension to that to which the word is attached".

73.Mann LJ, in a short concurring judgment, also referred to the meaning of the term "curtilage" discussed in *Methuen-Campbell*. He said it appeared from that decision that the meaning of the word "curtilage" is constrained to a small area about a building. However, he then went on to say that the size of the area appears to be a question of fact and degree. He too pointed out that the relevant statute was only concerned with the ground within the curtilage of a building, and not within the grounds of an institution.

74.Nourse LJ explained the origins of the term "curtilage" and quoted the definition in the OED referred to earlier in this judgment. He explained that the need for physical enclosure of the area had disappeared in modern usage and then made two comments about the dictionary definition as it applies today. First, the kind of ground most

usually attached to a dwelling-house is a garden. Secondly, it is permissible to refer to the curtilage of a building which is not a dwelling-house.

75.He then said that the authorities demonstrated that an area of land cannot properly be described as curtilage unless it forms part and parcel of the house or building which it contains or to which it is attached. That proposition, which he said was "consistent with the notion that the land is regarded by the law as forming one enclosure with the land or building," was most clearly and authoritatively stated in the passage quoted from the judgment of Buckley LJ in *Methuen-Campbell*. He added that while making every allowance for the fact that the size of the curtilage may vary somewhat with the size of the house and building, he was in no doubt that the 100 acre park on the edge of which Mr Dyer's house now stood could not possibly be said to form part and parcel of the manor house, let alone any of the other college buildings:

"Indeed, a park of this size is altogether in excess of anything which could properly be described as the curtilage of a manor house, an area which no conveyancer would extend beyond that occupied by the house, the stables and other outbuildings, the gardens and the rough grass up to the ha-ha, if there was one."

76.A similar approach was taken in *Barwick,* which also concerned whether the right of a secured tenant to buy a property was excluded because it was within the curtilage of a building which was held mainly for purposes other than housing. In that case, the house was one of 10 originally built for the purpose of housing firemen working at a nearby fire station. The fire station was a large building with a large yard to the rear, with a row of garages at the back of the yard. A gate in the high brick wall at the southern end of the yard led onto a path, and from the path there were gates into each of the gardens of the houses. Some of the occupants of the houses rented the garages. They could only gain access to the garages through a gateway to the north of the yard, which itself was only accessible from the public highway. The fire station was within a clearly marked boundary wall.

77.The judge at first instance, having paid a site visit, said that the site was "in appearance a compact whole and functionally a single unit." Parker LJ, with whom Stocker LJ agreed, said he found it difficult to comprehend how the housing estate and the fire station with its yard could be seen as a single unit. He took the judge to mean that it could be seen that the fire station could operate functionally with the houses to carry out a fire service, but that was not the issue. The curtilage of the fire station comprised the yard in which ancillary buildings, namely the garages, were located. By no stretch of the imagination could the house be regarded as within the curtilage of the fire station *building*. It did not matter that the housing estate was no doubt of extreme convenience for the use of the fire station. Nor was it relevant that the houses were built as houses for firemen. They could have been built on the other side of the road and would have been equally convenient, but on no basis could they then have been described as being within the curtilage of the fire station [I interpolate, let alone the fire station building].

78.Having given his salutary warning against the dangers of seeking to give a comprehensive definition of "curtilage", Sir David Croom-Johnson said (at pp 346-347) that the argument in *Dyer* was that "curtilage" must be interpreted having regard to the type of building to which it is attaching:

"That was accepted by the Court of Appeal in that case, but the curtilage of a school may be different from the curtilage of a dwelling-house and probably will be. Or the curtilage of a large dwelling house may be different from the curtilage of a small one.

But what is included in curtilage is narrower than something which it is convenient to have for the use of the building. It begins by needing to be immediately adjacent to that building. It may or may not have erections on it like sheds or small buildings. But if there are such, their function must be such as to facilitate the occupation of the principal building and not simply a convenient adjunct to the purpose for which the principal building is used or enjoyed."

79.The decision in *Calderdale*, which was a case about listed building consent, was made after *Methuen-Campbell* and before *Dyer*, in which it was not cited. A large industrial mill was linked at its southernmost point by a bridge to the first in a group of terraced cottages which were originally constructed as millworkers' dwellings. No. 1 cottage, apart from its attic (which was only accessible from No. 3), appeared to have been designed to form an office annexed to the mill. The sole means of access to the remaining parts of that cottage was via the bridge from the mill. The mill was a listed building, but neither the terrace nor the individual cottages were listed separately. At the time that an urgent application was made to Skinner J for an injunction to restrain the demolition of the terrace, the mill and the terrace were in separate ownership and no-one was living in the cottages.

80.The relevant statutory provision at the time was section 54 (9) of the Town & Country Planning Act 1971 ("the 1971 Act"), which provided that:

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

81.Skinner J held that (as was common ground before him) the terrace as a whole and each individual cottage was a "structure" for the purposes of that section, and that it formed part of the land. He regarded the two limbs of the statutory test as mutually exclusive, in that a structure was either fixed to the mill, or within the curtilage of the mill, and could not be both (this part of his judgment was reversed by the Court of Appeal). He therefore focused on the question whether the terrace was comprised within the curtilage of the mill.

82.Having referred to a number of cases that were cited to him on the meaning of "curtilage" within particular contexts (it is unclear whether these included *Methuen-Campbell,* which he did not mention) the judge set out the rival submissions of counsel. Counsel for the applicants submitted that "curtilage" in the context of an Act relating to listed buildings "embraces all that is within the boundaries of the site within which the listed building is situated." Counsel for the defendants submitted that boundaries were irrelevant, and that premises that were separately owned, occupied and rated from the mill could not be within its curtilage.

83.The judge preferred the former submission. He said that he had to ask himself, "from a planning rather than a strict conveyancing viewpoint", whether the buildings within the alleged curtilage formed a single residential or industrial unit and, in that instance, whether the mill and the terrace formed part of an integral whole. He said that on a strict conveyancing viewpoint, evasion of the Act would be easy to achieve. He was satisfied that the terrace lay within the curtilage of the mill, it was built within the boundaries of the mill and as an adjunct to it, and had it not been for the historical accident of the division of ownership in 1973 solely for administrative convenience, they would still have been in common ownership. Then, he said, no-one could have argued that they were not "within the same curtilage".

84.I agree with Holgate J that when Skinner J used the phrase "integral whole", he was using it in a different sense from Buckley LJ, and that it does seem clear that he was deliberately seeking to adopt a "planning" approach to the concept of curtilage that was distinct from, and wider than, what he dubbed the "conveyancing approach". That much emerges from the fact that he referred to a single residential or industrial unit, the test that was expressly rejected by the Court of Appeal in *Methuen-Campbell.* However, that does not really matter, because I do not share Holgate J's view that the Court of Appeal apparently endorsed Skinner J's approach. That approach was simply wrong, and contrary to authority. The Court of Appeal agreed with the result, but they adopted the orthodox approach.

85.When the case reached the Court of Appeal it was held that *both* limbs of the statutory test were satisfied. Stephenson LJ delivered the leading judgment, with which Ackner LJ and Sir Sebag Shaw agreed. In a passage on p.405 that needs to be treated with some caution (because the width of this part of his reasoning was disapproved in the subsequent decision of the House of Lords in *Debenhams Plc v Westminster City Council [1987] AC 396* ("*Debenhams*")), Stephenson LJ placed specific reliance on the fact that the preservation of a listed building cannot be considered in isolation; the building has to be considered in its setting, as provided by what was then section 56(3) of the 1971 Act.

86.He explained that there may be objects or structures which would not naturally 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. If the building itself is to be preserved unless the Secretary of State consents to its demolition, then so too should those objects and structures be. That objective is achieved by requiring them to be treated as part of the listed building. Stephenson LJ said that this indicated a broad approach to the provisions of s.54(9), and a construction of it which would enable the Secretary of State to exercise the discretion to grant or withhold listed building consent over a wide rather than a narrow field.

87.So far as the first limb of the statutory requirements was concerned, Stephenson LJ held on the facts that the terrace was fixed to the mill "in the ordinary sense of those words" (p.406). That part of the decision can no longer be regarded as good law in the light of *Debenhams*, discussed below. He then went on to consider whether the terrace cottages were within the curtilage of the mill.

88.At the bottom of p.406, Stephenson LJ adumbrated what have become known as the three "Stephenson factors" that must be taken into account in determining whether a structure or object is within the curtilage of a listed building, namely (1) the physical layout of the listed building and the structure, (2) their ownership, past and present and (3) their function, past and present. He observed that 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. Thus when the terrace was built and the mill was worked by those who occupied the cottages and the millowner owned the cottages, "it would have been hard, if not impossible, to decide that the cottages were outside the curtilage of the mill". He then went on to consider whether the changes that had occurred since the mill and terrace were built meant that the terrace cottages fell outside the curtilage of the mill.

89.It was in this specific context that Stephenson LJ cited, in full, the key passage from Buckley LJ's judgment in *Methuen-Campbell* which I have already quoted. He said nothing to suggest that the "part and parcel" test was wrong. He merely commented that whilst Buckley LJ did not refer to Skinner J's "single unit," he did refer to his "integral whole" (without perhaps appreciating that Skinner J had used that phrase in a different sense). He also observed that Buckley LJ was dealing with a house and premises in common ownership (which, of course, was not the case in *Calderdale*).

90.Despite the ambiguous nature of his comment about Buckley LJ's reference to "integral whole", it seems clear to me that on a fair reading of his judgment, Stephenson LJ was not applying (let alone purporting to apply) any different test than that in *Methuen-Campbell,* or treating that case as distinguishable. He said nothing to suggest that he had failed to appreciate that Buckley LJ's conclusion that the land and building together formed an "integral whole" was the result of treating the land as part and parcel of the building after considering the relevant factors, rather than being a reformulation or paraphrase of the "part and parcel" test he had already propounded. In the passage following his quotation from Buckley LJ's judgment, Stephenson LJ was simply making the point that when a court is deciding whether that test is satisfied on the facts, consideration of the factors he had already identified, and of the particular statutory context in which the issue arises, may lead to different conclusions in different types of case.

91.At p.408 Stephenson LJ recorded the submission of counsel for the appellant that different buildings within different ownerships fall less easily within the same curtilage and that "this terrace is not, or at any rate is no longer, *so intimately associated with the mill as to form part and parcel of it*, at least without exaggerating the importance of their history and ignoring the differences in ownership and user which now exist." (Emphasis added). Counsel was clearly addressing the *Methuen-Campbell* test.

92.Counsel for the respondent responded by submitting that, because of the particular context of the preservation of listed buildings, and the need to avoid evasion of the mischief by what he termed "colourable transfers of title," more weight should be given to historical association and physical proximity than to ownership. He then contended that the curtilage of a listed building is an area of land which contains objects or structures which "naturally form or formed with the listed building an integral whole" and that the boundaries of that area depended on the facts of the individual case. The substantially unchanged layout of the area including the terrace and the mill was the strongest indicator that the terrace was [still] within the curtilage of the mill.

93.Those submissions were focusing upon the closeness of the relationship between the structures, on the one hand, and the listed building, on the other. It was the structures, not the land upon which they were situated, which were said to "naturally form an integral whole" with the listed building. That focus is understandable in the context of a statute which, if it applied, required those structures to be treated as part of the listed building and subject to the same planning controls. What counsel was submitting was that because of the closeness of the relationship between them historically and geographically, the structures could, without artifice, be regarded as part of the mill and therefore as falling within its curtilage. That formulation of the legal argument was consistent with the test in *Methuen-Campbell*. Counsel was not propounding some different, wider, listed building test.

94.Stephenson LJ concluded, though not without doubt, at p.409, that the terrace had not been taken out of the curtilage by the changes that had taken place. He accepted that it was within the curtilage of the mill historically, when the terrace was originally constructed, and said that on the facts of that case the extent of the curtilage was not affected by the change in ownership and use of the cottages. The terrace "*remained so closely related physically and geographically to the mill* as to constitute with it a single unit *and* to be comprised within its curtilage." (Emphasis added).

95.Stephenson LJ did not say that being a "single unit" was what determined what fell within the curtilage of the mill; rather, the description of the terrace as forming a "single unit" with the mill *and* as "falling within the curtilage" were both consequences of the continuation of the close physical and geographical relationship of the structure (the terrace) to the mill. He was rejecting the submission of counsel for the appellant as to the lack of a continuing "intimate association" and applying the test in *Methuen-Campbell* to the facts of that case, albeit with a degree of generosity because of the identified policy behind the statute. In other words, despite the changes in use and ownership, the terrace was still to be treated as part and parcel of the mill for the purposes of listed building consent.

96.*Calderdale* was considered by the House of Lords in *Debenhams*, which concerned an exemption from liability to rates that applied to a structure or object falling within the extended definition of a listed building in s.54(9) of the 1971 Act. The House of Lords considered the decision in *Calderdale* and by a majority (Lord Ackner dissenting) held that in the context of s.54, the word "structure" was intended to convey a limitation to such structures as are ancillary to the listed building itself. The specific examples given were the stable block of a mansion house, or the steading of a farmhouse either fixed to the main building or within its curtilage.

97.Lord Keith, with whom Lord Templeman, Lord Griffiths and Lord Mackay agreed, rejected a construction of the word "structure" in s.54(9) as embracing "a complete building not subordinate to the building of which it is to be treated as forming part". He did not accept the width of Stephenson LJ's reasoning in *Calderdale* about the importance of preserving the setting of the listed building. He pointed out at p.403E-F that if that was part of the purpose, Parliament would not have stopped at other buildings fixed to or within the curtilage of the listed building, but would have subjected buildings immediately adjoining the building but not fixed to it, or buildings immediately opposite, to the same planning controls.

98.A little later, Lord Keith gave examples of buildings that would attract the rating exemption (at p.405A-B). These included a (listed) building with a garden, yard, court or other land ordinarily used for the purposes of the building (classic examples of land falling within the curtilage and treated as part and parcel of the building for that reason); and a building with an ancillary structure such as a garage or outhouse which is either fixed to the main building or within its curtilage (which would fall to be treated as part of the building by virtue of s.54(9)). He went on to say that whilst he would not accept the width of the reasoning of Stephenson LJ in *Calderdale* he would not overrule the decision "because there was room for the view that the terrace of cottages was ancillary to the mill".

99.In his concurring speech, Lord Mackay said it was not a natural use of language to describe two adjoining houses in a terrace by saying that one is an object or structure fixed to the other. He went on to describe *Calderdale* at p.411C as "a very special case on its facts" but accepted that it was possible to treat the terrace and the mill, having regard to the history of the properties, as a single unit. Again, it is clear from that passage that Lord Mackay was treating the "single unit" as the conclusion that was reached after considering the relevant factors and applying them to the facts of that case, not as the test for determining whether the terrace fell within the curtilage of the mill.

100.Whilst the decision in *Debenhams* was not directly concerned with the question of the meaning of "within the curtilage of a building", the way in which that concept was understood by both Lord Keith and Lord Mackay is consistent with the "part and parcel" test in *Methuen-Campbell* (a case which was cited to the House of Lords, but not referred to in the speeches). There is nothing in *Debenhams* to suggest that the House of Lords thought the Court of Appeal in *Calderdale* were laying down some special test for curtilage or giving it an extended meaning in the listed building context. In fact, the approach taken to the statute by the House of Lords was to eschew a broad interpretation of s.54(9), and to adopt a meaning of "structure" that was different from and narrower than its normal meaning.

101.The next case is *Skerritts*, which was decided after *Calderdale*, *Dyer, Barwick* and *Debenhams*. The issue in that case was whether listed building consent was required for replacement of the windows in a stable block located 200 metres to the east of a large Grade II listed house, Grimsdyke, which was then being used as a hotel. By then the governing statute was the Listed Buildings Act, but the definition of "listed building" in section 1(5) of that Act was in very similar terms to s.54(9) of the 1971 Act. This provided that:

"… any object or structure within the curtilage of the [listed] building which, although not fixed to the building, forms part of the land and has done so since before 1 July 1948, shall be treated as part of the building".

102.The judge had held that the planning inspector erred in law in failing to have regard to an alleged principle (which he said emanated from *Dyer*) that the curtilage of a listed building is confined to a small area around that building. The question on appeal was whether such a principle existed. The Court of Appeal decided that it did not, and that "smallness" was not inherent in the expression "curtilage". Whether something fell within the curtilage of a building was a question of fact and degree.

103.The leading judgment was given by Robert Walker LJ, who considered *Methuen-Campbell*, *Calderdale*, *Debenhams* and *Dyer*. He cited a large part of the passage in Buckley LJ's judgment in *Methuen-Campbell* without criticism, and without comment on the "part and parcel" test. He noted that Stephenson LJ in *Calderdale* had focused on Buckley LJ's reference to an "integral whole" rather than his reference to "small pieces of land". He pointed out, at p.65H, that in *Debenhams* Lord Keith did not criticise Stephenson LJ's view in *Calderdale* that an ancillary building might be within a main building's curtilage even though some way from it.

104.When considering *Dyer*, and Donaldson LJ's suggestion that "curtilage" involves "some small but necessary extension to that to which the word is attached", Robert Walker LJ correctly said that all three members of the Court regarded the issue as one of fact and degree. He also said they all appeared to have been influenced by the approach to disproprietary legislation taken in *Methuen-Campbell*.

105.It is slightly unclear to me how he formed that impression, as in *Dyer* the argument addressed to the Court on behalf of the landowner, based on the nature of the statutory right of compulsory purchase, was that they should adopt a *broader* approach and that "curtilage" in that context "must necessarily refer to a much larger area than would otherwise be the case". That argument was rejected. By contrast, in *Methuen-Campbell* the nature of the legislation appeared to have influenced Goff LJ (though only to a limited extent) in rejecting the wider interpretation of the statutory provisions advocated in that case by the tenant, the person who wanted to buy the paddock. In both cases, the rejection of the argument advanced by reason of the nature of the statutory right simply led to the Court of Appeal treating "curtilage" as bearing its normal meaning, rather than giving it some special or extended meaning. It did not result in the adoption of a more restrictive approach.

106.Whatever he may have thought about the supposed influence of the disproprietary nature of the statute on the approach taken by the Court of Appeal, Robert Walker LJ said in terms that the decision in *Dyer* was "plainly correct". He quoted with approval the passage in Nourse LJ's judgment to which I have referred in paragraph 75 above, thereby accepting that there are limits to the extent of the curtilage, and that in that case, the Court of Appeal had been right to decide that it did not include the park. However, he said the Court went further than was necessary to go in expressing the view that the curtilage of a building must always be small, or that the notion of smallness is inherent in the expression. As he correctly observed, the observations about smallness were not necessary to the decision.

107.At p.67 Robert Walker LJ pointed out that Nourse LJ had recognised in *Dyer* that in the case of a "principal mansion house", which is what Grimsdyke was built as, the stables and other outbuildings were likely to be included within its curtilage. He observed that 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", although he still accepted that "in the nature of things, the curtilage within which a mansion's satellite buildings are found is bound to be relatively limited." However, he said that the concept of smallness in that context was so completely relative as to be almost meaningless, and unhelpful as a criterion.

108.As Lieven J put it in *Challenge Fencing* at [29], the Court of Appeal in *Skerritts* made it clear that there is no test that a curtilage has to be small; but that does not mean that relative size is an irrelevant consideration. As she said, it may well be the case that a large house would more easily be found on the facts to have a curtilage that extended to outbuildings, than if the house were a small cottage. It was a relevant factor in *Challenge Fencing* itself that the building was small and the curtilage being claimed was extensive. It was also found to be plainly relevant that a number of other buildings on the site on which the building stood had been demolished, and would have had their own curtilages.

109.I can find nothing in *Skerritts* to support the suggestion that there is a wider or different approach to what is meant by "curtilage" in listed buildings cases or to support the test suggested by BAL. I agree with Holgate J's conclusion at [116] that there is nothing in the *ratio* of that case which detracts from or modifies the principles in *Methuen-Campbell, Dyer or Barwick*.

110.In any event, for the reasons already stated, I do not accept that the test in a listed building case is any different, although in order to be treated as if it were part of the listed building, a freestanding structure within the curtilage must also be ancillary to that building. *Calderdale* is simply an example of a case turning on its own special facts, in which the listed building context and a generous approach to the purpose of the statute probably tipped the balance in favour of a decision which resulted in the (temporary) preservation of the terrace. As Sir Sebag Shaw indicated in his judgment, the only practical impact of the decision was that the Secretary of State would have the final say on whether it was demolished.

111.The final case is the decision in *Challenge Fencing* which was a planning development control case, not one concerning a listed building. As Holgate J explained in his judgment at [117]-[120], the concept of "the curtilage of a dwellinghouse" or "the curtilage of a building" is used in the Town and Country Planning Act 1990 and other planning legislation to control development rights, and the statutory purposes of the Listed Buildings Act do not apply to development control under wider planning legislation.

112.The issue in *Challenge Fencing* was whether a large area of hardstanding, for which a certificate of lawful use or development was sought, was within the curtilage of an industrial warehouse. Lieven J held that the planning inspector had not erred in law in deciding that it was not. She considered the decisions in *Methuen-Campbell*, *Calderdale*, *Dyer* and *Skerritts* as well as some first instance decisions. Whilst she acknowledged at [10] that slightly varied considerations may be in play when considering the curtilage of an industrial building when compared with listed buildings, she drew no distinction between the general approach to be taken in a development control case and in a listed building case. That was entirely correct. As Mr Edwards submitted, it would be odd if there were a divergence of approach in principle, given that the Town and Country Planning Act 1971 originally contained the rules relating to listed buildings.

113.At [14] Lieven J referred to Nourse LJ in *Dyer* accepting the proposition drawn from the authorities 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." Having correctly identified the test, she then extracted a number of further propositions from the authorities, which she listed at [18] before reiterating, at [21], that the determination of what is the curtilage is a question of fact and degree for the decision maker, taking into account the relevant considerations.

114.Holgate J said in the present case at [123] that the guidance in paragraph 18 of *Challenge Fencing*, although helpful, and sufficient for the purposes of that case, did not purport to be exhaustive on the approach to identifying a "curtilage," and it is important to read that decision as a whole. I would strongly endorse that observation. Just as it would be inadvisable to try and define "curtilage", there are obvious dangers in attempting to be too prescriptive

about what factors are relevant to determining the curtilage in a given case, or in trying to create an exhaustive list of them. Reading her judgment as a whole, it is plain that Lieven J did not fall into that trap. Paragraph 18 does no more than helpfully identify some important propositions drawn from some of the earlier authorities.

115.What matters for present purposes is that (i) Lieven J approached the question on the basis that the "part and parcel" test adopted in *Dyer* but taken from *Methuen-Campbell* was correct; and (ii) she expressly acknowledged (at [31]) that, whilst the facts that the land and building were being used together and were closely related to each other were relevant considerations, there may be situations where the planning unit is different from (and almost certainly larger than) the curtilage of the building. The two concepts are not the same.

116.The conclusion to be drawn from the authorities is that they all illustrate different applications of the same test to the facts and circumstances of the specific cases. They demonstrate that the curtilage in a given case is a question of fact and degree. There is nothing in them which supports the test put forward by BAL; on the contrary, the approach of Buckley LJ in *Methuen-Campbell* has been adopted and followed in all the different statutory contexts in which the concept of "curtilage" has been considered, albeit perhaps with a slightly greater degree of latitude by the Court of Appeal in *Calderdale*. *Dyer*, *Barwick* and *Methuen-Campbell* itself would have been decided very differently if the test had been whether the land and building together formed part of some wider residential or industrial unit, or that there was "functional interdependence" between them, or (in the case of *Dyer*, at least) that one was necessary for the operation of the other.

117.Although none of the authorities is concerned with the 2006 Act, the approach taken in them to the concept of the "curtilage of a building" is consistent with the interpretation that I would have given to that expression in the 2006 Act as a matter of ordinary language. That approach is also compatible with redressing the mischief that paragraph 6 of schedule 2 was aimed at.

The Inspector's errors

118."Ancillary" means something which is subservient to, or subordinate to, or which provides essential support to the functioning of, something else. It was common ground that, although the land does not have to be ancillary to the building in order to fall within its curtilage, the answer to the question whether it is ancillary to the building is relevant and in some cases, may be highly relevant. This is a case in point. As Holgate J said, if that factor is taken into account the decision-maker must understand the concept correctly, and the notion of something being "ancillary" is meaningless unless it can be related to something else with a primary role.

119.The Inspector plainly fell into error in his approach by treating the land and the terminal building as ancillary to each other, for the reasons set out by Holgate J at [132]-[136] of his judgment. If the correct question were asked, namely, is the Application Land ancillary to the terminal building? the answer is plainly no. On the contrary, the terminal building is ancillary to the functioning of the airport, for the reasons given by the Judge. It was this mistake, and the findings made by the Inspector about "functional equivalence", which led to his adoption of the wrong test for identifying curtilage land.

120.No useful purpose was to be served by asking whether the Application Land and terminal building together formed part of a single functioning unit (i.e. the airport), but that is what the Inspector did, and that is where he went wrong. Although at one point he did articulate it in his decision letter, the Inspector never applied the right test. Had he done so, it seems to me that it would have been impossible for him to have reached the conclusion that the whole of the operational area of the airfield was in any sense "part and parcel of" the terminal building.

121.I agree with Holgate J's explanation at [147] of why BAL's test cannot be correct. As he points out, if it were permissible to identify a curtilage simply by asking whether the building and land together formed a single unit with "functional equivalence", or were used for the same overall purpose, then their relative sizes and functions, the question whether the land is ancillary to the building, and indeed any historical connection between them, would diminish in significance and perhaps cease to be of any relevance at all.

122.Moreover, as the Judge said, the reasoning adopted by the Inspector could be replicated for a golf course or other open air recreational activity occupied with a club house. The building itself need not be on the common land, if the land within its curtilage is. Given the number of golf courses that are situated on common land, there is

a real danger of the "integral whole" approach being used to obtain deregistration of substantial areas of common land without having to comply with the stringent requirements of s.16 of the 2006 Act.

123.Mr Edwards sought to distinguish a golf course on the basis that the relationship between the land and the building in such a case was not one of necessity, whereas with an airport it was; but there are two responses to that. First, *Methuen-Campbell* makes it clear that the test is not one of necessity. Secondly, whilst it may be possible to have a golf course without there being a club house, nevertheless, if there is a club house built next to a golf course, the adjacent course is what enables the building to function as a club house for members of the golf club. In those circumstances, and however large it may be, the club house is likely to be ancillary to the golf course, not vice versa. To my mind, there is no satisfactory answer to the golf course point, and it plainly was not Parliament's intention to enable owners of large tracts of common land used for recreational purposes to deregister that land without satisfying the requirements of s.16.

Conclusion

124.Holgate J was right to hold that the phrase "the curtilage of a building" in the 2006 Act 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, nor whether the building forms part and parcel of some unit which includes that land. He therefore correctly concluded that the Inspector's decision was fatally flawed by material errors of law.

125.For those reasons, I would dismiss this appeal. It only remains for me to express my gratitude to all counsel and to those instructing them for their industry and their helpful presentation of the arguments in this interesting case.

Lord Justice Nugee:

126.I agree. I am grateful to Andrews LJ for her impressive and thorough analysis of the authorities, on which I do not wish to add anything except my respectful agreement, and for the explanation of the errors that the Inspector fell into and that Holgate J correctly identified.

127.In summary, the statutory language in paragraph 6 of schedule 2 to the Commons Act 2006 requires one to ask whether since the date of its provisional registration as common land the relevant land has at all times been, and still is, "within the curtilage of a building". That, applying the guidance given by Buckley LJ in *Methuen-Campbell*, means that one needs to ask whether the land is so intimately associated with the building as to lead to the conclusion that the land forms "part and parcel of the building". I agree that nothing in the later authorities has displaced this guidance, and here the Inspector duly cited it (along with other guidance) at paragraphs 50 and 54 of his decision letter where he discussed the authorities. However when he came to express his conclusion at paragraph 83 he found that the operational area of the airfield was "part and parcel with the building". As Andrews LJ says at paragraph 7 above, that small but significant change of language illustrates his error; Dr Bowes in his short, cogent submissions for Mr Tipton put his finger on it when he said that the Inspector did not really answer the statutory question, namely whether the airfield was within the curtilage of the terminal building, but a different question, namely whether they together formed part of a single unit.

128.I add a few words on an aspect of statutory construction that the present case well illustrates. In the absence of any relevant statutory definition, the starting point is that Parliament is assumed to use words in their natural and ordinary meaning unless there is some reason to conclude otherwise. With ordinary English words in common usage that usually does not pose significant problems as we are all familiar with their ordinary meaning. This is so even if we would find it very difficult to produce a comprehensive definition: most words have a core meaning that is easily recognisable, although it is difficult to be sure quite how far it extends, and there may be real doubts as to borderline cases.

129.Thus for example we all know what a house is, and in most cases everyone would agree whether a building was a house or not; but there are cases where the answer is not so obvious, and it would be a struggle to produce a definition of a house that sought accurately to draw the line and enabled one to deal with all possible cases. If a Court is asked to decide if a building is a "house" for the purposes of some statutory provision, I do not think it

is necessary for the Court to seek to define exhaustively what a house is, nor indeed would it usually be sensible for it to do so. This is because the Court is necessarily focused on the facts of the particular case before it, and cannot reasonably envisage what other cases might arise in the future. It is enough if the Court explains why the particular building before it does or does not qualify as a house for the purposes of the statutory provision in question. (And incidentally I agree that the Court in such a case can take into account the purposes of the relevant statutory provision in answering that question; that does not mean that "house" has a different meaning for different statutes, rather that quite how far that meaning extends in any particular case may be influenced by the context, including the purposes of the statute under consideration).

130.Curtilage however is not a word in everyday usage, at any rate outside the south-west where it appears it may still be in popular use (see the OED definition cited by Holgate J at [73] of his judgment). How then do we ascertain its natural and ordinary meaning? One method is to have recourse to dictionary definitions. But these, although of some help, often themselves give rise to further argument. In the present case, for example, the OED definition refers to land attached to a dwelling-house "forming one enclosure with it, or so regarded by the law", which begs more questions than it answers.

131.If we want to know what a word's ordinary meaning is, it is to my mind more helpful to ask how it is used in practice. This is after all what we do with everyday words. We do not know what the word house means because we have looked it up in the dictionary; we know what a house is because we have experience of how the word house is used. In the same way if we want to know what curtilage means, it is helpful to look at examples of how it has been used in practice. Such an exercise may not indicate the outer edges of its meaning with precision, but it does help to illustrate its central meaning.

132.Fortunately the extensive array of authorities cited to us on this appeal enables us to do this. We find for example that in the case of modest houses, the curtilage would not on the face of it extend to the whole of 10 acres of pasture land let with a cottage (*Trim v Sturminster RDC [1938] 2 KB 508*); that a field used for keeping cows was not part of a house (*Pulling v London, Chatham and Dover Railway Co (1864) 3 De G J & S 661*); and that paddocks have been held not to be part of the curtilage of houses in both *Methuen-Campbell* and *Burford v Secretary of State for Communities and Local Government [2017] EWHC 1493 (Admin)* . On the other hand the curtilage does include a wall enclosing a recently expanded part of the garden (*Sumption v Greenwich LBC [2007] EWHC 2776 (Admin)*).

133.In grander houses, the curtilage would extend to "the house, the stables and other outbuildings, the gardens and the rough grass up to the ha-ha if there was one", but not to the 100 acre park surrounding a mansion house (*Dyer* at 358F-G per Nourse LJ); thus it would include a wall forming part of a ha-ha (*Watson-Smyth v Secretary of State for the Environment* (1992) 64 P&CR 156); and a stable block even some distance away from the main house (*Skerritts*); but not 64½ acres of a park, meadow land and pasture land (*Buck d. Whalley v Nurton (1797) 1 B & P 53*); nor a 650m long fence along the driveway (*Lowe v First Secretary of State [2003] EWHC 537 (Admin)*). Admittedly a devise of a mansion-house to the testator's wife was held to include three meadows let for grazing in *Leach v Leach [1878] WN 79* , but in *Methuen-Campbell* at 543F Buckley LJ said that he did not think, unless there was some special context, that this very liberal construction adopted by Malins V-C was good law.

134.When one moves away from dwelling-houses we find that the purpose-built residence of a medical superintendent within the boundary of a lunatic asylum was within the curtilage of the asylum (*Jepson v Gribble [1876] 1 Ex D 151*); but firemen's houses outside the boundaries of the yard to a fire station were not within the curtilage of the fire station (*Barwick*). A courtyard and access to a warehouse and mill was part of the curtilage (*Caledonian Railway Co. v Turcan [1898] AC 256*); as was a piece of ground in front of a public house used for access (*Marson v London, Chatham and Dover Railway Co (1868) LR 6 Eq 101*); and two small open spaces in an oil depot (*Clymo*); but not a large hardstanding massively in excess of what was necessary for an undertaking in a modest building (*Challenge Fencing*). To these can be added *Calderdale*, which concerned a terraced row of houses physically linked to a mill by a bridge and within its boundaries, and which is extensively considered by Andrews LJ above.

135.A survey such as this is neither scientific nor comprehensive. Nor does it give any indication why in any particular case the Court decided as it did: that requires a consideration of the explanations given by the judge(s) in any particular case. Nor does it take account of the different statutory contexts in which the question may arise.

Nor is it any substitute for a careful analysis of the question when it does arise. But that does not mean that it has no value. To my mind it gives a good idea of the concept of what it is for a piece of land to be within the curtilage of a building; it illustrates the natural and ordinary meaning of the word. I will not attempt to define it, but these are all examples of bits of land that go with a building, of "relatively limited" extent (*Skerritts*), that are "intimately associated" with it (*Methuen-Campbell*).

136.To repeat myself, the fact that we have a grasp of the central meaning of a word does not mean that we are able to define quite how far it extends with precision. But armed with this information, we can see that the relationship of the airfield to the terminal building in the present case bears very little resemblance to the cases where land has been held to be within the curtilage of a building, and although this cannot by itself determine the question, I do not find it surprising that the more detailed analysis undertaken by Andrews LJ demonstrates that Holgate J was entirely right to find that the airfield was not "within the curtilage of a building" as required by paragraph 6 of schedule 2 to the 2006 Act.

137.I agree that the appeal should be dismissed for the reasons that she gives.

Lady Justice King:

138.I agree with the judgments of My Lady and My Lord.

As Holgate J explained at [75] of his judgment, "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.