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## **Lowe v First Secretary of State and another**

[2003] EWHC 537 (Admin)

**Queen's Bench Division: Administrative Court**

**Sir Richard Tucker**

**6 February 2003**

*Curtilage -- Town and Country Planning (General Permitted Development) Order 1995 -- Development within curtilage of listed building requiring express grant of planning permission -- Fence erected along driveway to house in order to enclose boundary -- Whether fence erected within curtilage -- Whether purpose of fence relevant*

The appellant owned a Grade II listed building (the hall) with a 650m drive. He erected a 1.8m high chain-link fence along the length of the driveway without obtaining an express grant of planning permission. In February 2002, he was served with an enforcement notice, issued by the second defendant council, alleging that the fence was in breach of planning control and requiring its removal. On appeal against the enforcement notice, the issue before the Secretary of State was whether the erection of the fence constituted development within the curtilage of a listed building thus requiring planning permission. The erection of a fence within the curtilage of a listed building was not permitted development for the purposes of Class A of Part II of Schedule 2 to the Town and Country Planning (General Permitted Development) Order 1995. In finding that the fence had been erected within the curtilage of the hall, the inspector concluded that it had been erected with a view to enclosing the land within the appellant's ownership, and that it therefore defined the curtilage. He refused to grant permission, and upheld the enforcement notice. The appellant appealed.

**Held** The appeal was allowed.

The inspector's reference, in his decision letter, to a means of enclosure surrounding a listed building was unwarranted by, and contrary to, the terms of the statutory provisions, and was inappropriate: see [8]. The inspector fell into error in taking into consideration, and relying upon the reason for the construction of the fence. That reason could not affect either the character of the land upon which the fence was erected or the question of whether that land fell within the curtilage of the hall. The reason given for erecting the fence cannot define the curtilage, or show that the fence or the land upon which it was erected lay within the curtilage: see [20]. The judgment of Nourse LJ in *Dyer v Dorset County Council* [1989] QB 346 applied: see [21]. The inspector placed undue emphasis upon, and was influenced by, the fact that the site of the fence came within the same ownership as the hall, thus suggesting that he equated curtilage with ownership. Ownership may be a factor to take into

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account, but it is not a determinative factor. The inspector had been wrong to place reliance upon his perceived view that the reason given by the appellant for erecting the fence was connected with an attempt

to enclose the land within his ownership, and, in particular, to rely upon that as a reason for concluding that the fence lay within the curtilage of the hall: see [22].

**Cases referred to in the judgment**

*Attorney-General, ex rel Sutcliffe v Calderdale Borough Council* (1982) 46 P&CR 399, CA

*Dyer v Dorset County Council* [1989] QB 346; [1988] 3 WLR 213; (1988) 86 LGR 686

*Methuen-Campbell v Walters* [1979] QB 525; [1979] 2 WLR 113; [1979] 1 All ER 606; (1978) 38 P&CR 693; [1978] 2 EGLR 58; 247 EG 899, CA

*Skerritts of Nottingham Ltd v Secretary of State for the Environment, Transport and the Regions (No 1)* [2001] QB 59; [2000] 3 WLR 511; (2000) 80 P&CR 516; [2000] 2 PLR 84; [2000] JPL 789

**Appeal under section 289 of the Town and Country Planning Act 1990**

This was an appeal by the appellant, Denis Lowe, under section 289 of the Town and Country Planning Act 1990, against the decision of the first defendant, the First Secretary of State, who, by his inspector, upheld an enforcement notice issued by the second defendant, Tendring District Council.

Ian Albutt (instructed by Sharpe Pritchard) appeared for the appellant, Denis Lowe.

Sarah-Jane Davies (instructed by the Treasury Solicitor) appeared for the first respondent, the First Secretary of State.

The second respondents, Tendring District Council, did not appear and were not represented.

*The following judgment was delivered.*

**SIR RICHARD TUCKER:**

[1] I have before me an appeal under section 289 of the Town and Country Planning Act 1990. The appellant, Denis Lowe, claims that the decision made by the first defendant, the First Secretary of State, by his appointed inspector, pursuant to section 174 of the Act, and given by letter dated 2 September 2002, whereby he upheld an enforcement notice dated 11 February 2002, should be quashed.

[2] The appellant is the owner and occupier of a Grade II listed building, known as Alresford Hall, near Colchester. A description of the site is contained in paras 2 to 7 of the decision letter. In addition, I have a number of plans illustrating the site, and, in particular, a plan showing the hall and two other listed buildings, a barn, and a walled garden. Also, importantly, the plan shows the main driveway leading from the hall to Ford Lane.

[3] The subject matter of the enforcement notice is a 1.8m high chain-link fence, 650m long overall, running alongside the driveway. The

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notice asserted that it had been erected without planning permission, and required its removal.

[4] The erection of the fence would constitute permitted development authorised by Class A of Part II of Schedule 2 to the General Permitted Development Order 1995<sup>1</sup>, unless:

A.1(d) It would involve development within the curtilage of, or to a gate, fence, wall or other means of enclosure surrounding, a listed building.

[5] The appeals to the inspector and before me raise the issue of whether the erection of the fence was development within the curtilage of a listed building, namely Alresford Hall. If it did fall within the curtilage, as the inspector concluded, then planning permission was required for its erection. No such permission had been obtained, and the inspector refused to grant it. Therefore, he upheld the enforcement notice.

[6] Counsel for the appellant, Mr Ian Albutt, concedes that the inspector had correctly understood that this was the main issue, subject to a gloss that he placed upon the statutory provision. The complaint before me concerns the inspector's analysis of, and conclusions upon, the curtilage issue, which, it is submitted, reveal clear errors of law.

[7] It is further submitted that the inspector had wrongly taken into account the reason given by the appellant for erecting the fence as a key factor in his analysis of the extent of the curtilage of Alresford Hall.

[8] Therefore, I turn to the decision letter. At para 12, the inspector states that the main issue is whether or not the fence is within the curtilage of, or is a means of surrounding, a listed building. Had he restricted the test to whether or not the fence falls within the curtilage of a listed building, no complaint could have been made. However, the reference to a means of enclosure surrounding a listed building is, in my view, unwarranted by, and contrary to, the terms of the statutory provision, and is inappropriate.

[9] At para 18, under the rubric "use or function", the inspector sets out his understanding of the use of the land and the function of either the fence or the land in these terms:

18. My understanding of the way in which the land in the vicinity of the Hall is used is based on what I saw during my visit. Whatever use the land is put to it is evident that Mr Lowe wishes to enclose at least part of it. In a letter to the Council dated 13 August 2001 Mr Lowe states that "This fence (the fence subject to the notice) is necessary for our safety and the security of the property in order to stop the complainers ripping up newly planted trees, cutting down our shrubs, digging holes on our property, hiding in the woods near our house armed, abusing our employees." In my view the reasons given by Mr Lowe for erecting the fence are connected with an attempt (successful

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or not) to enclose the land within his ownership. The reasons given for erecting the fence suggest to me that it is either defining or lying within the curtilage -- it is most unlikely that it is outside the curtilage.

[10] Mr Albutt submits that, in this passage, the inspector is clearly, and erroneously, relying upon the reason why the fence was erected as an indication of whether it is within or without the curtilage. It is submitted that, for the purpose of deciding whether development is authorised by Class A or is excluded by para A.1(d), it is necessary to identify the curtilage of the relevant listed building prior to the carrying out of that development.

If, prior to carrying out the development, the land in question is not within the curtilage, then the development can be carried out, and the fact of it having taken place cannot change the extent of the curtilage.

[11] Ms Sarah-Jane Davies, on behalf of the respondent, accepts that the question is what the curtilage was when the fence was erected. She submits that it is permissible to look at the reason for erection in order to cast light upon what the use and function of the land was at the material time.

[12] In so far as there is a difference of opinion between counsel, I prefer Mr Albutt's submissions. However, whatever view is preferred, the question remains the same: at the time this fence was erected, was it or was it not within the curtilage of the hall?

[13] What is the meaning to be ascribed to the word "curtilage"? Not every dictionary condescends to mention it. However, in the *Oxford English Dictionary* (2nd ed) it is defined in these terms:

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.

In the *Shorter Oxford Dictionary* it is defined as:

A small court, yard, or piece of ground attached to a house and forming one enclosure with it.

A more succinct definition is given in *Chambers 20th Century Dictionary*:

A court attached to a dwelling house.

The Universal Dictionary defines it as:

The enclosed land surrounding a house or dwelling.

[14] I have been referred to three authorities. The first is *Attorney-General, ex rel Sutcliffe v Calderdale Borough Council* (1982) 46 P&CR 399. At pp406-407, Stephenson LJ referred to the agreement between counsel and the bench that:

three factors have to be taken into account in deciding whether a structure (or object) is within the curtilage of a listed building... whatever may be

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the strict conveyancing interpretation of the ancient and somewhat obscure word "curtilage". They are (1) the physical "layout" of the listed building and the structure, (2) their ownership, past and present, (3) their use or function, past and present. Where they are in common ownership and one is used in connection with the other, there is little difficulty in putting a structure near a building or even some distance from it into its curtilage.

[15] The second decision is that of the Court of Appeal in *Dyer v Dorset County Council* [1989] QB 346, and I refer to the following passages in the judgment of Lord Donaldson of Lymington MR, commencing at p355A:

Thus the sole issue is whether Mr Dyer's house is or is not within the curtilage of another building or, by the application of section 6 of the Interpretation Act 1978, of more than one other building. This is a question of fact and degree and thus primarily a matter for the trial judge, provided that he has correctly directed himself on the meaning of "curtilage" in its statutory context.

At p355D:

Parliament has not seen fit to define the word "curtilage" in this statutory context and we have to regard to dictionaries and to such authorities as to its meaning as existed in 1980 and 1984.

His lordship then cites from the *Shorter Oxford Dictionary*, as I have done, at p355E:

In *Jepson v Gribble* (1876) 1 TC 78 the issue was whether the house occupied by the medical superintendent of an asylum was part of the asylum. As in the present case, the house fronted on to a public road and had access from the back to the asylum itself, although it would appear that it was very much closer to the asylum than are the lecturers' cottages to any other college buildings. Kelly CB said, at p80:

"it is within the walls; it is part of the curtilage, in the language of the old law, and it is for the residence of a person whose attendance may be required at any moment, and who ought therefore to be at hand, and for that purpose it is put within the grounds; it is a part of the premises themselves, and with a ready, rapid, and almost instantaneous communication with the building which contains the lunatics."

I then turn to p356D:

There are also a number of ecclesiastical authorities to the effect that a curtilage must be near a house and must "belong" to it...

Reference is made to *Methuen-Campbell v Walters* [1979] QB 525. At p356F, Lord Donaldson continues:

Goff LJ, at p535, held that the decision of this court in *Trim v Sturminster Rural District Council* [1938] 2 KB 508 confined "appurtenances" to the curtilage of the house and in the following pages of his judgment expressed the view that the curtilage of a house is narrowly confined to the area surrounding it and did not extend to this paddock. Buckley LJ said, at pp543-544:

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"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 squares yards of land, constituting a yard or a basement area or passageway or something of the kind, owned and enjoyed with the house, which on a reasonable view could only be regarded as part of the messuage and such small pieces of land would be held to fall within the curtilage of the messuage. This may extend to ancillary buildings, structures or areas such as outhouses, a garage, a driveway, a garden and so forth. How far it is appropriate to regard this identity as parts of one messuage or parcel of land as extending must depend on the character and the circumstances of the items under consideration. To the extent that it is reasonable to regard them as constituting one messuage or parcel of land, they will be properly regarded as all falling within one curtilage; they constitute an integral whole..."

Then, finally, at p356G:

"Curtilage" seems always to involve some small and necessary extension to that to which the word is attached.

[16] Then I look at the judgment of Nourse LJ in the same case, p358B. He says:

I agree. The derivations mentioned in the *Oxford English Dictionary* (French, courtil -- a little court or garth; Italian, corte; Mediaeval Latin, cortile or curtile -- a court or yard) rather suggest that "curtilage" started life as a word describing a small area enclosed by walls or buildings, the smallness of the area being emphasised by the diminutive suffix "age" as in village. The need for physical enclosure of the area having disappeared in current usage, the dictionary definition, which I quote in full, is for most present-day purposes adequate...

That is the quotation to which I have already referred from the *Oxford English Dictionary*.

[17] At p358F, Nourse LJ says:

While making every allowance for the fact that the size of a curtilage may vary somewhat with the size of the house or building, I am in no doubt that the 100 acre park on the edge of which Mr Dyer's house now stands cannot possibly be said to form part and parcel of Kingston Maurward House, far less of 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 mansion house, an area beyond which no conveyancer would extend beyond that occupied by the house, the stables and other outbuildings, the garden and the rough grass up to the ha-ha, if there was one.

[18] Finally, a short passage from the judgment of Mann LJ, at p359C:

the word "curtilage" is a term of art and, in employing it, the draftsman and Parliament must have had regard to its meaning as such a term. Its meaning

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as a term was discussed in *Metheun-Campbell v Walters* [1979] QB 525. It appears from that decision that the meaning of the word "curtilage" is constrained to a small area about a building. The size of the area appears to be a question of fact and degree.

[19] Finally, *Skerritts of Nottingham Ltd v Secretary of State for the Environment, Transport and the Regions (No 1)* [2000] 2 PLR 84. In that case, the Court of Appeal described the decision in *Dyer* as plainly correct, although commenting that it went further than was necessary in expressing the view that the curtilage of a building must always be small. The Court of Appeal held that the curtilage of a substantial listed building was likely to extend to what were, or had been, in terms of ownership and function, ancillary buildings. The expression "curtilage" could not usefully be called a term of art; it is a question of fact and degree.

[20] In my view, the inspector fell into error in taking into consideration and relying upon the reason for the erection of the fence. That reason cannot affect the character of the land upon which it was erected, nor the question of whether or not that land fell within the curtilage of the hall. The reason given for erecting the fence can neither define the curtilage nor show that the fence, or the land on which it was erected, lay within the curtilage. I disagree with the inspector's conclusion that it is most unlikely that the fence is outside the curtilage.

[21] Of the authorities cited to me, I derive most assistance from the decision of the Court of Appeal in *Dyer*, and, in particular, the judgment of Nourse LJ in the passage already referred to at p358F-G. The expression "curtilage" is a question of fact and degree. It connotes a building or piece of land attached to a dwellinghouse and forming one enclosure with it. It is not restricted in size, but it must fairly be described as being part of the enclosure of the house to which it refers. It may include stables and other outbuildings, and certainly includes a garden, whether walled or not. It might include accommodation land such as a small paddock close to the house. But it cannot possibly include the whole of the parkland setting in which Alresford Hall lies, nor the driveway along which the fence was erected. It could not sensibly be contended that the site of the fence was attached to the hall, or that it formed one enclosure with it, or was part of the enclosure of it.

[22] Moreover, the inspector appears to have placed undue emphasis upon, and to have been influenced by, the fact that the site of the fence was within the same ownership as the hall, so as to suggest that he equated curtilage with ownership. As the cases show, ownership of the hall may be a factor to be taken into account. However, it is not the determinative factor. It was, in my judgment, wrong of the inspector to have placed reliance upon his perceived view that the reason given by the appellant for erecting the fence was connected with an attempt to enclose the land within his ownership, and, in particular, to rely upon that as a reason for concluding that the fence lay within the curtilage of the hall. It might be difficult to say that a piece of land falls within the curtilage of a dwellinghouse where the two are in different ownerships, but it does not

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follow that where they are in the same ownership one must form part of the curtilage of the other.

[23] For the reasons I have set out, I take the view that the inspector came to an erroneous decision, which cannot stand and which must be quashed.

*Appeal allowed.*