



Appeal Decision

Site visit made on 10 January 2024

by D Boffin BSc (Hons), DipTP, MRTPI, Dip Bldg Cons (RICS), IHBC

an Inspector appointed by the Secretary of State

Decision date: 15/04/2024

Appeal Ref: APP/N4720/F/23/3326823

Land at Chapel Cottage, High Street, Boston Spa, Wetherby LS23 6AA

- The appeal is made under section 39 of the Planning (Listed Buildings and Conservation Areas) Act 1990 as amended (the LBCA Act) by the Planning and Compensation Act 1991.
- The appeal is made by Mrs Susan McLaughlin against a listed building enforcement notice (LBEN) issued by Leeds City Council.
- The LBEN was issued on 30 June 2023.
The contravention of listed building control alleged in the notice is without Listed Building Consent, the removal of a section of the curtilage listed stone boundary wall and banking, which is within the listed curtilage of the host Grade II listed building, the Boston Spa Methodist Church.
- The requirements of the LBEN are:
Reinstate the form and height of the banking as existed prior.
Reinstate the magnesian limestone stone boundary wall using retained stone from the unauthorised demolition. Where this may not be possible, magnesian limestone stone to be sourced to match existing is required (to be secured by sample) and the wall to be reinstated to match that which existed prior in height, form and design – including stone size, coursing, jointing and stone capping, as shown in the photograph attached and using a suitable lime mortar specification (mix, colour and application finish) all to be agreed by sample panel.
- The period for compliance with the requirements is:
Sample panel – 1 month.
Wall and the reinstatement of the banking – 3 months.
- The appeal is made on the grounds set out in section 39(1) (a), (c), (e) and (g) of the LBCA Act.

Summary Decision: Subject to the correction and variations, the ground (c) appeal succeeds and the enforcement notice is quashed.

Preliminary Matters

1. The LBEN refers to a grade II listed building, Boston Spa Methodist Church. However, the listed building has been entered within its official list entry as Spa Lane Methodist Church. I am satisfied that the listed building cited within the LBEN is the same building as the latter. To avoid any confusion, I will refer to the listed building as Spa Lane Methodist Church.
2. The appellant has supplied a copy of a plan with respect to an alternative scheme for the reinstatement of the boundary wall through the ground (e) appeal. However, there is no provision for alternative schemes under ground (e) and as such it does not fall to me to consider such alternatives under ground (e).

The Notice

3. On an appeal any defect, error, or misdescription in a listed building enforcement notice may be corrected using the powers available in section 41(1)(a) of the LBCA Act, or the terms may be varied, where the correction or variation will not cause injustice to the appellant or local planning authority.
4. Both parties were consulted as to whether they considered the banking cited within the LBEN is a listed building or an object or structure for the purposes of section 1(5) (a) or (b) of the LBCA Act? In addition, they were asked for their views on *'without prejudice to the final decision if the Inspector found that the banking is not a listed building or an object or structure for the purposes of the LBCA Act could the allegation and the requirements be corrected/varied to delete references to the banking without injustice to both parties?'*
5. From the evidence before me the banking, cited within the description of the alleged contravention and the requirements, constituted soil and other material that may have been deposited on the site during and shortly after the construction of Spa Lane Methodist Church. In my judgment the deposition of that soil/other material may have constituted an engineering or other operation but, it is more likely than not, that it would not have constituted a building, object or structure. This is because the banking was formed by the deposition of soil/other material. Therefore, the banking would not have formed part of the listed building, Spa Lane Methodist Church.
6. In my judgement, the banking has been included within the contravention of listed building control by error. The corrections of that error, and the variations of the associated requirements and period of compliance, relate to a matter of fact and therefore I consider I can carry out these corrections and variations without injustice to either party. I therefore intend to delete the wording *'and banking'* within the description of the alleged contravention, delete the requirement which states, *'Reinstate the form and height of the banking as existed prior'* and delete *'and the reinstatement of the banking'* within the second period for compliance.
7. The remaining requirement of the notice includes, *'magnesian limestone stone to be sourced to match existing is required **(to be secured by sample)** and the wall to be reinstated to match that which existed prior in height, form and design – including stone size, coursing, jointing and stone capping, as shown in the photograph attached and using a suitable lime mortar specification (mix, colour and application finish) **all to be agreed by sample panel*** (emphasis added). That requirement involves the approval of a sample/sample panel by the Council. Therefore, on first receipt of the notice, it would not have been possible for the appellant to know what details might be approved by the Council, and consequently what they must do to comply with the notice. Furthermore, there is no mechanism through which the appellant could challenge any failure on the part of the Council to agree the details submitted, or should the appellant consider the subjective judgments made by the Council in these respects to be unreasonable or impossible to achieve.
8. Section 38(2) of the LBCA Act states that an LBEN shall specify the alleged contravention and require such steps as may be specified in the notice to be taken. Although not specifically stated there, it is implicit within that section that the LBEN must tell the person on whom it is served fairly what they have done wrong and what they must do to remedy it.

9. I have had regard to the judgment of Payne¹, in which the subject enforcement notice required the submission of a scheme for levelling and planting to be submitted to the local planning authority for approval. The Inspector found the requirement insufficiently specific to comply with section 173(3) of the Town and Country Planning Act 1990 (the 1990 Act) and described the notice as 'unacceptable because of the uncertainty it introduces.' Even so, they substituted precise requirements. It was held that the Inspector erred because, since they had made an express finding that the notice did not comply with section 173(3) of the 1990 Act, they ought to have found it null and incapable of variation.
10. I have also had regard to the Oates² judgment, cited by the Council, when considering its suggestion that the LBEN may be correctable. In that case, the third requirement of the enforcement notice was to 'make good the land...' The Inspector found the step 'vague and subjective' but that it could be deleted without causing injustice.
11. The grounds of challenge included that the notice ought to have been found null, but the High Court endorsed the Inspector's approach, and the ground was not pursued in the Court of Appeal. Whilst both judgments relate to enforcement notices issued under the 1990 Act the principles are equally applicable to a LBEN issued under the LBCA Act. Following Oates it is open to an Inspector to conclude that, while part of the relevant section of a notice is uncertain and cannot stand, the notice as a whole complies with the statutory requirements. The Inspector can delete the offending part and they should approach the exercise in a way that is not unduly technical or formalistic.
12. However, Oates cannot be read as authority for the proposition that an Inspector could delete a 'scheme' requirement so long as other steps are not vague and compliance with them would suffice to remedy the breach. Payne still applies insofar as, if an Inspector finds that a notice does not comply with the relevant sections of the 1990 Act or LBCA Act, they must conclude that it is null. Having regard to the above, Oates sanctions the correction of a notice to eliminate an element of vagueness or uncertainty, as long as the notice as a whole enables the recipient to know with "reasonable certainty" what they have done wrong and what they need to do to put it right.
13. In Oates, the offending requirement could simply be deleted and the enforcement notice would still ensure the breach was remedied. In this appeal, I cannot delete the requirement as it is the only remaining requirement, and it is crucial as it requires the boundary wall to be rebuilt. The Council considers that the requirement could be reworded to read '*Reinstate the magnesian limestone stone boundary wall using retained stone from the unauthorised demolition. Where this may not be possible, magnesian limestone stone to be sourced to match existing and the wall to be reinstated to match that which existed prior in height, form and design - including stone size, coursing, jointing and stone capping, as shown in photograph attached and using lime mortar.*' In my judgment it is apparent from the notice that the contravention relates to the removal of a section of boundary wall and that it is required to be reinstated utilising the original stone and if that is not possible to use matching

¹ Clive Payne v The National Assembly for Wales and Caerphilly County Borough Council [2006] EWHC 597 (Admin)

² Oates v SoCLG and Canterbury [2017] EWHC 2716

stone. The wall is to be rebuilt to the same height, form and design using lime mortar. As such it is not hopelessly uncertain and I am satisfied that it is not a nullity. Whilst the requirement is crucial the references to a sample and sample panel can be deleted and it is still apparent what is needed to put the contravention right. I intend to delete the wording of the second requirement and substitute it with the wording suggested by the Council and I intend to delete the period of compliance related to the sample panel. As the variations relates to a matter of fact I consider that I can vary the notice without injustice to both main parties.

Background

14. Spa Lane Methodist Church was listed in Grade II on 30 April 1982. The list entry states that the building was constructed in 1846 and is by Messrs. Atkinson of York. It also states that is of ashlar magnesian limestone with a Welsh slate roof. Chapel Cottage was erected in the early 20th Century and there is no dispute that it originally functioned as a home for the caretakers of the adjacent church. That cottage is adjacent to the north-western corner of Spa Lane Methodist Church. The boundary wall attacked by the LBEN was of a relatively low height, was constructed from magnesian limestone and appeared to act as a retaining wall for the banking cited above. It adjoined a pedestrian access from Spa Lane and part of it fronted onto ane.

The ground (a) appeal

15. This ground of appeal is that the building is not of special architectural or historic interest and implicitly attacks the listing of the building. The ground of appeal only applies to the listed building itself. Therefore, quite simply, if Spa Lane Methodist Church is included on the 'list' it is deemed to be of architectural or historic interest.
16. In this case, the appellant has focussed on whether the boundary wall is of any special interest and whether its removal would have an adverse impact on the setting and significance of the listed church. Since there is no argument that Spa Lane Methodist Church is not of architectural or historic interest the appeal on ground (a) must fail.

The ground (c) appeal

17. A ground (c) appeal is that the matters alleged in the LBEN do not constitute a contravention. The appellant argues that the boundary wall was not within the curtilage of Spa Lane Methodist Church and was therefore not part of that listed building. Section 1(5) of the LBCA Act states 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 this Act— (a) any object or structure fixed to the building; (b) any object or structure within the curtilage of the building which, although not fixed to the building, forms part of the land and has done so since before 1st July 1948*'.
18. There is no dispute that the boundary wall was not fixed to the listed building. There is little evidence before me to indicate when the wall was constructed. Whilst the location of the wall appears to be in line with the line of footpath and boundary with Spa Lane as shown on historic maps this does not provide evidence to indicate when the wall itself was constructed. Nevertheless, the submitted photographic evidence indicates, in my experience, that the wall is

- of some age and it is more likely than not that it was constructed prior to 1 July 1948.
19. The Courts have often addressed the meaning of 'curtilage', most frequently in relation to listed buildings. The Council has cited the judgments of *Debenhams*³ and *Calderdale*⁴ within its evidence. I have also had regard to Historic England's Advice Note No 10, Listed Buildings and Curtilage (HE Note 10).
 20. In *Calderdale* Stephenson LJ stated that '*three factors have to be taken into account in deciding whether a structure (or object) is within the curtilage of a listed building 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.*' These have become known as the "Stephenson factors". The approach in *Calderdale* is cited within HE Note 10. *Debenhams* accepted these factors and held that only a structure which was ancillary and subordinate to the listed building itself can form part of a listed building. *Calderdale* cited an earlier judgment *Methuen-Campbell*⁵ in it. Within *Methuen-Campbell* Buckley LJ stated that '*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.*'
 21. Caselaw indicates that the curtilage in a given case is a question of fact and degree and that 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.
 22. In this case the boundary wall extended along one side of a footpath and part of the frontage with Spa Lane. The wall was in close proximity to the church and built of similar materials it. As stated above, the line of the footpath and the boundary with Spa Lane appear to be little changed from at least 1888. There are doors within the eastern elevation of the listed building close to the footpath. It is therefore reasonable to consider that the footpath was originally utilised to access the church or parts of it. Nevertheless, the main entrance to the church appears to have been on the southern elevation and a further access point from Spa Lane and a circular drive, in front of that elevation, are also apparent on the submitted historic maps. I noted on my site visit that the additional access point still exists today.
 23. The footpath from Spa Lane extends towards Chapel Cottage and also appears to have been utilised to access it after that cottage had been built. On the opposite side of the footpath there is a similar wall to that removed but there is a substantial hedge behind and extending above it. The boundary, to Spa Lane Methodist Church, that extends along Spa Lane from that side of the footpath is largely formed of hedge. The removed wall appears to have acted as a retaining structure for the banking that adjoined it. The material that formed the banking was more than likely derived during the construction process of Spa Lane Methodist Church.
 24. Nevertheless, that banking was landscaped and, based on the evidence before me, it formed part of the domestic garden to Chapel Cottage. The banking was

³ *Debenhams Plc v Westminster CC* [1987] AC 396; [1987] JPL 344

⁴ *Attorney-General ex rel Sutcliffe v Calderdale BC* (1983) 46 P&CR 399

⁵ *Methuen-Campbell v Walters* [1979] 2 QB 525

included within the land that was sold with the cottage in 2019 which supports the evidence that it had formed part of the garden to that cottage. Furthermore, visually the church/graveyard can be clearly identified as being adjacent to the front elevation of the church. Whilst it also partially extends down the side elevation that fronts Spa Lane the church/graveyard is visually and physically contained by the hedges that bound Spa Lane and the footpath. There is little evidence to suggest that the banking formed part of the church/graveyard at the time of listing nor at any time since 1982.

25. There is no dispute that until 2019 the wall was in the same ownership as the church. Historically, the occupants of Chapel Cottage acted as caretakers for the church. It is unclear when the occupancy of that cottage ceased to be associated with the caretaking duties. In any case, the wall functioned as a retaining and boundary wall adjacent to Spa Lane and a footpath, that appears to have provided access to the church and Chapel Cottage. However, the banking appears to have been used as part of the domestic garden of Chapel Cottage since, at least, 1982. In my judgment therefore the wall's function was, more likely than not, ancillary and subordinate to the residential use of Chapel Cottage rather than the ecclesiastical use of the church since the date of listing.
26. In conclusion, whilst the land on which the wall was erected was in the same ownership as the church until 2019 and is in close proximity to the church visually there is a distinct separation to the church/graveyard due to the boundary hedges. Moreover, that land is more likely than not to have been used in association with the residential use of Chapel Cottage. As such, I find as a matter of fact and degree, on the balance of probabilities that the parts of the land on which the wall was erected cannot reasonably be treated as forming part and parcel of Spa Lane Methodist Church and they are therefore not within its curtilage. Furthermore, the wall's function was not, on the balance of probabilities, ancillary and subordinate to the ecclesiastical use of that church.
27. As a matter of fact and degree I conclude that the wall subject to the notice did not form part of Spa Lane Methodist Church for the purposes of section 1(5) of the LBCA Act. It follows therefore that no contravention of listed building control has occurred. The ground (c) appeal is therefore successful.
28. A number of local residents refer to the wall as being curtilage listed but I have concluded to the contrary on the basis of the facts of the case.

Overall Conclusion

29. For the reasons given above, I conclude that whilst the appeal on ground (a) fails, the appeal on ground (c) succeeds. The appeal on grounds (e) and (g) do not therefore fall to be considered.

Formal Decision

30. It is directed that the LBEN be corrected by:

- Deleting the wording '*and banking*' within the description of the alleged contravention.

And varied by:

- Deleting the requirement which states '*Reinstate the form and height of the banking as existed prior*'.
- Deleting '*and the reinstatement of the banking*' within the second period for compliance.
- Deleting the wording of the second requirement and substituting it with '*Reinstate the magnesian limestone stone boundary wall using retained stone from the unauthorised demolition. Where this may not be possible, magnesian limestone stone to be sourced to match existing and the wall to be reinstated to match that which existed prior in height, form and design - including stone size, coursing, jointing and stone capping, as shown in photograph attached and using lime mortar.*'
- Deleting the period of compliance related to the sample panel.

31. Subject to the correction and variations, the appeal succeeds and the enforcement notice is quashed.

D Boffin

INSPECTOR