Neutral Citation Number: [2021] EWCA Civ 136

Case No: A1/2019/1062

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT
Mr Justice Waksman
HT2015000219

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/02/2021

Before:

LORD JUSTICE LEWISON
LADY JUSTICE ASPLIN DBE
and
LADY JUSTICE CARR DBE

- -

Between:

MR JEAN-FRANÇOIS CLIN	**Appellant/ Defendant**
- and –	
WALTER LILLY & CO. LIMITED	**Respondent /Claimant**

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- -

Vincent Moran QC, James Maurici QC and Tom Coulson (instructed by **Eversheds Sutherland LLP**) for the **Appellant**
David Thomas QC, Rupert Warren QC and Matthew Finn (instructed by **Pinsent Masons LLP**) for the **Respondent**

Hearing date: 21 January 2021

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Approved Judgment

"Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10.00am 8 February 2021."

LADY JUSTICE CARR:

Introduction

1. This appeal raises a question of planning law in the context of a contractual construction dispute between the Appellant property owner, Mr Jean-François Clin ("Mr Clin"), and the Respondent contractor, Walter Lilly & Co. Limited ("Walter Lilly"), a specialist in the renovation of prime residential properties. Specifically, the issue for consideration is the correct approach to be taken in determining when construction works are to be treated as amounting to demolition for the purpose of s. 74 of the Planning (Listed Buildings and Conservation Areas) Act 1990 ("s. 74") ("the PLBCAA"), thus requiring conservation area consent ("CAC"). Its resolution requires consideration of the principles identified by the House of Lords in *Shimizu (UK) Limited v Westminster City Council* [1997] 1 WLR 168 ("*Shimizu*") (in the context of listed building consent).

2. Mr Clin is the owner of residential property now known as 50 Palace Gardens Terrace, London W8 4RR ("the Building"). In September 2012 he contracted with Walter Lilly to carry out demolition, refurbishment and reconstruction works to form a single residence out of Nos 48 and 50 Palace Gardens Terrace ("the Works") ("the Contract"). The Works commenced in March 2013 but were suspended in August 2013 after the relevant local authority, the Royal Borough of Kensington & Chelsea ("RBKC"), expressed the view that CAC, which had not been sought by or on behalf of Mr Clin, was required. The Works recommenced in August 2014, Mr Clin having by then applied for and obtained the relevant permission. The parties are now in dispute as to where contractual responsibility for the one year's delay in progress of the Works properly falls. As set out more particularly below, the issue of whether or not CAC was lawfully required for the proposed Works is key to answering that question.

3. In a judgment dated 17 April 2019 ([2019] EWHC 945 (TCC)) ("the Judgment"), Waksman J ("the Judge") held that the Works amounted to demolition such that CAC was required. By an order dated 2 May 2019 he granted declaratory relief as follows:

> "1. [Mr Clin] breached his implied contractual obligation to [Walter Lilly] to use all due diligence to obtain in respect of the Works any permission, consent, approval or certificate required under, or in accordance with, the provisions of any statute or statutory instrument for the time being in force pertaining to town and country planning and to that extent and in that way [Mr Clin] was in breach of his implied contractual obligation to [Walter Lilly] not to hinder or prevent [Walter Lilly] from carrying out its obligations in accordance with the terms of the Contract or from executing the Works in a regular and orderly manner and to co-operate with [Walter Lilly] in so far as necessary for [Walter Lilly] to discharge its obligations.
>
> 2. As a consequence thereof:
>
> a) A Relevant Event or Relevant Events have occurred within the meaning of clause 2.29 of the Contract.

> b) [Walter Lilly] is entitled to an extension of time to the Date for Completion of 53.2 weeks.
>
> c) [Walter Lilly] has no liability to [Mr Clin] for liquidated damages for delay in respect of that period.
>
> d) A Relevant Matter or Relevant Matters have occurred within the meaning of clause 4.24 of the Contract."

("the Order").

4. Mr Clin appeals against the Judgment and the Order. It is said that the Judge was wrong to conclude that CAC for the Works was required. Three grounds are raised, in summary as follows,:

   i) The Judge ought to have concluded, by reference to the underlying purpose of the statutory scheme relating to the establishment of conservation areas, that it was appropriate to consider whether the demolition to the Building involved a significant and/or substantial impact on the "character and appearance" of the conservation area (see ss. 69, 72 and 74 of the PLBCAA) ("Ground 1");

   ii) The Judge erred in law and fact in concluding that the retention of a "box" (ie the party walls with adjoining properties, together with most of the front elevation and a large part of the rear elevation) did not preclude a conclusion that there was demolition for the purpose of s. 74. As a matter of law, applying the test in *Shimizu*, the site was never cleared ("Ground 2");

   iii) The Judge's conclusion that there was substantial demolition for the purpose of s. 74 was based on a series of considerations or reasons so fraught with error as to undermine that conclusion ("Ground 3").

   It is submitted that, applying the correct principles, the Judge would or ought to have concluded that CAC was not required for the Works.

5. The appeal is resisted by Walter Lilly which contends:

   i) On Ground 1: Questions relating to character and appearance are irrelevant to the issue of whether a building is to be demolished. Provided that the qualitative assessment to which a local planning authority must pay heed under s. 72 of the PLBCAA is carried out when deciding whether or not to grant CAC, effect is given to the purpose and intent of the PLBCAA. The anterior question of whether or not CAC is required in the first place is entirely distinct and purely quantitative;

   ii) On Grounds 2 and 3: There is no basis on which to interfere with what were findings of fact by the Judge, following the hearing of contested evidence, that the Works amounted to demolition of the Building.

   In any event, even if Mr Clin's complaints are well-founded, it is said that the Judge would and ought to have found that CAC was nevertheless required. By a Respondent's Notice Walter Lilly argues further that it is in any event entitled to the relief obtained

in the Order because of RBKC's insistence that the proposed Works could not proceed until CAC was obtained.

6. The financial value of the dispute (incorporated as part of an ongoing Final Account dispute between the parties) is around £3 million (excluding legal costs): following the Judgment Mr Clin repaid some £924,000 to Walter Lilly (in respect of liquidated damages payments) and Walter Lilly has an outstanding loss and expense claim in respect of the relevant period of delay of some £2.1 million.

7. The parties were originally agreed that, in the event that any ground of appeal were to be upheld, this court should not remit the matter but rather should determine the substantive outcome by reference to its own substituted assessment on the evidence. As the hearing developed, however, Walter Lilly stepped back from that position and submitted that there would have to be remission to the High Court for further evidence, in particular in relation to the character and appearance of the conservation area in question.

8. The court was assisted by helpful written and oral submissions on both sides, Mr Clin being represented by a team led by Mr Moran QC (who did not appear below) and Walter Lilly being represented by a team led by Mr Thomas QC (who did appear below).

The relevant facts in summary

9. The Building consists of what was once two adjoining houses (Nos 48 and 50 Palace Gardens Terrace) and is located within a conservation area in RBKC. Mr Clin had owned No 50 for some time and then purchased No 48 with a view to combining the two. This was to involve the removal of the entire interior and parts of the front and rear elevations of both properties which were to be rebuilt as a single dwelling with six floors and a large swimming pool at the rear. All the windows at the rear were to be changed and aligned with a new five-panel window opening onto a new terrace, with aligned cornicing at roof level. No such alignment was to be carried out at the front elevation.

10. During the course of 2010 and 2011 Mr Clin, by his architect PTP Architects London Ltd ("PTP"), made a series of applications to RBKC for planning permission for the Works. Following his application on 13 June 2011, he was granted a certificate of lawful development ("CLOPUD") pursuant to s. 192 of the Town and Country Planning Act 1990 ("the TCPA") on 17 August 2011. This confirmed the lawfulness of amalgamation (but did not provide permission for any demolition or building works). Some limited breaking-through work was carried out to implement the CLOPUD in or around September 2011.

11. Further multiple planning permission applications followed in 2011 and 2012 (and indeed beyond into 2013). As outlined in the Judgment, it appears that Mr Clin (or those acting on his behalf) did not disclose to RBKC the full extent of the overall scheme and, in particular, the full extent of proposed demolition. Mr Clin and his advisers had been put clearly on notice by RBKC in pre-planning advice given in March 2011 that it was considered highly likely that the proposed works would involve substantial demolition requiring CAC.

12. Mr Clin and Walter Lilly entered into the Contract on 25 September 2012. The Contract was in the standard form JCT Building Contract with Quantities (2005, incorporating Revision 2 (2009)), with Contractor's Designed Portion incorporating bespoke amendments. By the Contract Particulars the Date of Possession was 19 February 2013 and the Date for Completion was 9 November 2014.

13. The extent of the demolition under the Contract can be summarised as follows (as identified in [71] to [96] of the Judgment in particular):

    i) The internal walls and floors were to be demolished in their entirety, as was the party wall between Nos 48 and 50;

    ii) Significant parts of the building below ground level were to be demolished;

    iii) At the front elevation, at all levels above lower ground floor level, the windows would be removed and replaced. There would be some demolition below the windows at lower ground floor level and removal of both the ground floor and lower ground floor front bay window at No 48;

    iv) At the rear elevation, so the Judge found (and as set out in what was called "the Marked-Up Plan"), there was to be demolition of effectively the entire rear elevation at lower ground and ground floor levels, together with the removal of the existing windows and surrounding brickwork at lower ground floor level;

    v) The party walls with Nos 46 and 52 were to be retained. (The Judge commented (at [130]) that this was a function of the fact that Nos 48 and 50 were within a terrace);

    vi) The roofs and chimney stacks of both Nos 48 and 50 were to be removed.

14. In summary, what was to be left were the party walls with Nos 46 and 52, together with much of the front elevation and some of the rear elevation.[1]

15. By letter dated 3 April 2013 a financial adviser acting for Mr Clin wrote to RBKC submitting that Mr Clin ought not to be liable to pay council tax during the period of the Works. The rationale was that Nos 48 and 50 were:

    > "….in the process of being demolished in their entirety and then
    > there will be a new building erected in their place".

16. This appears, unsurprisingly, to have triggered further interest within RBKC as to the scope and nature of the Works. RBKC visited the site and sought disclosure from PTP of full details of the Works. On 8 July 2013 a representative attended the site (without the knowledge of Mr Clin or PTP) and was shown the relevant demolition plans and drawings (and walked around the site) by Walter Lilly.

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[1] Mr Clin applied on this appeal to adduce a document showing axonometric views of the front and rear of the Building based on the Judge's findings. The court considered it *de bene esse*. I would not receive it under CPR 52.21(2). The Judge's findings as to the extent of the demolition works are set out clearly in the Judgment, and there are contemporaneous plans and photographs available (which were before the Judge), together with the "Marked Up Plan" accepted by the Judge as accurate. The document is unlikely to (and indeed would not) have an important influence on the result of the appeal.

17. On 17 July 2013 a planning enforcement officer in the Planning and Borough Development Department of RBKC, wrote (separately but in materially similar terms) to Walter Lilly and PTP stating that CAC was required for the proposed Works but had not been applied for. The letter to Walter Lilly ("the July 2013 letter") stated:

> "I write further to my officer's visit …on [8] July 2013 regarding demolition work undertaken. Whilst the extent of demolition at this time was not substantial demolition and a breach of the [1990] Act had not occurred, my officer was shown plans from the onsite engineer that indicated the following demolition works:-
>
> - Rear elevation of both 48 and 50 to be demolished below the cill of the first floor windows
> - The whole of the internal envelope of both buildings from third to lower ground level to be demolished
> - The removal of the roof from each property
> - The removal of the ground and lower ground front bay of 48 Palace Gardens Terrace
>
> You are advised that the extent of demolition proposed above is considered substantial demolition requiring [CAC] from the Council. I confirm that such an application has not been sought or obtained.
>
> I must also advise you that carrying out unauthorised substantial demolition works to a building in a conservation area is an offence under Section 9 of the [1990] Act……..Continued non-compliance can result in further prosecutions for a similar offence….The Council may also issue a [CAC] enforcement notice, which is served on all parties having a material interest in the property…….
>
> If it is your intention to proceed with the above demolition works, I would wish to receive an appropriate application within 28 days of the date on this letter. You will need to demonstrate why the above demolition works are structurally necessary and what temporary works you are proposing to secure the stability of the buildings. I would also wish to receive written confirmation of your intentions, within 21 days of the date on this letter. If you fail to do so, and the works proceed without the necessary consent, I will consider initiating formal prosecution proceedings in this matter…"

18. As a result, Walter Lilly stopped work on site in August 2013 (apart from progressing some non-critical elements in so far as it was able to do so in September and October 2013). It issued a notice of delay under clause 2.27 of the Contract on 6 September 2013.

19. Between August and November 2013 correspondence between Mr Clin's advisers and RBKC was exchanged in which the need for CAC was debated. Mr Clin's attempts to persuade RBKC to change its position were unsuccessful. On 7 November 2013 RBKC stated that:

> "The correct approach is to view the works being undertaken as a whole, not to break them artificially into distinct elements…In the context of the whole building it is clear…, as a matter of fact and degree, that the extent of the work proposed amounts to demolition so that the scheme of redevelopment may take place…."

20. Despite maintaining and without prejudice to his position that CAC was not required and in order to make progress, on 19 December 2013 Mr Clin applied for CAC (technically, by then, for planning permission to carry out relevant demolition). That application was successful (on 17 June 2014) and Walter Lilly recommenced work on 26 August 2014.

The contractual dispute

21. Walter Lilly commenced the present proceedings on 22 May 2015 seeking declarations that Mr Clin bore contractual responsibility for the 53.2 weeks of delay between August 2013 and August 2014. Its case was that Mr Clin was contractually responsible (by reason of express and/or implied terms in the Contract) for the intervention of RBKC. Edwards-Stuart J, amongst other things, rejected the submission that Mr Clin was under any absolute obligation to secure relevant planning permission (see [2016] EWHC 357 (TCC) at [60]). The Court of Appeal agreed, holding that it was instead an implied term of the Contract that Mr Clin would use all due diligence to obtain in respect of the Works any permission, consent, approval or certificate as was required under, or in accordance with, the provisions of any statute or statutory instrument for the time being in force pertaining to town and country planning ("the Implied Term") (see [2018] EWCA Civ 490 at [37]).

22. In the light of that conclusion, Walter Lilly amended its case to contend that CAC was lawfully required on the basis that the Building was being demolished within the meaning of s. 74. Whether or not this was correct was the central issue before the Judge.

The hearing and the Judgment

The hearing

23. The hearing took place over four days in March and April 2019. The following witnesses gave evidence at trial:

    i) For Walter Lilly: factual evidence from Mr Andrew Postlethwaite, its Pre-Construction Director; and expert evidence from Dr Chris Miele, a chartered town planner, member of the Institute of Historic Buildings Conservation and senior partner of Montagu Evans LLP;

ii) For Mr Clin: factual evidence from Mr Satish Patel, a director of PTP, who was involved in the Works from 2011 onwards, as well as from Mr Clin himself; and expert evidence from Mr John Bowles, a chartered town planner and director of Savills (UK) Ltd.

24. In their joint statement, the experts agreed, amongst other things,:

> "3.17 It is our understanding that whether or not works comprise 'substantial demolition' is a matter of fact and degree. The judgement to be made is whether the removal of fabric is 'so substantial as to amount to a clearing of the whole site for redevelopment' (*Shimizu*, page 187, Weekly Law Reports para B)."

25. Mr Thomas submitted that this agreement explained why there was little to no evidence before the Judge on the question of the character and appearance of the conservation area. There was indeed little to no evidence on this issue. Mr Moran could point to paras. 8.23 to 8.28 of Mr Bowles' report, but no more. Those paragraphs refer, at least in part, to the impact of the Works on "the character and appearance of the conservation area" but say nothing about what that character or appearance is. The court was not taken to any evidence identifying the size and scope of the conservation area, its demographic and population, the nature of any surrounding buildings and their occupation, or any other matters which might be relevant to character and/or appearance.

26. The experts also agreed (at 3.20 of their joint statement) that, whilst it was not agreed between them as to whether the opinion of RBKC that CAC was needed was correct,:

> "…..the expression of an opinion by RBKC in its letter of 17 July 2013 that the extent of the demolition proposed was substantial was not unreasonable…."

The Judgment

27. Having introduced and set out the background to the claim and identified the issues, the Judge outlined the witnesses. He found Mr Postlethwaite to be a reliable and straightforward witness, Mr Patel less so. Mr Clin generally gave his evidence in a straightforward manner, but his evidence was not of great assistance on the issues in hand.

28. The Judge then turned to the law. Having set out the relevant planning legislation and policy, he turned (at [30]) to *Shimizu*. He identified that *Shimizu* was concerned with the meaning of demolition for the purposes of listed building consent but recorded that it was "not suggested that this makes a difference to the application of *Shimizu* here". He set out Lord Hope's judgment at 185F-H and concluded (at [33]):

> "Accordingly,
>
> (1) For there to be "demolition" of a building it is not necessary that every part of it is removed; works involving the removal of

> so much of the old building as to clear a site for its redevelopment can amount to demolition;
>
> (2) In any given case it is a question of fact (and both parties have added the words "and degree") as to whether the proposed works constitute demolition of the building; and
>
> (3) The original proposal in *Shimizu* itself did amount to demolition."

29. He referred to the evidence of Mr Bowles (to the effect that whether or not a proposal amounted to demolition itself included a consideration of the extent to which the elements to be removed themselves contributed to the character and appearance of the conservation area), and the evidence of Dr Miele to the contrary. He concluded that, as a matter of law, the view of Dr Miele was "clearly correct":

> "35. In support of this argument, Mr Bowles referred to sub-paragraph (b) of CL3, quoted in paragraph 24 above, and said that the expression "resist substantial demolition" in relation to RB was concerned not (or not only) with the grant of CAC if sought, but whether CAC was necessary at all.
>
> 36. Dr Miele took the opposite view and said that questions of contribution to character and appearance do not relate to the first question at all (i.e. whether there is demolition so as to require CAC) but only the second i.e. the grant or otherwise of consent.
>
> 37. As indicated above, ultimately this is a matter of law for me to decide but I consider that the view of Dr Miele is clearly correct and that Mr Bowles is clearly wrong."

30. At [38] the Judge observed:

> "First, there is nothing in the very clear judgment of Lord Hope in *Shimizu* to suggest that the question of demolition or not involves a consideration of whether the elements to be removed themselves contribute to the character and appearance of the conservation area. It would be extremely odd if it did, because that would then require a judgment to be made on those matters which are not simple questions of fact and degree and moreover which are then to be considered again at the stage of deciding whether or not to grant consent. The issue of demolition or not is akin to the question as to whether there are building operations amounting to development so as to require general planning permission."

31. The Judge commented that Mr Bowles' invocation of Policy CL3 of RBKC's Local Plan, the "RBKC Core Strategy" adopted on 8 December 2010 dealing with Heritage Assets and Conservation Areas ("CL3"), to justify his approach demonstrated why his view was wrong. CL3 had nothing to do with what amounts to demolition. Mr Bowles' suggestion that, when one speaks of "substantial demolition", "substantial" had to be

understood in a qualitative sense, conflated inappropriately the separate tests for whether CAC was required and whether any CAC should be granted. Mr Bowles had failed to apply *Shimizu* to the facts of the case.

32. The Judge went on to reject Mr Patel's (more extreme) position that the fact that the whole of the interior was to be demolished was irrelevant to the question of whether or not there was demolition, a position which no one else supported. He also rejected Mr Patel's suggestion that temporary works of demolition (such as to the front bay window of No 48) fell outside the CAC regime altogether.

33. Having addressed the law, the Judge set out a detailed description of Nos 48 and 50 prior to works commencing and the planning history. As set out above, at [71] to [96] he set out and made findings as to the scope of the Works. He then considered the events of 2013, concluding amongst other things, that "there was a considered attempt [by PTP] to avoid showing the relevant demolition plans to [RBKC]".

34. The Judge's decision on whether CAC was needed for the demolition works is set out at [111] to [132]. The Judge set out the views of Dr Miele who determined that the sites of both houses were being cleared for redevelopment. He agreed with Dr Miele, that the removal of the partition wall between Nos 48 and 50 was "particularly significant because it served the structural purpose of supporting at one end all of the internal structures" at Nos 48 and 50. He observed at [116]:

> "Mr Hughes QC suggested in argument that this greatly overstated the position because in truth one still had, after, as well as before, a "box" representing the house i.e. the party walls with numbers 46 and 52, together with most of the front elevation and a large part of the rear elevation. In one sense, of course, that is true but the mere retention of walls (or most of them) does not mean that there cannot be substantial demolition. For the same reason I do not accept the suggestion made by Mr Hughes QC in closing that the proposed external demolition was more than a "façade retention scheme". If the latter can mean that the works as a whole are demolition for *Shimizu* purposes, then I fail to see how yet more external demolition produces a different result. Equally, the idea that the site was not "cleared" here in the *Shimizu* sense because there were substantial temporary and permanent steel structures does not assist Mr Clin. Indeed it assists WL because it points to what was necessary to hold up the only remaining structures which (apart from the party walls with Nos. 46 and 52) were most (though not all) of the front and rear elevations which would otherwise fall down, unsupported. The fact that a new steel frame was needed for the new house does not mean that the site was effectively cleared. It was cleared, prior to the arrival of the new frame."

35. He rejected the views of Mr Bowles, which he said were dictated largely by his erroneous view that demolition of the interior, even if total, did not count for very much. He noted the inconsistency between that view and Mr Bowles' agreement that RBKC's position as to demolition was not unreasonable. The Judge also referred to the utility

or otherwise of a 50% "rule of thumb" test to determine whether the intended works amounted to substantial demolition and concluded (at [126]):

> "So, to the extent that a 50% test is used, it does not actually help Mr Clin. Rather it helps WL. However, in my judgment, any percentage test is only of limited value when the Court has to decide for itself whether there is substantial demolition."

36. The Judge's overall conclusion on demolition was that the construction works in this case amounted to substantial demolition and CAC was therefore required:

> "130. In my judgment, it is plain, simply looking at the nature and extent of the proposed demolition works that they amounted to substantial demolition of the Properties. To say that there remained a box (with significant removals to the important front and rear elevations thereof) and therefore the building actually remained is completely unrealistic in my view. This was in every practical sense a clearing of the site occupied by the two houses for the redevelopment intended to take place as one. The only reason why any parts of the facades were retained (i.e. not to be demolished and reinstated or recreated) was because PTP knew that it would not obtain CAC for the pre-application scheme. While it is true that the two party walls for numbers 46 and 52 were retained, that is simply a function of the fact that the Properties were within a terrace".

37. He added that he would have reached the same conclusion, even were the front bay window at No 48 to be left out of account.

38. The Judge rejected the suggestion for Mr Clin that certain works fell outwith the ambit of the Implied Term and also concluded that as at July 2013 there had been a clear breach by Mr Clin of the Implied Term. It followed that there had been:

> "… an act of impediment, prevent or default which is a Relevant Event under clause 2.29(6) and a Relevant Matter under clause 4.24 (6). [Walter Lilly] is therefore entitled to the EOT as sought, along with compensation for the loss and expense caused by the delay period. Conversely, Mr Clin has no claim to liquidated damages."

39. In the light of these conclusions he did not need to consider the further arguments advanced by Walter Lilly that there was still a "decision" by RBKC which would have the same consequences as if CAC was required or that the need for CAC amounted to a "Statutory Requirement" under the Contract.

The relevant planning legislation and *Shimizu*

40. The PLBCAA is one of four Acts implemented in 1990 consolidating the legislation on town and country planning. Part I relates to listed buildings and Part II relates to conservation areas, which were first introduced by the Civic Amenities Act 1967, including their designation and effect, and control of demolition and development

within those areas. The need for consent for the demolition of buildings in conservation areas was introduced by s.1 of the Town and Country Amenities Act 1974.

41. A conservation area is an area which is of special architectural or historical interest, the character or appearance of which it is desirable to preserve or enhance. In the 54 years or so since the first conservation areas were designated, there has been a slow but steady increase in the number of specific statutory provisions aimed at assisting their preservation and enhancement. Up to October 2013, following the decision in *R (Save Britain's Heritage) v Secretary of State for Communities and Local Government* [2011] EWCA Civ 334; [2011] PTSR 1140, the demolition of an unlisted building in a conservation area in England required CAC and planning permission (subject to presently immaterial exceptions for small structures).

42. Part I of the PLBCAA (ss. 1 to 68) concerns listed buildings; Part II (ss. 69 to 80) concerns buildings in conservation areas. The key provisions of the PLBCAA relevant to this appeal are ss. 69, 72 and 74.

43. S. 69 provides:

> "69. Designation of conservation areas
>
> (1) Every local planning authority -
>
>> (a) shall from time to time determine which parts of their area are areas of special architectural or historic interest the character or appearance of which it is desirable to preserve or enhance, and
>>
>> (b) shall designate those areas as conversation areas….."

44. S. 72 sets out the general duty relating to the exercise of functions under the planning Acts (as defined), whether by planning authorities, the Secretary of State, inspectors or any others:

> "72. General duty as respects conservation areas in exercise of planning functions
>
> (1) In the exercise, with respect to any buildings or other land in a conservation area, of any functions under or by virtue of any of the provisions mentioned in subsection (2), special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area.
>
> (2) The provisions referred to in subsection (1) are the planning Acts and Part I of the Historic Buildings Ancient Monuments Act 1953 and sections 70 and 73 of the Leasehold Reform, Housing and Urban Development Act 1993….."

The "planning Acts" (as defined in s. 91 of the PLBCAA by reference to s. 336 of the TCPA) are the PLBCA; the TCPA; the Planning (Hazardous Substances) Act 1990; and the Planning (Consequential Provisions) Act 1990.

45. S. 74 provides:

> "74. Control of demolition in conservation areas
>
> (1) A building in a conservation area shall not be demolished without the consent of the appropriate authority (in this Act referred to as "conservation area consent")….
>
> (3) Sections 7 to 26, 28, 32 to 46, 56, 62 to 65, 66(1), 82(2) to (4), 82A to 82D and 90(2) to (4) have effect in relation to buildings in conservation areas as they have effect in relation to listed buildings subject to such exceptions and modifications as may be prescribed by regulations…"

46. Thus there are two questions to consider under s. 74:

    i) First, whether a building in a conservation area is to be "demolished" such that CAC is required;

    ii) Secondly, if it is, whether or not CAC should be granted.

47. S. 74 does not apply, amongst other things, to listed buildings (see s. 75(1) of the PLBCAA), but there are no material exceptions.

48. As from 1 October 2013 CAC was replaced by "demolition planning permission" as a result of the Enterprise and Regulatory Reform Act 2013 which repealed s. 74 and added a new requirement for demolition planning permission where there was "relevant demolition" (see s. 196D of the TCPA). It is common ground that there was no substantive change of any relevance to the issues under consideration.

49. CL3 states:

> "The Council will require development to preserve and to take opportunities to enhance the character or appearance of conservation areas, historic places, spaces and townscapes and their settings.
>
> To deliver this the Council will:
>
> a. Require full planning applications in conservation areas;
>
> b. Resist substantial demolition in conservation areas unless it can be demonstrated that:
>
> i. The building or part of the building or structure makes no positive contribution to the character or appearance of the area;
>
> ii. A scheme for redevelopment has been approved;…"

Since CL3 forms part of the RBKC's development plan, RBKC is obliged to determine any relevant planning application in accordance with it unless material considerations

indicate otherwise (see s. 70 of the 1990 Act and s. 38(6) of the Planning and Compulsory Purchase Act 2004).

50. As for planning permission more generally, s. 55 of the TCPA provides that planning permission is required for any "development", which includes building operations which themselves include demolition or rebuilding of and structural alterations to buildings. Where the work to be done falls within "permitted development rights", planning permission is not required. The terrace of houses including the Building was subject to a direction under what was then Article 4 of the Town and Country Planning General Development Order 1977, removing what would otherwise have been permitted development rights in relation to alterations, improvements to and extensions of any part of the front or rear elevation of the properties. Thus, general planning permission was required for any such works.

Shimizu and the meaning of demolition

51. The arguments raised in relation to the correct interpretation of the word "demolished" in s. 74 turn, in part, on an analysis of the legal principles identified by the House of Lords in *Shimizu*.

52. In *Shimizu* listed building consent had been granted for the demolition of virtually the whole of a listed building sited on the corner of Old Bond Street and Piccadilly in London except for the façades, chimney-breasts and chimney-stacks, and for the redevelopment of the site. The building then changed hands, and the new owners sought consent further to remove the chimney-breasts as well. The Secretary of State dismissed their appeal against a deemed refusal of consent. The owners sought compensation pursuant to s. 27 of the PLBCAA, claiming that the removal of the chimney breasts amounted to "alteration" not "demolition". The Lands Tribunal agreed but the Court of Appeal (by a majority) overturned that decision. The majority of the House of Lords (Lords Hope, Browne-Wilkinson, Lloyd and Cooke with Lord Griffiths dissenting) allowed the subsequent appeal and restored the decision of the Lands Tribunal, holding:

i) That by virtue of s. 336 of the TCPA a "listed building" for the purpose of the list compiled or approved by the Secretary of State under s. 1 of the 1990 Act might be a building or part of a building;

ii) Whether proposed works amounted to "alteration or extension of a listed building" within the meaning of s. 27 of the PLBCAA was to be considered in the context of the listed building as a whole;

iii) Whether works constituted "alteration" of a listed building or demolition was a question of fact and degree for the Lands Tribunal;

iv) The Lands Tribunal had been entitled to hold that the removal of the chimney breasts had been works of alteration, not demolition;

v) Accordingly, the claim to compensation fell within s. 27 of the PLBCAA.

53. In the leading opinion, Lord Hope held:

i) That, according to its ordinary meaning, the word "demolish" when used in reference to a building means to pull the building down - in other words, to destroy it completely and break it up. In relation to a building, its destruction and breaking up cannot constitute a mere alteration. Once the works are over, the old building has gone (183F-G);

ii) That the concepts of "demolition" and "alteration" are mutually exclusive (183G). Works which involve the pulling down and breaking up of part of the building, falling short of its destruction, will fall within the expression "alteration" (185E).

54. Central to the present debate is what Lord Hope then went on to say (at 185E-H):

> "I do not see the word "demolition" as applying only where the proposal is that every single part of the listed building should be pulled down. It is now commonplace, especially in towns and cities, where the exterior of a building contributes to the architectural or historic interest of a group of buildings such as buildings in a terrace, for the façade to be left standing while clearing the remainder of the site for redevelopment. That indeed is what was done in this case…
>
> It seems to me to be plain that the original proposal was for the demolition of the listed building for all practical purposes, so that a scheme of redevelopment could be carried out. It went far beyond what could reasonably be described as its alteration, as the works were so extensive and so much was to be pulled down and taken away, although the facade and the chimney-breasts and chimney-stacks were to be retained. The question is ultimately one of fact for the decision of the Lands Tribunal, and I do not think that any more precise definition of this expression is required". (emphases added)

55. A façade retention scheme in a terrace necessarily presupposes that the party walls are left intact.

56. Having referred to the observations of Lord Diplock in *Customs and Excise Commissioners v Viva Gas Appliances Ltd* [1983] 1 WLR 1445 (at 1451A-H), Lord Hope stated further (at 186B-C):

> "In any event I do not think that what he said in that case can be taken to mean that, in the context of listed building consent, works which will involve the removal of so much of the old building as to clear a site for redevelopment cannot be held to amount to demolition works for the purposes of Part I of the Act of 1990 and in particular for the purpose of section 8(2)." (emphasis added)

57. Lord Hope later (at 187H) repeated that the question of what constitutes demolition is "a question of fact and degree which will need to be decided on the facts of each case".

58. Thus, for there to be "demolition" of a building, it is not necessary for every part of the building to be removed. Works involving the removal of so much of the old building as to clear a site for redevelopment can amount to demolition. In any given case it is a question of fact (as all members of the House of Lords agreed) and degree. Lord Griffiths also referred (at 170D) to the need for "common sense" to be applied.

59. Lord Hope considered s. 74 in the course of his analysis of the first question before him, namely the meaning of "building" in the context of "listed buildings" as referred to in Part I of the 1990 Act (at 183B to E):

> "It was suggested that the provisions of section 74, which appears in Part II of the Act of 1990 relating to conservation areas, were inconsistent with [the interpretation that "listed building" was not to be given an extended meaning so as to include "any part of a listed building"]…. I do not think that there is any inconsistency, so long as it is appreciated that a listed building can consist of a part of a building. Buildings in conservation areas are put on the same footing as buildings of special architectural or historic interest, or any part of a building which has that character, which is for the time being included in the list. In the context of section 74(1), subject to any exceptions or modifications in this regard which may have been prescribed under subsection (3) of that section, the reference to the demolition of a building in a conservation area must be taken to mean the removal of the whole building, in the same way as section 17(3) appears to contemplate works to a listed building which will produce a site for redevelopment."

60. Following the decision in *Shimizu* government guidance in relation to demolition works in conservation areas was amended to read as follows:

> "The House of Lords also considered that works for the demolition of an unlisted building in a conservation area must also involve the total or substantial destruction of the building concerned. This means that many works which involve the destruction of the fabric of part only of a building will not be works of demolition and will not require conservation area consent."

(see Circular 01/01 Appendix D).

Grounds of appeal

61. Mr Moran emphasised at the outset the importance of clarity on the meaning of demolition, not least given the criminal liability that can attach to a breach of s. 74 (pursuant to s. 196D(1) of the TCPA). It was suggested that there is currently great uncertainty in practice; reference was made to *Listed Buildings and Other Heritage Assets* (5th Ed) by Mynors and Hewitson ("*Listed Buildings and Other Heritage Assets*") (at 12-018) where it is stated that the distinction between demolition on the one hand and "alteration or extension" on the other had caused "considerable problems in practice, not least following the decision….in *Shimizu*".

Ground 1

62. For Mr Clin it is said that the Judge ought to have concluded that, in circumstances where a substantial part of a building is to remain intact, consideration of the impact of the proposed retention and demolition on the character and appearance of the conservation area "might well be highly relevant". This is so for four reasons:

i) As a matter of statutory interpretation. The purpose of the legislative conservation area scheme is to preserve the character or appearance of such areas as are designated. In a case of total destruction there may be little need to consider that wider purpose. But the decision in *Shimizu* confirms that a building may be demolished even though part of it remains intact. In that situation, at least a partly qualitative exercise of judgment (and not a purely quantitative exercise) is required. It may be highly relevant if, for example, the demolition proposed would be capable of having a significant adverse impact on the character or appearance of the conservation area in question;

ii) S. 72 of the PLBCAA expressly requires that, when exercising any function under any of the provisions in any planning Act (as defined), "special attention" is to be paid to (the desirability of preserving or enhancing) the character or appearance of the conservation area in question. "Functions" are defined in s. 91 of the PLBCAA as including "powers and duties"; they extend to both express and implied powers and duties (see the comments of Lord Lowry in *McCarthy & Stone (Developments) Ltd v Richmond upon Thames Borough Council* [1992] AC 48 at 68E to 70B). S. 72 thus extends to the function of making a determination that CAC is (or is not) required, which is a separate and discrete function from the separate (and subsequent) exercise of deciding whether to grant CAC (if required). Reliance is placed on the fact that it is common ground that there are two separate questions to be answered under s. 74;

iii) The fact that issues of character or appearance may be relevant to a decision whether or not to grant CAC does not mean that they are not also relevant to the threshold question of whether or not CAC is needed;

iv) There is no analogy to be drawn, as the Judge drew, with the question of whether or not building operations amount to development such as to require general planning permission.

Ground 2

63. Ground 2 focusses on [116] of the Judgment (set out above). It is said that there was an error of principle on a mixed question of law and fact. The Judge is said to have applied the test in *Shimizu* wrongly to the facts of the case. He wrongly relied on Lord Hope's (obiter and, so it is submitted, unhelpful) elaboration of the meaning of demolition in the context of the retention of façades (at 185F-H). The Judge is said to have failed to ask the correct question, namely whether or not the whole or substantially the whole of the Building was removed, focussing instead on what was being removed from inside the Building. He accorded far too little weight to the amount and importance of the original fabric of the Building which was to be retained. The proposed Works did not amount to the removal of the whole building or its complete destruction. The

Judge ought then to have considered whether it was nevertheless right to characterise the Building as being demolished (see *Shimizu* at [185F-H]), paying special attention to questions of the character and appearance of the conservation area. It was (very largely) the external fabric of the Building that contributed to the character and appearance of the conservation area (which was largely being retained). The front of the Building carried a number of distinctive features, including balconies, a stuccoed frontage and horizontal coursing. Whilst the internal fabric was to be entirely demolished, it did not contribute (either at all or to any significant degree) to the character or appearance of the conservation area.

64. Further and in any event, the conclusion that so much of the Building was being demolished or that the site was to be cleared for redevelopment, was wrong. Emphasis is again placed on the fact that, following amalgamation, there was only one property.

65. Additional complaints are made of the Judge's reasoning, including that he mischaracterised or misunderstood the submissions made on behalf of Mr Clin. He was also wrong to conclude that the site was cleared in the sense identified in *Shimizu* in part because of the existence of temporary and permanent steel structures used in connection with the proposed Works. If the site had been cleared, no support structures would have been required at all and in any event, whether or not the site had been cleared was not properly to be judged by reference to the degree of support required by the fabric of the building retained.

<u>Ground 3</u>

66. Mr Clin attacks [130] of the Judgment (set out above), arguing that the Judge wrongly regarded the Building as two separate buildings and should not have paid any regard to what he considered to be PTP's (subjective) intentions or motivations. The two buildings had been amalgamated lawfully into a single building years before. This paragraph was a central and operative part of the Judge's conclusions on the key issue.

Discussion

<u>Ground 1</u>

67. It is common ground that the correct approach to statutory interpretation is to have regard to the purpose of a particular provision and to interpret its language in a way which best gives effect to its purpose. Regard must be had to the context and scheme of the relevant Act as a whole: see the comments of Lewison LJ in *Pollen Estate Trustee Co Ltd v Revenue & Customs Commissioners* [2013] EWCA Civ 753; [2013] 1 WLR 3785 at [24] and most recently *Zuberi v Lexlaw Ltd* [2021] EWCA Civ 6 at [30]. The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by Parliament. The courts give a very wide meaning to the concept of "absurdity", using it to include virtually any result which is, amongst other things, unworkable or impracticable, inconvenient, anomalous or illogical (see the comments of Lord Kerr in *McCool, R v (Northern Ireland) (Rev 1)* [2018] UKSC 23; [2018] 1 WLR 2431 at [24] and [25], endorsing passages from *Bennion on Statutory Interpretation (2013) (6th ed)* at section 312).

68. At the heart of Mr Clin's case on Ground 1 lies the submission that the effect of s. 72 is that, in considering whether or not there has been demolition for the purpose of s. 74,

special attention must be paid to the impact of the demolition on the character and appearance of the conservation area.

69. There was some debate as to whether or not s. 72 was relied on for Mr Clin below either at all or in this manner. Mr Moran, who did not appear below, maintained vigorously that it was, effectively through the evidence of Mr Bowles. Mr Thomas, who did appear below, took issue with this suggestion. The Judgment certainly does not reflect that s. 72 was said by Mr Clin to assume the importance that it is now accorded. But in the event, in the absence of any objection on Walter Lilly's part to the argument being raised on appeal, the point is now squarely before the court.

70. I do not accept that s. 72 requires a planning authority (or court) when determining whether or not CAC is required (as opposed to whether CAC should be granted) to carry out a qualitative exercise by reference to considerations of character and appearance of the conservation area in question, as suggested for Mr Clin.

71. My reasons (independently at this stage of any reliance on *Shimizu*) are as follows:

   i) Although there are two questions to consider under s. 74 (namely whether CAC is required and, if so, whether it should be granted), the planning authority is performing a single function, namely controlling the demolition of buildings in a conservation area. There is no dispute that on the second question, when deciding whether or not to grant CAC, special attention must be paid to the desirability of preserving or enhancing the character or appearance of the conservation area. In this way, s. 72 is properly respected, and the purpose and intent of the legislative scheme as a whole fulfilled;

   ii) Parliament is unlikely to have intended for the matters identified in s. 72 to be considered twice, first when assessing the threshold question of demolition and secondly again for the purpose of considering whether or not to grant CAC;

   iii) The concept of paying special attention to the desirability of preserving or enhancing the character or appearance of a conservation area is not apt in the context of what is a fact-finding exercise as to whether or not a building is being demolished. It involves questions which go beyond simple questions of fact and degree. There is no logical connection between the question of demolition and questions of character and appearance of the conservation area. The concept fits, on the other hand, very neatly into a consideration of whether or not to grant CAC for the Works;

   iv) It would be wholly unrealistic to place on developers the burden of assessing the impact of proposed works on the character or appearance of a conservation area in order to identify whether or not CAC was required. As indicated above, this is a multi-factorial question to be considered by reference potentially to a very wide range of considerations, including the scope of the conservation area, its demographic and population, the nature of any surrounding buildings and their occupation. The qualitative assessment is pre-eminently a matter for the planning authority to perform. It would be difficult, if not impossible, for any developer to have any degree of certainty as to whether or not CAC was required

in the first place[2]. The result contended for by Mr Clin would be absurd (adopting the wider meaning of that concept);

v) CL3 (as the Judge found) has nothing to do with what amounts to demolition. It governs how a planning authority is to deal with the grant or otherwise of permission. It demonstrates that local authorities will commonly refuse to grant CAC unless satisfied that the building to be demolished does not contribute positively to the character or appearance of an area.

72. Then there is also the decision in *Shimizu*, which reinforces (if not dictates) the conclusion as a matter of principle that the assessment of whether or not works amount to demolition is a quantitative exercise.

73. It appeared to be submitted for Mr Clin at one stage that the principles in *Shimizu* were not applicable to Part II of the PLBCAA and the conservation area (as opposed to the listed building) regime. However, Mr Moran clarified that it was accepted that the principles in *Shimizu* applied. (It would have been difficult for him to do otherwise, given Mr Clin's position below (as reflected in [30] of the Judgment) and as set out in Mr Clin's skeleton on appeal (which expressly accepted that the analysis in *Shimizu* "applied equally to s. 74 of the Ac").) It is nevertheless suggested for Mr Clin that the ratio of *Shimizu* is only narrow and that the various passages relied upon by the Judge and Walter Lilly were *obiter dicta.* Further, the House of Lords in *Shimizu* did not consider s. 72.

74. In *Listed Buildings and Other Heritage Assets* it is suggested (at 12-053) that it is arguable that the observations in *Shimizu* at 183B – E were obiter, "but the better view would seem to be that they formed an integral part of [Lord Hope's] analysis of the statutory code and thus of the decision".

75. I do not consider it necessary or helpful to carry out a detailed analysis of which parts of Lord Hope's opinion formed part of the strict *ratio decidendi* and which did not. Even if parts were obiter, they are to be accorded significant weight, given their provenance. It is clear that both Parts I and II of the PLBCAA were before and expressly under consideration by the House of Lords, including s. 74. The concept of "demolition" appears in both Parts I and II of the PLBCAA; it is clear that both Parts were before and expressly considered by the House of Lords. (Indeed, Lord Hope's analysis of the correct approach to demolition follows immediately upon his references to s. 74.) At no stage was there any suggestion that the approach to assessing whether or not there was demolition in Part II should be in some way different to the approach in Part I. This is not surprising; one would expect a consistency of approach to what is a single concept.

76. What *Shimizu* confirms is that the question of whether or not demolition of a building is involved is a question of fact and degree to be assessed on a quantitative basis ie by reference to the extent of the demolition (see for example 185F-H, 186C and 187B). There is no suggestion that there is any qualitative exercise (by reference to impact on

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[2] It is to be noted that there is no statutory procedure enabling a landowner to find out, in case of doubt, whether CAC/demolition permission is required for intended works to a building in a conservation area. There is, in particular, no equivalent in the PLBCAA to the procedure in ss. 191 to 193 of the TCPA (see the discussion by McCombe J (as he then was) in *Chambers and another v Guildford Borough Council* [2008] EWHC 826 (QB); [2008] JPL 1459 at [13]).

the character or appearance of the surroundings or otherwise) to be carried out. This applies to the conservation area regime in Part II of the PLBCAA just as it does to the listed building regime in Part I of the PLBCAA.

77. Further support for the conclusion that questions of character are not relevant to whether or not a building is demolished is to be found in s.7(1) of the PLBCAA which provides:

> "(1) Subject to the following provisions of this Act, no person shall execute or cause to be executed any works for the demolition of a listed building or for its alteration or extension in any manner which would affect its character as a building or special architectural or historic interest, unless the works are authorised under section 8."

The words "for" separate out demolition on the one hand, and alteration or extension on the other. It applies to listed buildings only but, as indicated, consistency of approach within a single piece of legislation is to be assumed (absent any indicator to the contrary). On the second limb (relating to alteration or extension), there is a restriction on works which would affect the character of the listed building. But there is no such restriction or consideration in the context of demolition. All this points to the fact that considerations of character (and appearance) are not relevant to the assessment of demolition under the PLBCAA.

78. There is nothing in the criticism of the Judge's comparison with building operations amounting to development as contained in a single sentence at the end of [38] of the Judgment. All that the Judge was there doing was emphasising that whether or not demolition is taking place is a prior question to the question of grant of CAC.

79. Before leaving Ground 1 I would mention one final matter for the sake of completeness only, since it does not affect the above reasoning on demolition. As already indicated, the House of Lords held that where the word "building" appeared in the phrase "listed building", the extended definition of "building" as including "any part of a building" in s. 336 of the TCPA does not apply. The extended definition is to be left out of account. The logic of Lord Hope's conclusion in this regard was that the context required that it should not (for the purpose of s. 91(2) of the PLBCAA[3]). That context was the fact that the listing process itself delineates what has been listed (which may be only part of the building) (see s. 1(5) of the PLBCAA) (see 180, 182G-H and 183A).

80. That logic does not seem to me to apply to an unlisted building in a conservation area where the definition of building is left at large. Therefore, to the extent that Lord Hope decided that the word "building" in Part II of the PLBCAA is not to be taken as including "any part of a building", I would respectfully query it. As stated, this does not affect the outcome on Ground 1 (although, if anything, if right, it would strengthen Walter Lilly's position), but it might be a question for another day.

[3] S. 91(2) of the PLBCAA provides that the meaning of "building" was (subject to s. 91(6) and (7)) to have the same meaning as in the TCPA "except in so far as the context otherwise requires".

81. Dismissal of Ground 1 is not dispositive of Grounds 2 and 3 but it certainly materially diminishes their strength, not least since much of Mr Clin's argument on Ground 1 is relied on in support of Ground 2 in particular.

Grounds 2 and 3

The standard of appellate review

82. Grounds 2 and 3 involve challenges against either the Judge's findings of fact and/or evaluative findings.

83. Appellate courts have been warned repeatedly, including by recent statements at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The reasons for this approach are many. They include:

   i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed;

   ii) The trial is not a dress rehearsal. It is the first and last night of the show;

   iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case;

   iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping;

   v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence);

   vi) Thus, even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.

   (See *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at [114].)

84. The relevant line of authorities is well-known and includes *Fage UK Ltd (supra); Hamilton v Allied Domecq Plc* [2006] SC 221 at [85]; *Henderson v Foxworth Investments Ltd* [2014] UKSC 41 at [62]; *Haringey LBC v Ahmed & Ahmed* [2017] EWCA Civ 1861 at [29]-[31]; *Volcafe Ltd & Ors v Compania Sud Americana De Vapores SA* [2019] AC 358 at [41]; *Perry v Raleys Solicitors* [2020] AC 352 at [52]; *Wheeldon Brothers Waste Ltd v Millennium Insurance Company Ltd* [2019] 4 WLR 56 at [7] to [18]; *JSC BTA Bank v Ablyazov* [2018] EWCA Civ 1176 at [40]; *R (Bowen) v Secretary of State for Justice* [2018] 1 WLR 2170 at [65]; *Re Sprintroom Ltd* EWCA Civ 932 at [76]; *PN (Uganda), R (On the Application Of) v Secretary of State for the Home Department* [2020] EWCA Civ 1213 at [62]; *Group Seven Ltd v Nasir* [2020] Ch 129 at [21].

85. In essence the finding of fact must be plainly wrong if it is to be overturned. A simple distillation of the circumstances in which appellate interference may be justified, so far as material for present purposes, can be set out uncontroversially as follows:

    i) Where the trial judge fundamentally misunderstood the issue or the evidence, plainly failed to take evidence in account, or arrived at a conclusion which the evidence could not on any view support;

    ii) Where the finding is infected by some identifiable error, such as a material error of law;

    iii) Where the finding lies outside the bounds within which reasonable disagreement is possible.

86. An evaluation of the facts is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and appellate courts should approach them in a similar way. The appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the trial judge's treatment of the question to be decided, such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion.

87. The degree to which appellate restraint should be exercised in an individual case may be influenced by the nature of the conclusion and the extent to which it depended upon an advantage possessed by the trial judge, whether from a thorough immersion in all angles of the case, or from first-hand experience of the testing of the evidence, or because of particular relevant specialist expertise.

Disposal

88. I am not persuaded that there is any proper basis for interfering with the Judge's finding on the facts that the Works amounted to demolition of the Building for the purpose of s. 74.

89. Criticism is made of the Judge's use of the phrase of "substantial demolition" at various points in the Judgment (for example at [112] and [113]) ; it is said that he should have referred (by reference to *Shimizu*) to "substantial removal of the whole of the building" or "clearing of the site for redevelopment". However, it is accepted that the Judge correctly identified the law (by reference to *Shimizu*) at [33] of the Judgment. He clearly understood the (correct) test to be applied. In referring to "substantial demolition" he was doing no more than adopting a shorthand (which the parties had in fact themselves used) for that test.

90. The Judge faithfully applied that test to the factual and expert evidence before him in reaching the conclusion that he did (at [130]) that the Works amounted to demolition of the Building. He accepted Dr Miele's views (as recorded at [113] to [115] and [129]) and rejected those of Mr Bowles (at [117] to [118] and [129]).

91. I do not consider that there is any justified criticism of [116] of the Judgment. The Judge was entitled to reject the specific submission made for Mr Clin that the significance attached by Dr Miele to the removal of the partition wall between Nos 48

and 50 was greatly overstated because a "box" representing the house, namely the party walls with Nos 46 and 52 and most of the front and much of the rear elevations, was to remain. (Whilst I fully accept that the reference to façade schemes in *Shimizu* (at 185F-H) is illustrative only, *Shimizu* does demonstrate that a property in a terrace (with sidewalls and façades – and indeed chimneys - being maintained) can nevertheless be demolished.) The Judge was also entitled to conclude that the presence of substantial temporary and permanent steel structures did not point away from demolition. Indeed, it demonstrated the need for support for all that was to remain.

92. The Judge was entitled to find further support for Dr Miele's views from the events of 2013 themselves (including RBKC's views at the time). There is no criticism of the Judge's approach to what was described as a 50% "rule of thumb" test.

93. Mr Moran suggested that in considering the extent of demolition, regard should have been paid to the size of the whole site, including not only the Building but also its rear garden. This, however, ignores the fact that s. 74 refers to demolition of a "building" (not the whole site on which it stands).

94. The Judge then reached his overall finding on demolition at [130], as set out above. Put simply, he was entitled to conclude that so much of the Building was being demolished and the (relevant) site being cleared for redevelopment that the Works amounted to demolition. What is left of Mr Clin's appeal (after the dismissal of Ground 1) amounts to little more than disagreement with the Judge's finding on the facts.

95. Ground 3 criticises the Judge's reference in [130] of the Judgment to multiple properties when, by reason of the CLOPUD, there was only one. I do not accept the criticism: the point being made by the Judge (as was emphasised by Dr Miele and recorded at [115] of the Judgment) was that the internal structure of the property was being completely demolished. The removal of the partition wall between Nos 48 and 50 was particularly significant because that wall had served the structural purpose of supporting at one end all of the internal structures at Nos 48 and 50. With the removal of the partition wall, the sites of both houses were being cleared for redevelopment. The CLOPUD had no bearing on this issue.

96. It is also suggested that the Judge was wrong in [130] to place any reliance on the reason why parts of the façades were being retained (by reference to PTP's understanding that CAC would not be granted otherwise). The Judge's reference to the reasons why there was not more demolition proposed did not relate directly to the central question (as to the extent of actual demolition proposed). It merely served to emphasise the extent of the scheme as it had developed (and narrowed). (At the pre-application advice stage the demolition of the whole of the front elevation at No 48 was being proposed.)

97. Finally, and as a forensic aside only, I would add that it would be a most surprising outcome for the Judge's conclusion that the Works amounted to demolition to be overturned as wrong in principle or in some way perverse on the facts in circumstances where both experts were expressly agreed that RBKC's view in 2013 that CAC was required was not unreasonable.

The Respondent's Notice

98. In the light of these findings, it is not necessary to consider Walter Lilly's alternative position advanced by reference to the July 2013 letter, namely that the letter amounted to a "Statutory Requirement" within the meaning of the Contract, in any event entitling Walter Lilly to the relief granted in the Order.

Conclusion

99. For all these reasons, I would dismiss the appeal.

Lady Justice Asplin:

100. I agree.

Lord Justice Lewison:

101. I also agree.