



Law Commission

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DESTRUCTION OF HERITAGE ASSETS – THE LEGAL CONSEQUENCES

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The problem ...



Unauthorised works

Development carried out without planning permission is “a breach of planning control”; can be the subject of enforcement action;

- failure to comply with enforcement notice can then be the subject of prosecution

Works to listed buildings without listed building consent (and unauthorised demolition in a CA) can be the subject of either

- prosecution, or
- enforcement action.

Unauthorised works to a listed building

LBC required for:

- works for the demolition of a listed building; or
- works for its alteration or extension in any manner which affects its character as a building of special architectural or historic interest.

(note: not any alteration)

- PLBCAA 19990, sections 7, 9

Rationale

Direct criminal liability necessary to avoid irreplaceable loss (as with protected trees).

But

- all buildings are old (more or less); and
- cannot expect to control all works.

Powers (enforcement or prosecution) must be used sensibly.

... and remember justice as well as law.

In practice

May be deliberate demolition

- usually as prelude to redevelopment of site
- relatively rare.

May be “accidental” demolition

- including collapse during permitted works.

May be due to insufficient care.

Or may be genuine accident...

... particular situations

Building burnt before or after being listed

Accidental fire followed by demolition of what remains
(Silchester)

Building being demolished for safety reasons

Building being sold in kit-form (Stagbatch Barn)

Breach of conditions on listed building consent.

Prosecution for unauthorised demolition of listed building

Prosecution to prove beyond reasonable doubt:

- the building was listed
- works were carried out “for” demolition
(ie, not genuine accident)
- accused carried them out, or caused or permitted them
(may be tricky with larger projects).

No need to prove that the accused knew it was listed
(and may be prejudicial to show knowledge: *Sandhu*).

Defence to prosecution

Accused to prove (on balance of probabilities):

- the existence of consent (not for prosecution to disprove).

May be able to prove:

- works were urgently necessary (for health, safety, or preservation of building); and
- not practicable to rely on repairs, temporary support or shelter; and
- works limited to minimum measures immediately necessary; and
- planning authority notified in writing as soon as practicable.

Unauthorised demolition in a conservation area

Demolition (not alteration) of unlisted building in a conservation area needs:

- planning permission (in England);
- conservation area consent (in Wales, Scotland and Northern Ireland).

Unauthorised demolition is an offence.

Prosecution as for listed buildings.

Unauthorised alterations to listed building

Basically as for demolition, but authority must be able to show that works affected character of building as building of special architectural or historic interest.

Care needed where works includes negative and positive phase; consider programme as a whole.

May need a statement as to basis of guilty plea.

Duress of circumstances

Accused may be able to avoid conviction if able to show:

- genuinely believed works were necessary to avoid death or serious physical injury; and
- response to perceived threat was reasonable and proportionate (*Palmer*).

To avoid this, planning authority should visit site, and offer written advice as to how to avoid danger (eg by propping or fencing).

Decision to prosecute

Standard CPS test:

1. Is there a realistic prospect of conviction?
2. Would prosecution be in the public interest
 - How serious is offence?
 - What is culpability of defendant?
 - What is impact on community?
 - Is prosecution an proportionate response?

No time limit; but delay undesirable.



Procedure generally



“Well”, said Owl, “the crustimoney proseedcake in such cases is as follows...”

“What does Crustimoney Proseedcake mean?” said Pooh, “for I am a Bear of Very Little Brain, and long words bother me.”

Evidence and procedure

Where possible, save time by “formal admissions”.

Evidence should not be included as to knowledge or intention – irrelevant to liability, but not as to sentence.

Maximum fine now the same in the Crown Court (jury) or magistrates’ court;

latter is generally preferable (quicker, cheaper), but not if point of law involved, or confiscation order sought.

Appeal from Magistrates to Crown Court, then to Divisional Court and (with permission) to Supreme Court

Sentencing

Maximum sentence since 2015:

- Crown Court: 24 months prison or unlimited fine;
- Magistrates' court: 6 months or unlimited fine.

Imprisonment unheard of in practice.

Factors to consider:

- degree of damage to historic structure;
- degree of financial gain arising from offence;
- degree of culpability;
- means of accused.
- guilty plea at first opportunity.

Sentencing in practice

In practice, fines vary from £100 (“prosecution a gross misuse of public funds” to £200,000.

Extensive database on IHBC website, produced and maintained by Bob Kindred.

- approx 290 convictions in 20 years (c. 15 per year);
- but doesn't include acquittals;
- and may not include low sentences.

Also helpful digest exploring some cases in more detail.

Prosecution of Offenders Act 2002

“Those who choose to run operations in disregard of planning enforcement requirements are at risk of having the gross receipts of their illegal businesses confiscated. This may greatly exceed their personal profits. In this respect they are in the same position as thieves, fraudsters and drug dealers.”

(Court of Appeal in *Basso*)

Prosecution of Offenders Act 2002

Following prosecution, court may impose confiscation order – reflecting gain from “criminal lifestyle” or “criminal conduct”:

- *Rance* (demolition in a conservation area, 2012) – £120,000 fine, £100,000 costs, no POCA order;
- *Davey* (felling of TPO tree, 2013) – £50,000 POCA order (gain in value of property), £75,000 fine (on top), £14,500 costs;
- *Bahbahani* (non-compliance with planning enforcement notice, 2018) – £2,000 fine, £4,330,000 POCA order (with eight years prison in default of payment).

Prosecution of Offenders Act 2002

37½ per cent of money recovered under the order goes to the prosecuting authority.

However, Court of Appeal has sounded warning against over-enthusiasm:

The possibility of a POCA order being made in the prosecutor's favour should play no part in the determination of the evidential and public interest test within the Code for Crown Prosecutors.

(non-compliance with enforcement notice, *Scott*, 2019)

Enforcement action

Cheaper and easier than prosecution, but only appropriate where remedial action is possible.

May need both listed building enforcement notice and planning enforcement notice

Breach of condition: consider issuing:

- enforcement notices or
- breach of condition notice.

The decision to enforce

Action must be expedient in the light of:

- effect of works on character and appearance of building (LB building enforcement notice)
- development plan and other material considerations (planning enforcement notice).

Consider carefully what to require.

Issue enforcement notice; serve copies:

- LB enforcement notice: no time limit (*Braun*)
- planning enforcement notice: 4 years (or 10 yrs for breach of condition or change of use).

Appeal against enforcement notice

- Copies of notice not served properly;
- Alleged breaches:
 - have not occurred, or
 - didn't need consent / permission
 - were works urgently necessary for health or safety etc;
- Too late for enforcement (*planning enforcement notice only*);
- Consent / permission should be granted
 - (or conditions discharged)
- Building not listed (*LB enforcement notice only*);
- Steps required:
 - excessive;
 - won't have the desired effect;
- Time for compliance too short.

Appeal procedure

Procedure as for other appeals

- although inquiries or hearings more common
- almost always decided by inspectors.

Watch out for technicalities.

Further appeal to High Court, Court of Appeal and Supreme Court (all require permission).

Subsequent procedure

Planning authority can enter land and carry out works required by notice.

Non-compliance with notice is offence.

Cases of urgency

Normal planning powers can be used – stop notices, injunctions etc

Injunction can be sought from High Court or County Court to prevent work to listed building expected (or under way).

Also, temporary listed buildings stop notice (Wales) and listed buildings stop notice (Scotland)

Retrospective permission / confirmatory consent

It is possible, and may be more appropriate, to invite application for retrospective permission / confirmatory consent

- Enforcement action in reserve, although may not be appropriate just to regularise position.

Special procedure available in

- Wales (“enforcement warning notice”) and
- Northern Ireland (notice under PA(NI) 2011, s 44).

Conclusion



“Formerly we
suffered from crimes;
now we suffer from
laws”

(Tacitus, Annales,
3:25)

Thank you
Diolch yn fawr

