

# Contested Heritage

10<sup>th</sup> February 2021

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# Contested Heritage: checklist

- (1) Is it subject to listed building control?
- (2) What planning controls apply?
- (3) Who owns it?
- (4) What policy considerations apply?

# Contested Heritage: Listed building control

Catherine Dobson

# Is it a building?

For purpose of determining whether garden objects or structures as “buildings” in their own right apply the *Skerritts*/planning test: *Dill* [2020] 1 WLR 2206 at § 59

- Size
- Permanence
- Degree of physical attachment



Crystal Palace Dinosaurs



Reclining Woman, Henry Moore

# Is it fixed to a building?

For the purposes of applying the extended definition, apply real property concepts under the common law: *Dill* at § 39:

- (1) method and degree of annexation;
- (2) the object and purpose of the annexation



‘Old Flo’, Henry Moore



30 Torrington Square,  
Bloomsbury  
c.1913

# Is LB consent required?

- Demolition
- Alteration – does it affect the special interest?
- Removal/relocation?



Monument to Sir Samuel Sadler



Removal of Robert E. Lee Statue In Dallas

# Applying for LB consent/de-listing

## Listed building consent/certificate of lawfulness

- Application to local planning authority under s.10/s.26H Listed Buildings Act 1990
- SoS may call in
- Notice to Historic England and National Amenity Societies if:
  - Works to grade I or II\*
  - Demolition of grade II principal building
  - Applications by LPA

## De-listing

- Application to Historic England
- Recommendation to SoS who takes decision whether to de-list
- HE guidance (2019): The SoS will remove a building from the List only if it no longer meets the criteria of special architectural or historic interest.

# Contested Heritage: Planning Control

Richard Harwood QC

# Whether planning permission is needed

- Whether building or part of a building
- Exclusions: no material effect on external appearance or internal
- Demolition not development if under 50m<sup>3</sup> (outside conservation areas), 2014 Direction



Gift Horse by Hans Haacke

# Conservation Areas

- Relevant demolition
- More than 115 m<sup>3</sup> (but 50 m<sup>3</sup> is development)
- Pre-1925 tombstone: 'a monument or memorial to a deceased person which was erected before 1 January 1925'
- [Conservation Areas \(application of section 74 of the Planning \(Listed Buildings and Conservation Areas\) Act 1990\) Direction 2015](#)



Horse and Rider by Elisabeth Frink

# Permitted development

- Demolition or alteration?
- Demolition Part 11, Class B (not part of a building; or in conservation areas)
- Alteration: eg householder, office, education, rail
- Article 4 directions



Isambard Kingdom Brunel by John Doubleday

# Expected changes

- Written Ministerial Statement 'removal of any historic unlisted statue, plaque, memorial or monument subject to an explicit requirement to obtain planning permission' 18 January 2021
- Amend Demolition Direction
- Amend permitted development for demolition and alteration
- Notice to Historic England and Amenity Societies (DMPO)
- Ref to SoS under TCP (Consultation) (England) Direction 2009 if HE/NAS objection

# Contested Heritage: Property law considerations

David Sawtell

# Contested art, contested ownership?



Draped  
seated woman  
(1958 bronze)  
in Grimwade  
Gardens,  
National  
Gallery of  
Victoria (NGV)

Donal dytong, CC BY-SA 3.0 <<https://creativecommons.org/licenses/by-sa/3.0>>, via Wikimedia Commons

# Who owns a statue?

- Is it personal property i.e. does it remain a chattel? (who owns the chattel?)
- Or does it become part of the land? (owner of the land owns the statue. But who owns the land?)

*Elitestone Ltd v Morris* [1997] 1 WLR 687

# Application to art



- Tapestry – *Leigh v Taylor* [1902] AC 157
- Clock - *Kennedy v Secretary of State for Wales* [1996] EGCS 17
- Statue and sundial - *Berkley v Poulett* [1977] 1 EGLR 86

Source: [archive.historicengland.org.uk](http://archive.historicengland.org.uk)

# Application to art

*Berkley v Poulett* [1977] 1 EGLR 86 at 89 per Scarman LJ

- “The best argument for the statue being a fixture was its careful siting in the West Lawn so as to form an integral part of the architectural design of the west elevation of the house. The design point is a good one so far as it goes: it explains the siting of the plinth, which undoubtedly was a fixture. But what was put upon the plinth was very much a matter for the taste of the occupier of the house for the time being. We know that at one time the object on the plinth had been a sundial. At the time of the sale it was this statue of a Greek athlete. The plinth's position was architecturally important: it ensured that whatever stood on it would be correctly positioned. **But the object it carried could be whatever appealed to the occupier for the time being.**”

# *London Borough of Tower Hamlets v The London Borough of Bromley [2015] EWHC 1954 (Ch)*

*“What is this? Is this monstrosity supposed to represent Womanhood? Surely there is something wrong with Art when it deliberately sets out to portray a malformed, ill-proportioned wench as a woman. What does the statue, just off Jamaica Street suggest to the passer by? I see on the mound a heap of metal roughly moulded, it is large and it is ugly. I think of the many Stepney Matrons I have the pleasure of knowing. Does this statue do them justice? No!”*

# *London Borough of Tower Hamlets v The London Borough of Bromley [2015] EWHC 1954 (Ch)*

- London County Council acquired the statue, located it in Stepney
- Held not to be part of the land
- Did not form part of an integral design of the estate

# *London Borough of Tower Hamlets v The London Borough of Bromley [2015] EWHC 1954 (Ch)*

- Who owned the statue?
- The LCC became the GLC, and the statue vested in it
- Held that Tower Hamlets had converted the statue, Bromley's title to it had been extinguished

# *London Borough of Tower Hamlets v The London Borough of Bromley [2015] EWHC 1954 (Ch)*

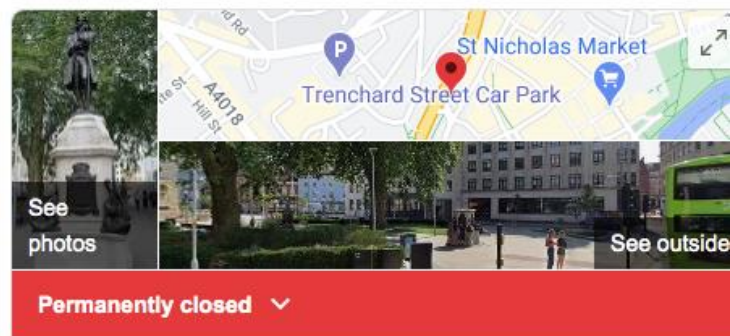
- Removed from its site
- Loaned contractually to a sculpture park
- Undertaken further restoration

# Disputed title to statues

- Objects in museum collections – custodians or conversion?
- What do you do with ‘unwanted’ objects?
- If a statue is on public display, is it part of the land?



Proposed British Museum  
Archaeological Research Collection  
(<https://www.mcaslan.co.uk/work/british-museum-archaeological-research-collection> )



## Statue of Edward Colston

Directions

Save

4.9 ★★★★★ 17 Google reviews

Statue by John Cassidy

The statue of Edward Colston is a bronze statue of Bristol-born merchant Edward Colston, which was originally erected in The Centre in Bristol, England. It was created in 1895 by the Irish sculptor John Cassidy and erected on a plinth of Portland stone. It was designated a Grade II listed structure in 1977. [Wikipedia](#)

**Artist:** [John Cassidy](#)

**Address:** Colston Ave, Bristol BS1 4TB

**Opened:** 1895

**Subject:** [Edward Colston](#)

**Medium:** Bronze

REASONS FOR DESIGNATION The statue of Edward Colston is designated at Grade II for the following principal reasons: \* A handsome statue, erected in the late C19 to commemorate a late C17 figure; the resulting contrast of styles is handled with confidence \* The statue is of particular historical interest, the subject being Edward Colston, Bristol's most famous philanthropist, now also noted for his involvement in the slave trade. \* Group value with other Bristol memorials: a statue of Edmund Burke, the Cenotaph, and a drinking fountain commemorating the Industrial and Fine Art Exhibition of 1893

# De-listing?

- Power to amend the list, s1 P(LBCA)A 1990. Amendment of the list is a matter for consultation (s.1(4) P(LBCA)A).
- “The statutory criteria for a building being included on the List are that it holds special architectural or historic interest. The Secretary of State will remove a building from the List only if it no longer meets these criteria.
- Historic Interest – to be able to justify special historic interest a building must illustrate important aspects of the nation’s history and/or have closely substantiated historical associations with nationally important individuals, groups or events; and the building itself in its current form will afford a strong connection with the valued aspect of history.”
- Historic England, [Removing a Building from the List](#), January 2019

Photo credit: The  
Independent



Which statues are on the three plinths in Trafalgar Square?



## Details

BRISTOL

ST5872 ST AUGUSTINE'S PARADE, Centre 901-1/16/2138 (East side) 04/03/77 Statue of Edmund Burke (Formerly Listed as: COLSTON AVENUE Statue of Edmund Burke)

II

Statue of Edmund Burke. Dated 1894. Donated by Sir WH Wills. Bronze statue of a pointing figure, on a red granite plinth with moulded top inscribed on the front EDMUND BURKE/ 1774-1780/ I WISH TO BE AN MP TO HAVE MY SHARE OF DOING GOOD AND RESISTING EVIL/ SPEACH AT BRISTOL 1780, and on the back SIR WH WILLS 1894.

Listing NGR: ST5859972948

## Legacy

The contents of this record have been generated from a legacy data system.

Legacy System number: 380419

Legacy System: LBS

Photo credit: English Heritage

“You choose a member indeed; but when you have chosen him, he is not a member of Bristol, but he is a member of parliament.” *Speech to the Electors of Bristol of 1774*

‘The speech is cited in constitutional and political argument to this day. That it was made in Bristol makes it part of the city's history and heritage. Burke is by far the most distinguished political figure ever to have represented the city, and he is certainly the one with the most enduring international reputation.’ [Chris Bertram](#)

# Relocation

*Judge v First SoS* [2005] EWCA Civ 1155 held that “relocation” was simply a convenient shorthand for demolition (s. 7) and reconstruction (s. 17), both of which were clearly within the powers conferred by the Act.

A local authority would need permission from the SoS (Reg 13(2-2A), Planning (Listed Buildings and Conservation Areas) Regulations 1990, see also the Arrangements for Handling Heritage Applications – Notification to Historic England and National Amenity Societies and the Secretary of State (England) Direction 2015).

In the CA, refusing leave to appeal, Buxton L.J. held that:

"True it is, of course, that the code in terms does not deal with the moving of a building. But I find it impossible to say that such a step is excluded from the code--that is to say, excluded from any possibility of receiving listed building permission--merely by the fact that an object of this sort is to be moved rather than left in its place" (citing *Leominster*).

# Granting permission for a relocation

- Both dismantling and re-assembly to be considered as part of the same operation: *R. (on the application of East Riding of Yorkshire Council) v Hobson* [2009] P.T.S.R. 562 per Keene LJ.
- The significance of the list description was considered by the House of Lords in *City of Edinburgh Council v Secretary of State for Scotland* [1998] 1 All ER 174. Though this focuses more on what is listed, rather than why it is listed.
- NPPF (draft) 196: In determining applications, local planning authorities should take account of:
  - a) *the desirability of sustaining and enhancing the significance of heritage assets and putting them to viable uses consistent with their conservation ...*
- Editor of *JPEL* on *Leominster* (J.P.L. 1988, Aug, 554-557): “the relevant sections were not drafted with the present circumstances in mind: the wording does not really fit”.

# Revised NPPF text for consultation

NPPF (draft) 197: In considering any applications to remove or alter a historic statue, plaque or memorial (whether listed or not), local planning authorities should **have regard to** the importance of retaining these heritage assets and, where appropriate, of explaining their historic and social context rather than removal.

“To *have regard to* a matter means simply that that matter must be specifically considered, not that it must be given greater weight than other matters, certainly not that it is some sort of trump card. It does not impose a presumption in favour of particular result or a duty to achieve that result. In the circumstances of the case other matters may outweigh it in the balance of decision-making. On careful consideration the matter may be given little, if any, weight.”

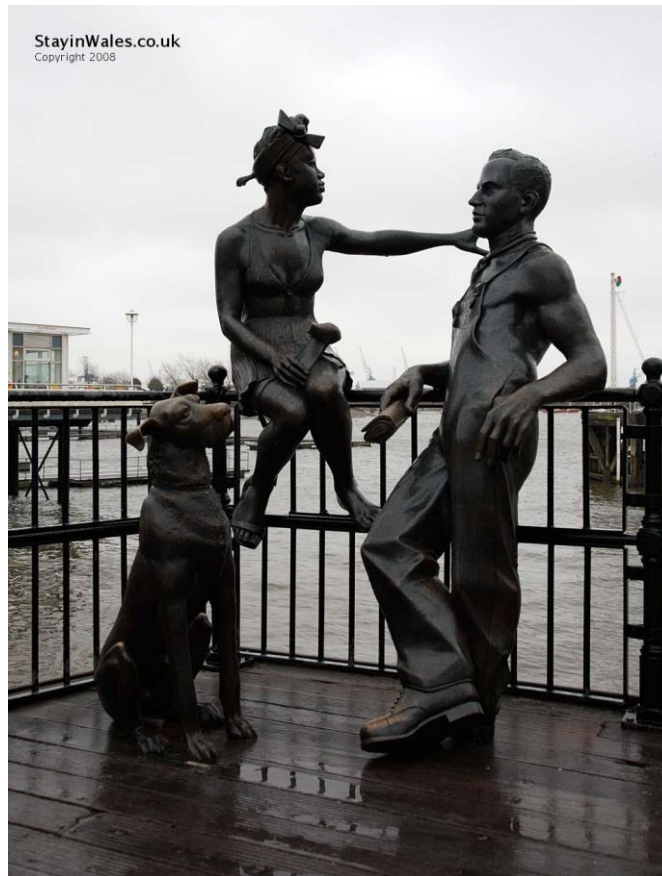
Cranston J. *Howell v SoS CLG* [2014] EWHC 3627  
(Admin).

“‘have regard to’ ... leaves scope for some divergence from national policies” Sir David Keene in *Howell* [2015] EWCA Civ 1189

# Considerations & Material Considerations

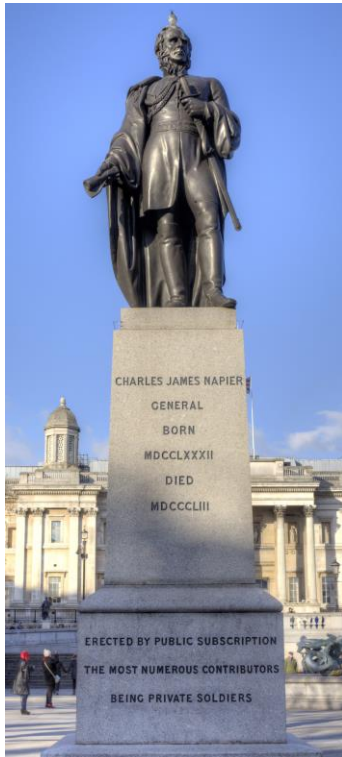
Aesthetics? Causing offence? The reasons we might move a statue such as Colston, or Burke, are not really covered by the current regime.

- P(LBCA)A 1990, s. 16(2) 'special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses'.
- (NPPF, draft 8(b)) a social objective – to support strong, vibrant and healthy communities ... by fostering a well-designed, *beautiful* and safe places built environment ...
- (NPPF, draft 193) In determining applications, local planning authorities should require an applicant to describe the significance of any heritage assets affected, *including any contribution made by their setting* ...
- (NPPF, draft 194) Local planning authorities should identify and assess the particular significance of any heritage asset that may be affected by a proposal (*including by development affecting the setting of a heritage asset*) taking account of the available evidence and any necessary expertise ...



People like us (John Clinch)  
credit: StayinWales.com

Photo



Sir Henry Napier  
Photo credit: Wikipedia



George IV  
Photo credit: Wikimedia



Major General Sir Henry  
Photo credit: Military.wiki



Hahn/Cock (Katharina Fritsch)  
Photo credit: Wikipedia



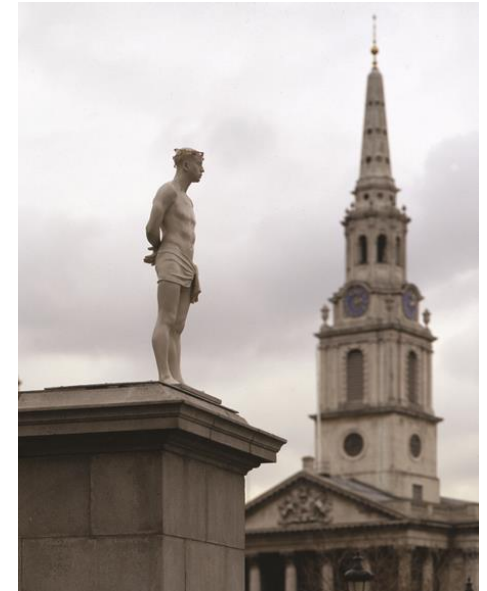
Ship in a Bottle (Yinko Shobari)  
Photo credit: Wikimedia



The End (Heather Phillipson)  
Photo credit: BBC



Alison Lapper Pregnant (Marc Quinn)  
Photo credit: Artat site.com



Ecce Homo (Mark Wallinger)  
Photo credit: Londonhua Wiki



[Wellcome Trust](#)

“... ‘Jenner’ was banished. A non-military character, sitting reflectively, and not astride a horse, was thought inappropriate in Trafalgar Square. It was an area devoted to British success at arms and to the nation's military heroes. The Times spoke up for his removal and it was demanded in Parliament. The medical profession, led by The Lancet and the British Medical Journal, were up in arms and responded vigorously. Punch, sitting on the sidelines, contributed poetically in verse, ironically, saying:

England's ingratitude still blots  
The escutcheon of the brave and free;  
I saved you many million spots,  
And now you grudge one spot for me.”

John Empson, ‘Little honoured in his own country: statues in recognition of Edward Jenner MD FRS’

[J F Soc Med 1996;89:514-518](#)

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# Thank you for listening!

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