

IN THE MATTER OF NO.1 POULTRY

ADVICE

1. I am instructed to advise the Twentieth Century Society on the decision of the Secretary of State for Culture, Media and Sport of 3rd December 2015 not to list No.1 Poultry, City of London.

Summary

2. The Planning (Listed Buildings and Conservation Areas) Act 1990 (“Listed Buildings Act”) requires the Secretary of State to list a building if he considers it to be of special interest. The references in the non-statutory *Principles of Selection of Listed Building* to ‘buildings of less than 30 years old are normally listed only if they are of outstanding quality and under threat’ operate as a discouragement to investigation of special interest and a caution that it may be more difficult to ascertain whether a building which has not yet stood the test of time is of special interest. If the Secretary of State considers a building to be of special interest then he must list it, even if he does not consider it to be of outstanding interest or under threat.
3. In these particular circumstances there have been irregularities in the listing decision process which are evidence that the decision has been wrongly made:
 - (a) the reasons do not disclose whether the Minister considered whether No.1 Poultry was of special interest. If he decided it had such interest then he was obliged to list the building irrespective of whether it was under threat. The reasons are therefore inadequate as they leave open a very real possibility that the decision was wrong and that a significant legal error was made;
 - (b) as the merits of the building have been consulted upon and considered by Historic England there is no rational reason for the Secretary of State not to consider whether the No.1 Poultry is of special interest. He is sufficiently well informed to take a view and it was irrational not to do so.
4. These irregularities in the listing decision meet the criteria for a review in the DCMS *Guidance on Making a Request to Review a Listing Decision*. They also amount to identified legal errors which can be avoided by a review.

Background

5. No.1 Poultry was constructed in 1994 to 1998 following an epic planning battle. It replaced eight listed buildings on the Mappin and Webb site in the City of London. The Secretary of State for the Environment agreed with his Inspector that James Stirling's 'design has a strong consistency and character and is one which would be a worthy modern addition to the architectural fabric of the City'.¹ Consequently there were special circumstances which overrode the presumption in favour of the retention of the listed buildings. The Minister's decision was challenged but ultimately upheld by the House of Lords in *Save Britain's Heritage v Number 1 Poultry Limited*.²
6. In 2015 pre-application discussions took place between the building owner and the City of London Corporation in respect of alterations to No.1 Poultry. These prompted the Twentieth Century Society to make an application to the Secretary of State for Culture, Media and Sport, via the usual route of Historic England, for the building to be listed as being of special architectural or historic interest.
7. On 15th May 2015, Wood Grafton One Sarl made a planning application to the Corporation for:³

“Refurbishment and alterations to including change of use from a shop (A1) to create a new office reception (B1) and flexible shop/office (A1/B1) use at ground floor level.”
8. Historic England carried out an inspection of the building on 9th July 2015 and ultimately recommended that it be listed at grade II*. The listing application was supported by Lord Palumbo, who commissioned the building, Mary Stirling (James Stirling's widow), his partners Michael Wilford and Laurence Bain, and other leading architects including Lord Foster, Dame Zahid Hadid and Lord Rogers.
9. The owners and tenants considered that the building should not be listed. They had commissioned a Heritage Assessment from Ken Powell which concluded that No.1 Poultry is not of more than special interest and does not warrant listing at Grade II*, additionally it was not under threat. KM Heritage, on behalf of AVIVA concluded that

¹ Secretary of State's decision, 22nd May 1985, para 6.

² [1991] 1 WLR 153.

³ Reference 15/00496/FULL.

the building did not 'have the outstanding quality required to list a building less than 30 years old'.

10. On the question of any threat, Historic England noted the owners' views and said:

"We accept that opinions differ as to whether the changes constitute a threat. We do consider, however, that the proposed changes, if effected, would alter the character and structure of the original building. Most importantly, since the question has been posed, assessment of the building will provide clarity for future management. The value of this approach has been clearly demonstrated in our recent project on post-war commercial offices 1964-1994; No.1 Poultry was identified but was not taken forward because of its age and as there was, at that time, no potential threat to it."

11. They then summarised the proposed works.

12. Historic England's assessment on the interest of the building noted that:

"In accordance with the Principles of Selection for Listing Buildings (March 2010) particularly careful selection is required for buildings dating after 1945 and for those less than 30 years old exceptional scrutiny is applied. The broad architectural and historic context in which the late C20 commercial office can be understood is set out in our Introduction to Heritage Assets 'The Late-20th Century Commercial Office' (September 2013). Our Listing Selection Guide: Commerce and Exchange Buildings (April 2011) identifies considerations for listing."

13. They considered:

"Architecturally this is an outstanding commercial building, among the best architecture of its type in the City, which if permitted to remain in its original guise will take its place among key buildings of the later C20."

14. Historic England said that James Stirling's 'hand is paramount' notwithstanding his premature death in 1992. They note that 'James Stirling has claim to be among the first modern British architects to achieve widespread international standing' and 'Of all James Stirling's major buildings in England, No.1 Poultry is the only one not yet recognised through listing'. In summary, Historic England said:

"We are aware of the high significance this case carries and have given very careful thought to our recommendation. No.1 Poultry, like other Stirling buildings, is

exacting and challenging, but it is rigorously thought through and inventive in its exploration of space and movement.

To reiterate, architecturally this is an outstanding commercial building, among the best architecture of its type in the City, which if permitted to remain in its original guise will take its place among key buildings of the later C20.

For its combined architectural authority, provenance and civic presence, as an unsurpassed example of commercial post-modernism, by an architect of international acclaim, No.1 Poultry has the undoubted high level of special architectural and historic interest to merit listing at Grade II*.

In recommending the extent of designation, we have considered whether powers of exclusion under s.1 (5A) of the 1990 Act are appropriate, and consider that they are, which is clear in the proposed List entry."

15. The proposed reasons for the designation decision were:

"REASONS FOR DESIGNATION DECISION

No.1 Poultry, designed in 1985-88 by James Stirling, Michael Wilford and Associates, and built in 1994-98 by the practice, renamed Michael Wilford and Partners after Stirling's death in 1992, is recommended for listing at Grade II* for the following principal reasons:

- * Architect: a highly significant late work by one of Britain's foremost post-war architects, which expresses Stirling's singular approach to design;
- * Architectural and design interest: an unsurpassed example of commercial post-modernism, on a monumental scale, intricate in its planning and rigorously scrutinised and executed;
- * Commercial development: one of the key developments of the post-war era, built by a prominent developer, determined to create a building of enduring quality;
- * Spatial interest and form: a striking symmetrical composition on a tightly constrained site, exemplifying Stirling's work in its exploration of space and movement through interlocking geometrical volumes and in its use of materials, colour and motifs, and exceptionally carrying this through to a dynamic interior space;

* Planning: exemplary urban contextualism in a complex spatial inter-relationship of mixed-use office and retail accommodation, a public right of way, roof garden and restaurant, entrance to the underground station and public house, where the generosity of the public realm is exceptional for a speculative scheme;

* Civic presence and group value: occupies a very prominent site in the heart of the City of London, in close proximity to highly prestigious civic and commercial buildings, which are referenced in the design."

16. Countersigning the recommendation, the Head of Designation at Historic England, Emily Gee, said:

"This assessment has had considerable thought and close involvement from the Listing Director. It is a complex case but the building is, without question, a major and important work of post-modern commercial architecture, rich in architectural quality and interest, and designed by one of the country's most significant post-war architects. We acknowledge the commercial sensitivities and have proposed a rigorously clear List entry to focus attention on the special parts of the building. No.1 Poultry merits listing at Grade II*."

17. On 3rd December 2015 the Secretary of State decided not to list No.1 Poultry, saying:

"Having considered the evidence for and against designating the building, and having had regard to the desirability of preserving or enhancing the conservation area in which it sits, the Secretary of State has decided not to list No.1 Poultry under the terms of the Planning (Listed Buildings and Conservation Areas) Act 1990.

The Secretary of State's Principles of Selection for Listed Buildings state that buildings of less than 30 years old are normally listed only if they are of outstanding quality (equivalent to Grade I or II*) and under threat. In the case of No.1 Poultry the Secretary of State has noted the view of Historic England that the proposed changes 'would alter the character and structure of the original building', but has decided that they do not represent a substantial threat to its architectural or historic interest and so the criteria for listing is not met'. In reaching this conclusion the Secretary of State has also had due regard to other representations submitted, including those from: the Twentieth Century Society; Dp9; PW Real Assets LLP;

KM Heritage; and four elected Members from the Cordwainer Ward of the City of London.”

Legislation

18. The listing of buildings is dealt with in section 1(1) of the Listed Buildings Act:

“For the purposes of this Act and with a view to the guidance of local planning authorities in the performance of their functions under this Act and the principal Act in relation to buildings of special architectural or historic interest, the Secretary of State shall compile lists of such buildings, or approve, with or without modifications, such lists compiled by the Historic Buildings and Monuments Commission for England (in this Act referred to as “the Commission”) or by other persons or bodies of persons, and may amend any list so compiled or approved.”

19. The Commission is known as Historic England. Various relevant matters are identified in section 1(3):

“In considering whether to include a building in a list compiled or approved under this section, the Secretary of State may take into account not only the building itself but also—

- (a) any respect in which its exterior contributes to the architectural or historic interest of any group of buildings of which it forms part; and
- (b) the desirability of preserving, on the ground of its architectural or historic interest, any feature of the building consisting of a manmade object or structure fixed to the building or forming part of the land and comprised within the curtilage of the building.”

20. A consultation duty is introduced by section 1(4):

“Before compiling, approving (with or without modifications) or amending any list under this section the Secretary of State shall consult—

- (a) in relation to buildings which are situated in England, with the Commission; and
- (b) with such other persons or bodies of persons as appear to him appropriate as having special knowledge of, or interest in, buildings of architectural or historic interest.”

21. Historic England’s functions include that it:⁴

⁴ National Heritage Act 1983, s 33(2).

“(b) may give advice to any person in relation to ancient monuments, historic buildings and conservation areas situated in England, whether or not they have been consulted;

(c) may, for the purpose of exercising their functions, carry out, or defray or contribute towards the cost of, research in relation to ancient monuments, historic buildings and conservation areas situated in England;

(d) may, for the purpose of exercising their functions, make and maintain records in relation to ancient monuments and historic buildings situated in England;”

22. Historic England have a general duty:⁵

“It shall be the duty of the Commission (so far as practicable)—

(a) to secure the preservation of ancient monuments and historic buildings situated in England.

(b) to promote the preservation and enhancement of the character and appearance of conservation areas situated in England, and

(c) to promote the public's enjoyment of, and advance their knowledge of, ancient monuments and historic buildings situated in England and their preservation, in exercising the functions conferred on them by virtue of subsections (2) to (4) and section 34; but in the event of a conflict between those functions and that duty those functions shall prevail.”

23. The exercise of statutory powers and duties is addressed in the Interpretation Act 1978, section 12(1):

“Where an Act confers a power or imposes a duty it is implied, unless the contrary intention appears, that the power may be exercised, or the duty is to be performed, from time to time as occasion requires.”

Policy

24. The Secretary of State has adopted non-statutory guidance on his approach to listing in Principles of Selection for Listing Buildings (March 2010). The general principle used in respect of the age and rarity include:⁶

⁵ National Heritage Act 1983, s 33(1).

⁶ Principles of Selection for Listing Buildings, para 12.

“buildings of less than 30 years old are normally listed only if they are of outstanding quality and under threat.”

25. Historic England’s current policy on whether to consider listing applications is on their website:⁷

“We only take forward applications where the building or site:

- Is under serious threat of demolition or major alteration
- Is a priority under Historic England’s Action Plan
- Has very strong potential for inclusion on the NHLE. See online form for details.”

Assessment

26. The Secretary of State decided not to list No.1 Poultry because he considered that there was no substantial threat to the architectural or historic interest of the building. He expressed no view on whether the building was of special interest or outstanding interest.

27. The duties and powers of the Secretary of State with respect to listing are by section 1(1):

(a) a duty to compile (‘shall compile’) lists of buildings of special architectural or historic interest;

(b) a duty to approve lists of buildings of special architectural or historic interest compiled by Historic England, with or without modifications;

(c) a power to amend any list so compiled or approved.

28. This can be contrasted with provisions in respect of scheduling monuments under the Ancient Monuments and Archaeological Areas Act 1979, section 1. The Secretary of State ‘shall compile and maintain ... a schedule of monuments’.⁸ On first compiling the schedule, the Minister must include those monuments which were on the list compiled under the Ancient Monuments Consolidation and Amendment Act 1913 or which were proposed to be included in it.⁹ There was otherwise a discretion to include a monument either when the schedule was first compiled under the 1979 Act or when any later amendment was considered, see section 1(3):

⁷ <https://historicengland.org.uk/listing/apply-for-listing/> [accessed 21st December 2015].

⁸ Ancient Monuments and Archaeological Areas Act 1979, s 1(1).

⁹ Ancient Monuments and Archaeological Areas Act 1979, s 1(2).

“the Secretary of State may on first compiling the Schedule or at any time thereafter include therein any monument which appears to him to be of national importance”

29. Once the Minister has decided that a monument is of national importance then he retains a broad discretion as to whether to schedule it.¹⁰
30. The listed building provisions are differently expressed. In both cases there is a duty to compile lists, however for monuments there is an express discretion whether to include those which meet the statutory criterion of national importance. No such discretion is offered for listing buildings, where the duty is to compile lists of buildings meeting the criteria. Where the list is compiled by Historic England, the duty is to approve it, with or without modifications, but the ability to modify is not based on a discretion. The implication is that lists should only be modified if the criteria are not met or there is an error which needs to be corrected.
31. A power to amend the list is then given (‘may amend’). An amendment may comprise including a building in a list¹¹ as well as altering any entry for a particular building.
32. The criteria for inclusion in the list are those of ‘special architectural or historic interest’ and the Listed Building Act leaves a duty to include such buildings when a list is first compiled. Similarly if the list is compiled by Historic England, then the Secretary of State may only add or omit buildings on the basis of these criteria. In distinction to scheduling monuments, it is not possible for the Minister to decide that the listing criteria are met but to choose not to include the building on the compiled or approved list.¹²
33. There is a discretion whether to amend the list but the Act does not allow the Minister to decline to list a building which meets the criteria. It would be a nonsense for the Minister to be able to refuse to list a building which he would have to include if the list was being compiled or approved for the first time. Otherwise it might be possible to refuse to list a building put forward by Historic England as an amendment, but the Minister would then have to approve it on a new list provided by them.

¹⁰ *R v Secretary of State for the Environment ex p Rose Theatre Trust Co* [1990] 1 QB 504 at 513-514 per Schiemann J.

¹¹ Listed Buildings Act, s 1(3).

¹² A view also taken in *Listed Buildings, Conservation Areas and Monuments*, Charles Mynors, 2006 (4th Edition), p. 75.

34. Consequently if the Secretary of State considers that a building is of special interest then it must be included in the list.
35. Whether there is a duty to act, or a discretion to do so, there does not need to be continuous consideration of whether to act. By the Interpretation Act 'the power may be exercised, or the duty is to be performed, from time to time as occasion requires'. A duty to act may therefore apply if there has been a change in circumstances but there is no need to repeatedly consider substantively unchanged applications or proposals even where there is expressed to be a duty.¹³
36. In the present case it is not known whether the Secretary of State considers No.1 Poultry to be of special architectural or historic interest, or indeed of outstanding interest. Historic England advised the Minister that it is of special interest, and indeed of outstanding interest. The owners and occupiers appear (from the Historic England summary in the assessment) to have accepted that it is of special interest. Consequently it is not apparent whether or why the Minister might consider that the statutory criteria were not met.
37. If the Minister did conclude that No.1 Poultry was of special interest then he was required to list it, irrespective of whether he considered it to be under threat. Once special interest is established in the Minister's mind, the element of threat in the non-statutory principles drop away. Similarly the Minister would have to list if the building is of special but not outstanding interest. The only assistance which the 'outstanding interest' criterion gives is that it may be harder to determine that a younger building is of special interest than one which has stood the test of time and so a more cautious approach to special interest could be taken.
38. It is not known whether the Minister considered that the statutory criteria were satisfied.
39. Whether a building is under threat can only be relevant to the preliminary question of whether to consider whether it is of special interest. The Minister is not obliged to consider every request for listing or to continue a perpetual search for new listings. A question of threat can be a preliminary screening process, having regard to the resources available to the Minister. However in the present case the work of assessing the merits of the building and consulting those interested has already been carried out by Historic England. The Minister is capable of disagreeing with Historic England's views on the

¹³ *R v Ealing London Borough Council ex p McBain* [1985] 1 WLR 1351.

merits, subject to forming a reasonable view when doing so. However he would have to address the question if Historic England proposed a fresh list for the area which includes No.1 Poultry.

40. The inclusion of 'threat' in the Principles of Selection fulfils two potential functions. The first is to screen applications to avoid investigations being carried out when there is no need to do so. That role is now carried out more widely by Historic England's application criteria. The second is to reduce the risk of a precipitant, and incorrect, listing where opinion on the special interest of a building is not fully formed. Even in such a case it is the relative newness of the building which bears on the special interest, not the level of threat. Similarly consideration of whether there is 'outstanding interest' operates to caution against finding special interest in more marginal cases, but cannot displace the statutory criteria of special interest. In the present case the work on the merits of the building has been carried out. The merit of the design was heavily debated long before the building was even constructed and as the Historic England report indicates, sufficient time has passed for the status of the building in late Twentieth Century architecture and James Sterling's work to be appreciated. The statutory criteria remain those of special interest and exist independently of whether there is a threat to the building. Provided that the work on the application has in fact been done there is no rational reason not to consider whether the building is of special interest.
41. Since Historic England have put before the Minister the question of whether No.1 Poultry is of special interest, along with the various representations made by all sides in the debate, there is no reason why he cannot reach a view on its special interest if he has not already done so. Reliance upon a conclusion that changes proposed do not threaten the building is to put off a decision in a way which can only risk harm to the interest of the building.
42. In these particular circumstances there have been irregularities in the listing decision process which are evidence that the decision has been wrongly made:
 - (a) the reasons do not disclose whether the Minister considered whether No.1 Poultry was of special interest. If he decided it had such interest then he was obliged to list the building irrespective of whether it was under threat. The reasons are therefore inadequate as they leave open a very real possibility that the decision was wrong and that a significant legal error was made;

(b) as the merits of the building have been consulted upon and considered by Historic England there is no rational reason for the Secretary of State not to consider whether the No.1 Poultry is of special interest. He is sufficiently well informed to take a view and it was irrational not to do so.

43. These irregularities in the listing decision meet the criteria for a review in the DCMS *Guidance on Making a Request to Review a Listing Decision*. They also amount to identified legal errors which can be avoided by a review. This approach does not undermine the references to threat or outstanding interest in the *Principles of Selection* but recognise the gate-keeper role of that provision. Once the merits of listing are considered, the issue is whether the building is of special interest, rather than whether it is under threat.
44. If any matters arise out of this advice, please do not hesitate to contact me in Chambers.



39 Essex Chambers

Richard Harwood QC

81 Chancery Lane

London WC2A 1DD

21st December 2015