IN THE HIGH COURT OF JUSTICE **Claim No: CO/4504/2019**

QUEENS BENCH DIVISION

ADMINISTRATIVE COURT

BETWEEN

BALJIT SINGH BHANDAL
BALBIR SINGH BHANDAL
AMRIK SINGH BHANDAL

APPELLANTS

AND

SECRETARY OF STATE FOR HOUSING COMMUNITIES AND LOCAL GOVERNMENT

1ST RESPONDENT

BROMSGROVE DISTRICT COUNCIL

2ND RESPONDENT

INDEX TO HEARING BUNDLE – VOLUME A
HEARING 5 MAY 2020

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IN THE HIGH COURT OF JUSTICE **Claim No.:**

QUEENS BENCH DIVISION

ADMINISTRATIVE COURT

BETWEEN

BALJIT SINGH BHANDAL and
BALBIR SINGH BHANDAL and
AMRIK SINGH BHANDAL **INTENDED APPELLANTS**

AND

THE SECRETARY OF STATE FOR THE MINISTRY OF HOUSING, COMMUNITIES AND LOCAL GOVERNMENT

INTENDED FIRST RESPONDENT

BROMSGROVE DISTRICT COUNCIL **INTENDED SECOND RESPONDENT**

APPLICATION FOR PERMISSION TO APPEAL UNDER SECTION 289 TOWN AND COUNTRY PLANNING ACT 1990 (AS AMENDED)

LAND AT FOUR STONES RESTAURANT, ADAMS HILL, CLENT, STOURBRIDGE, WORCESTERSHIRE DY9 9PS

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1. This is an application by Mr Baljit Singh Bhandal, Mr Balbir Singh Bhandal and Mr Amrik Singh Bhandal for permission to apply for an Order under s289 of the Town and Country Planning Act 1990 (as amended) to remit the determination of the First Defendant's Inspector in relation to their appeals against an Enforcement Notice issued by the Second Defendant, for redetermination by the First Defendant.

2. The Court is requested to fix a date for the hearing of the application.

3. The papers which are annexed to this application comprise:

   3.1 draft Appellant's Notice which the Intended Appellants seek permission to issue;

   3.2. proposed Grounds of Appeal, which will stand as the reasons why permission should be granted under this application;

3.3. Witness Statement of Suzanne Tucker, FBC Manby Bowdler LLP on behalf of by the Intended Appellants formally producing documents relevant to the application now made; and

3.4. Witness Statement by the Appellants' Solicitor evidencing that the papers comprised in this application have been served on the First and Second Respondents and those other persons who ought to be served with notice of this application pursuant to CPR Part 52 PD52D para 26.1(12).

Appeal Decision Dated: 17 October 2019

Appeal References: APP/P1805/C/19/3219678, APP/P1805/C/19/3219679, and APP/P1805/C/19/3219680

In respect of Land known as: Land at Four Stones Restaurant, Adams Hill, Clent, Stourbridge, Worcestershire DY9 9PS

Signed S. Tucker
Suzanne Tucker, FBC Manby Bowdler LLP, Solicitor for the Appellant

Dated: 13 November 2019.

FIRST RESPONDENT
Government Legal Department
102 Petty France
Westminster
London
SW1H 9GL
DX 123243 Westminster 12
Tel: 020 7210 8500
Email: thetreasurysolicitor@governmentlegal.gov.uk

SECOND RESPONDENT
Bromsgrove District Council
Parkside
Market Street
Bromsgrove
Worcestershire
B61 8DA

Tel: 01527 881288
Email: newplan@bromsgroveandredditch.gov.uk

Appellant's notice

(All appeals except small claims track appeals and appeals to the Family Division of the High Court)

Notes for guidance are available which will help you complete this form. Please read them carefully before you complete each section.

For Court use only	
Appeal Court Ref. No.	CO/4504/2019
Date filed	13th November 2019

HIGH COURT OF JUSTICE
SEAL
23 DEC 2019
BIRMINGHAM
ADMINISTRATIVE COURT

Section 1 Details of the claim or case you are appealing against

Claim or Case no. CO/4504/2019

Fee Account no. (if applicable)

Help with Fees – Ref. no. (if applicable) H W F - - -

Name(s) of the ☐ Claimant(s) ☒ Applicant(s) ☐ Petitioner(s)

(1) Mr Baljit Singh Bhandal
(2) Mr Balbir Singh Bhandal
(3) Mr Amrik Singh Bhandal

Name(s) of the ☐ Defendant(s) ☒ Respondent(s)

(1) The Secretary of State for The Ministry of Housing, Communities and local Government
(2) Bromsgrove District Council

Details of the party appealing ('The Appellant')

Name

(1) Mr Baljit Singh Bhandal
(2) Mr Balbir Singh Bhandal
(3) Mr Amrik Singh Bhandal

Address (including postcode)

(1) Mr Baljit Singh Bhandal
Summerlea
Quarry Park Road
Stourbridge
West Midlands
DY8 2RE
(2) Mr Balbir Singh Bhandal
Gateways
Belbroughton Road
Kidderminster
DY10 3LL
(3) Mr Amrik Singh Bhandal
Blakedown House
Belbroughton Road
Kidderminster
DY10 3LL

Tel No.	
Fax	
E-mail	

Details of the respondent to the appeal

Name

(1) The Secretary of State for The Ministry of Housing, Communities and Local Government
(2) Bromsgrove District Council

Address (including postcode)

(1) Government Legal Department
102 Petty France
Westminster
London
SW1H 9GL DX 123243 Westminster 12
Tel: 020 7210 8500
Email:
thetreasurysolicitor@governmentlegal.gov.uk

(2) Bromsgrove District Council, Parkside,
Market Street, Bromsgrove, Worcestershire
B61 8DA
Tel: 01527 881288
Email:
newplan@bromsgroveandredditch.gov.uk

Tel No.	
Fax	
E-mail	

Details of additional parties (if any) are attached? ☐ Yes ☒ No

Section 2 Details of the appeal

From which court is the appeal being brought?

☐ The County Court at

☐ The Family Court at

☐ High Court

- ☐ Queen's Bench Division
- ☐ Chancery Division
- ☐ Family Division

☒ Other (please specify)

The Planning Inspectorate

What is the name of the Judge whose decision you want to appeal?

Planning Inspector J Whitfield BA (Hons) DipTP MRTPI

What is the status of the Judge whose decision you want to appeal?

☐ District Judge or Deputy ☐ Circuit Judge or Recorder ☒ Tribunal Judge

☐ Master or Deputy ☐ High Court Judge or Deputy ☐ Justice(s) of the Peace

What is the date of the decision you wish to appeal against?

17 October 2019

Is the decision you wish to appeal a previous appeal decision? ☒ Yes ☐ No

Section 3 Legal representation

Are you legally represented? ☒ Yes ☐ No

If 'Yes', is your legal representative (please tick as appropriate)

☒ a solicitor?

☐ direct access counsel instructed to conduct litigation on your behalf?

☐ direct access counsel instructed to represent you at hearings only?

Name of your legal representative

FBC Manby Bowdler LLP

The address (including postcode) of your legal representative

Routh House
Hall Court
Hall Park Way
Telford
Shropshire
TF3 4NJ

Tel No.	01952 292129
Fax	01952 291716
E-mail	suzanne.tucker@fbcmb.co.uk
DX	DX 707202 Telford 4
Ref.	SRT/BHA85/8

Are you, the Appellant, in receipt of a Civil Legal Aid Certificate? ☐ Yes ☒ No

Is the respondent legally represented? ☒ Yes ☐ No

If 'Yes', please give details of the respondent's legal representative below

Name and address (including postcode) of the respondent's legal representative

(1) Government Legal Depertment,102 Petty France, Westminster, London SW1H 9GL
DX 123243 Westminster 12
Email:thetreasurysolicitor@governmentlegal.gov.uk
Tel: 020 7210 8500
(2) Bromsgrove District Council, Parkside, Market Street, Bromsgrove, Worcestershire B61 8DA
Email: newplan@bromsgroveandredditch.gov.uk
Tel: 01527 881288

Tel No.	
Fax	
E-mail	
DX	
Ref.	

Section 4 Permission to appeal

Do you need permission to appeal? ☒ Yes ☐ No

Has permission to appeal been granted?

☒ **Yes** (Complete Box A) ☐ **No** (Complete Box B)

Box A

Date of order granting permission
13 December 2019

Name of Judge granting permission
HIS HONOUR JUDGE DAVID COOKE

Box B

I

the Appellant('s legal representative) seek permission to appeal.

If permission to appeal has been granted **in part** by the lower court, do you seek permission to appeal in respect of the grounds refused by the lower court? ☐ Yes ☐ No

Section 5 Other information required for the appeal

Please set out the order (or part of the order) you wish to appeal against

Inspector's decision relating to appeals against enforcement notice, Planning Inspectorate References APP/P1805/C819/3219678; APP/P1805/C/19/3219679; and APP/P1805/C/19/3219680

Have you lodged this notice with the court in time? (There are different types of appeal - see Guidance Notes N161A)

☒ Yes ☐ No

If **'No'** you must also complete **Part B of Section 10 and Section 11**

Section 6 Grounds of appeal

Please state, in numbered paragraphs, **on a separate sheet** attached to this notice and entitled 'Grounds of Appeal' (also in the top right hand corner add your claim or case number and full name), why you are saying that the Judge who made the order you are appealing was wrong.

☒ I confirm that the grounds of appeal are attached to this notice.

Section 7 Arguments in support of grounds of appeal

☐ I confirm that the arguments (known as a 'Skeleton Argument') in support of the 'Grounds of Appeal' are set out **on a separate sheet** and attached to this notice.

OR (in the case of appeals other than to the Court of Appeal)

☒ I confirm that the arguments (known as a 'Skeleton Argument') in support of the 'Grounds of Appeal' will follow within 14 days of filing this Appellant's Notice. A skeleton argument should only be filed if appropriate, in accordance with CPR Practice Direction 52B, paragraph 8.3.

Section 8 Aarhus Convention Claim

For applications made under the Town and Country Planning Act 1990 or Planning (Listed Buildings and Conservation Areas) Act 1990

I contend that this claim is an Aarhus Convention Claim ☐ Yes ☒ No

If Yes, and you are appealing to the Court of Appeal, any application for an order to limit the recoverable costs of an appeal, pursuant to CPR 52.19, should be made in Section 10.

If Yes, indicate in the following box if you do not wish the costs limits under CPR 45 to apply.
If you have indicated that the claim is an Aarhus claim set out the grounds below.

Section 9 What are you asking the Appeal Court to do?

I am asking the Appeal Court to:-
(please tick the appropriate box)

☐ set aside the order which I am appealing

☒ vary the order which I am appealing and substitute the following order. Set out in the following space the order you are asking for:-

An order is sought to remit the appeals to the Secretary of State for redetermination with costs against the Secretary of State

☐ order a new trial

Section 10 Other applications

Complete this section only if you are making any additional applications.

Part A

☐ I apply for a stay of execution. (You must set out in Section 11 your reasons for seeking a stay of execution and evidence in support of your application.)

Part B

☐ I apply for an extension of time for filing my appeal notice. (You must set out in Section 11 the reasons for the delay and what steps you have taken since the decision you are appealing.)

Part C

☐ I apply for an order that:

(You must set out in Section 11 your reasons and your evidence in support of your application.)

Section 11 Evidence in support

In support of my application(s) in Section 10, I wish to rely upon the following reasons and evidence:
See separate Grounds (Witness Statement with Exhibit Bundle already filed with application for permission to appeal)

Statement of Truth – This must be completed in support of the evidence in Section 11

I believe (The Appellant believes) that the facts stated in this section are true.

Full name: Suzanne Tucker, Appellants' Solicitor

Name of Appellant's legal representative firm: FBC Manby Bowdler LLP

signed: S. Tucker

Appellant('s legal representative)

position or office held: Solicitor

(if signing on behalf of firm or company)

Section 12 Supporting documents

To support your appeal you should file with this notice all relevant documents listed below. To show which documents you are filing, please tick the appropriate boxes.

If you do not have a document that you intend to use to support your appeal complete the box over the page.

In the County Court or High Court:

- ☒ three copies of the Appellant's notice for the appeal court and three copies of the grounds of appeal;
- ☒ one additional copy of the Appellant's notice and grounds of appeal for each of the respondents;
- ☒ one copy of the sealed (stamped by the court) order being appealed;
- ☐ a copy of any order giving or refusing permission to appeal together with a copy of the Judge's reasons for allowing or refusing permission to appeal; and
- ☐ a copy of the Civil Legal Aid Agency Certificate (if legally represented).

In the Court of Appeal:

- ☐ three copies of the Appellant's notice and three copies of the grounds of appeal on a separate sheet attached to each Appellant's notice;
- ☐ one additional copy of the Appellant's notice and one copy of the grounds of appeal for each of the respondents;
- ☐ one copy of the sealed (stamped by the court) order or tribunal determination being appealed;
- ☐ a copy of any order giving or refusing permission to appeal together with a copy of the Judge's reasons for allowing or refusing permission to appeal;
- ☐ one copy of any witness statement or affidavit in support of any application included in the Appellant's notice;
- ☐ where the decision of the lower court was itself made on appeal, a copy of the first order, the reasons given by the Judge who made it and the Appellant's notice of appeal against that order;
- ☐ in a claim for judicial review or a statutory appeal a copy of the original decision which was the subject of the application to the lower court;
- ☐ one copy of the skeleton arguments in support of the appeal or application for permission to appeal;
- ☐ a copy of the approved transcript of judgment;
- ☐ a copy of the Civil Legal Aid Certificate (if applicable);
- ☐ where a claim relates to an Aarhus Convention claim, a schedule of the claimant's financial resources.

Reasons why you have not supplied a document and date when you expect it to be available:-

Title of document and reason not supplied	Date when it will be supplied
Order giving permission to appeal awaited	within 7 days of receipt

Section 13 The notice of appeal must be signed here

Signed S. Turner Appellant('s legal representative)

Find out how HM Court and Tribunals Service uses personal information you give when you fill in a form.

https://www.gov.uk/government/organisations/hm-courts-and-tribunals-service/about/personal-information-charter

CO/

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

IN THE MATTER OF AN APPLICATION UNDER SECTION 289 OF THE TOWN AND COUNTRY PLANNING ACT 1990

BETWEEN:

BALJIT SINGH BHANDAL
BALBIR SINGH BHANDAL
AMRIK SINGH BHANDAL

Claimants

-and-

SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT

Defendant

-and-

BROMSGROVE DISTRICT COUNCIL

Interested Party

GROUNDS OF APPEAL

For convenience, these grounds will adopt the usual practice of referring to the decision letter of the Defendant by the suffix "DL" followed by the relevant paragraph number. Reference to the Claim Bundle will be [CB/x].

The Claimants seeks an Order: -

(i) Pursuant to section 289 of the Town and Country Planning Act 1990 that the

decisions of the Defendant's Inspector under Section of the 1990 Act given by decision letter dated 17 October 2019 be quashed and remitted to the Defendant for redetermination;

(ii) That the costs of and incidental to this application may be paid by the Defendant, or that such other order as to costs may be made as the Court thinks fit.

Essential reading

a. Decision Letter dated 17 October 2019
b. These Grounds of Appeal
c. ***Mahfooz Ahmed v The Secretary of State for Communities and Local Government, London Borough of Hackney*** **[2014] EWCA Civ 566**

Introduction

1. The Claimants seek permission to bring proceedings challenging the decision of an Inspector appointed by the Defendant dated 17 October 2019 ("the decision"), to dismiss the Claimants' appeals pursuant to section 174 of the Town and Country Planning Act 1990 ("the Act") against an Enforcement Notice ("EN") issued by the Interested Party on 27 November 2018. The Interested Party is the Local Planning Authority with responsibility for planning enforcement in the area of the appeal site. The appeal was determined by way of written representations.

2. The EN (Ref:17/00076/PLAN) relates to Four Stones Restaurant, Adam Hill, Clent, Stourbridge, Worcestershire DY9 9PS ("the site"). It alleges a breach of planning control in the following way:

"without planning permission the erection of a replacement glazed sunroom ("the unauthorised development")."

3. The requirements of the notice were for the Claimants to:

" 1. Remove the unauthorised development from the Land;

2. Remove from the Land all building material and rubble arising from compliance with the requirements of step 1 above."

4. The Claimants appealed against the EN pursuant to sections 174(2)(a), (f) and (g) of the Act.

Background

5. The background to this matter is set out at DL2 (CB/B.2). Essentially, the unauthorised development was completed following the grant of planning permission by the Council for the demolition of an existing sun room, and replacement with a new flat roof sun room ("the 2016 permission"). The 2016 permission decision notice can be found at CB/B.1. In due course, a sun room was erected, but it differed in some respects to that which had been permitted. In particular, the roof was sloping and higher, and extended into an overhanging canopy. The canopy has been removed. Photos of the previous structure and the structure now on the site are included at CB/B.42 and CB/B.142-143 respectively.

6. As part of the appeal, the Claimants proposed four alternative schemes to the entire demolition of the sun room that are set out on pages 7-8 of the Statement of Case, CB/B.26-27 (the "Alternative Developments"). Those options included Options B and C which were a reversion to the 2016 permission or similar. However in respect of Options B and C, the Inspector considered that because those alternatives included the formation of a new roof it was not open to him to grant planning permission; see DL23-27 (CB/B.4-B.5). The Inspector was wrong to so conclude.

7. In respect of the fourth proposal, Option D involved making good the frontage of the restaurant that would be left open and exposed by the removal of the unauthorised sun room. Again, the Inspector considered that it was outwith his powers to grant permission for the proposals; see DL28 and 36 (CB/B.5 and B.6). Again, the Inspector erred in his conclusion.

Summary of Grounds of Appeal

8. **The Appellants case is made on the following Grounds:**

Ground 1: The Inspector misinterpreted and failed to properly apply section 177(1) of the 1990 Act, and / or failed to give adequate reasons for rejecting the Alternative Development proposals.

Ground 2: The Inspector misinterpreted sections 173(4)(a) and 176(1)(b) of the 1990 Act, failed to properly assess the obvious Alternative Developments and / or failed to give adequate reasons for rejecting the Alternative Development proposals in relation to the ground f appeal.

Ground 3: The Inspector failed to consider and/or exercise his powers in relation to section 176(1) of the 1990 Act, and/or failed to have regard to the consequences of the existing requirements of the EN. Additionally, the Inspector failed to provide adequate reasons in that respect. The approach was irrational.

Relevant Law

Enforcement and alternative schemes

9. By section 171A(1)(a) of the 1990 Act, carrying out development without the required planning permission constitutes a breach of planning control.

10. Section 172 empowers the local planning authority to issue an enforcement notice where it appears to them that there has been a breach of planning control and that it is expedient to issue the notice. Section 173 is concerned with the contents and effect of a notice and provides in particular:

> *"173 ...*
>
> *(3) An enforcement notice shall specify the steps which the authority require to be taken, or the activities which the authority require to cease, in order to achieve, wholly or partly, any of the following purposes.*
>
> *(4) Those purposes are:*
>
> *(a) remedying the breach by making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land, by discontinuing any use of the land or by restoring the land to its condition before the breach took place; or*
>
> *(b) remedying any injury to amenity which has been caused by the breach."*
>
> *(5) An enforcement notice may, for example, require— (a) the alteration or removal of any buildings or works; (b) the carrying out of any building or other operations; (c) any activity on the land not to be carried on except to the extent specified in the notice; or (d) the contour of a deposit of refuse or waste materials on land to be modified by altering the gradient or gradients of its sides."*

11. Section 174(1) provides that a person having an interest in the land to which the enforcement notice relates may appeal to the Secretary of State. The grounds on which an appeal may be brought are set out in section 174(2) and include:

> *"(a) that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted ...;*
>
> *...*

(f) that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach."

12. Section 176 contains general provisions relating to the determination of appeals and includes the following:

"(1) On an appeal under section 174 the Secretary of State may –

(a) correct any defect, error or misdescription in the enforcement notice; or

(b) vary the terms of the enforcement notice,

if he is satisfied that the correction or variation will not cause injustice to the appellant or the local planning authority.

(2) Where the Secretary of State determines to allow the appeal, he may quash the notice.

(2A) The Secretary of State shall give any directions necessary to give effect to his determination on the appeal."

13. In considering an appeal under section 174 the Secretary of State has power, under section 176(1)(b), to vary the terms of an enforcement notice if he is satisfied that the variation will not cause injustice to the appellant or the local planning authority.

14. Section 177 relates to the grant or modification of planning permission on appeals against enforcement notices:

"(1) On the determination of an appeal under section 174 , the Secretary of State may –

(a) grant planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control, whether in relation to the whole or any part of those

matters or in relation to the whole or any part of the land to which the notice relates …

…

(2) In considering whether to grant planning permission under subsection (1), the Secretary of State shall have regard to the provisions of the development plan, so far as material to the subject matter of the enforcement notice, and to any other material considerations.

…

(5) Where an appeal against an enforcement notice is brought under section 174 and

…

(b) that land is in England and the statement under section 174(4) specifies the ground mentioned in section 174(2)(a), the appellant shall be deemed to have made an application for planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control."

15. The purpose of the statutory scheme was explored in ***Mahfooz Ahmed v The Secretary of State for Communities and Local Government, London Borough of Hackney*** **[2013] EWHC 2084 (Admin)**, and [**2014] EWCA Civ 566**. That case is very important in this appeal, and has materially similar facts, which are addressed below. In particular:

(i) In **Ahmed** Permission was granted in 2005 for the demolition of an existing building, and the erection of a three storey building with a butterfly roof, comprising a retail unit on the ground floor and six flats on the two upper floors;
(ii) The consent expired on 7 June 2010, and was no longer extant at the time of the appeal.
(iii) What was built on site, was a 4 storey building with a flat roof. An enforcement notice was served and Mr Ahmed appealed. The appeal was dismissed.
(iv) As part of his appeal, Mr Ahmed proposed modifying the building as built to bring it into conformity with the lapsed 2005 planning permission.
(v) That site was also in a Conservation Area.

16. Mr Ahmed contended that the requirement in the enforcement notice for the complete demolition of the building amounted to over-enforcement for the purposes of section 174(2)(f), and that the Inspector erred in law by failing to

consider whether the breach of planning control could be rectified by amending the enforcement notice so as to require the partial demolition of the building and its remodelling so as to make it conform to the terms of the 2005 consent.

17. It was argued that the Inspector had power under 176(1)(b) to vary the terms of the enforcement notice to remedy the breach of planning control, as well as having power under section 177(1) to grant retrospective consent for that part of the structure that was authorised by the 2005 consent.

18. The question in the main appeal was whether the Inspector erred in law on the enforcement notice appeal by failing to consider an "obvious alternative" in accordance with the principles discussed in ***Tapecrown Ltd v First Secretary of State*** **[2006] EWCA Civ 1744, [2007] 2 P&CR 7** and ***Moore v Secretary of State for Communities and Local Government*** **[2013] JPL 192**

19. The Judgment records the Defendant Secretary of State's argument at paragraph 19(4)] that:

"On an enforcement notice appeal the Secretary of State is confined to giving planning permission for the development of which the notice complained: Richmond upon Thames Borough Council v Secretary of State for the Environment [1972] EGD 948, as applied in Runnymede Borough Council v Secretary of State for the Environment, Transport and the Regions [2001] PLCR 24. Section 177(1)(a) is not wide enough to empower a grant of planning permission for the 2005 scheme…."

20. The argument and others were rejected, and the Court held that in principle, planning permission could have been granted for the 2005 scheme providing that such that a development in accordance with the 2005 scheme could be regarded as a "part" of the development as built. The fact that the unlawful building would need to be modified to achieve the 2005 scheme was not fatal to the argument:

"26. That brings me to the deputy judge's finding that the inspector erred in law by overlooking an obvious alternative by way of granting planning permission for the 2005 scheme and varying the enforcement notice accordingly. It is clear that the inspector did not consider the possibility of that alternative. I do not accept Mr Whale's submission that even if the inspector had considered it he would have had no power to grant permission for the 2005 scheme. Whether it would have been open to him to grant such permission depended, as explained below, on an exercise of planning judgment which he did not undertake. ***It cannot be said, either as a matter of law or on the basis that the facts were capable of leading to only one reasonable answer, that it would have been outside his powers to grant permission for the 2005 scheme.***

27. I agree with Mr Whale that the power under section 177(1) to grant planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control is linked to an appeal under ground (a) rather than under ground (f). But Mr Ahmed's appeal included express reliance on ground (a) and he would have been deemed in any event to have made an application for planning permission by virtue of section 177(5) as it existed as the material time. Although his ground (a) appeal sought planning permission only in respect of the development as built, which constituted the whole of the matters stated in the notice as constituting a breach of planning control, the power under section 177(1) was to grant planning permission "in relation to the whole or any part of those matters". ***In principle, therefore, planning permission could have been granted for the 2005 scheme if the differences between it and the development as built (i.e. the differences identified in the notice as "unauthorised additions, alterations and variations to the approved scheme") were such that a development in accordance with the 2005 scheme could be regarded as a "part" of the development as built. This was a matter of planning judgment for the inspector.*** *It was a judgment he did not make because of his failure to give any consideration to the possibility of granting planning permission for the 2005 scheme. This court is not in a position to decide what conclusion he would have reached if he had considered that possibility.* ***In particular, we cannot exclude the possibility that he might reasonably have concluded that the 2005 scheme was to be regarded as "part" of the development as built, on which basis he would have had power under section 177(1) to grant planning permission in relation to it.***

....

33. For those reasons I am satisfied that the inspector would have had power to grant planning permission for the 2005 scheme and to vary the enforcement notice accordingly if, having considered the possibility, he had judged the 2005 scheme to be a "part" of the development as built." ***emphasis added.***

21. In **Tapecrown**, Carnwath LJ explained, (not for the first time) that that the enforcement procedure is intended to be remedial rather than punitive. It was observed at para 33 of his judgment that an Inspector has wide powers to decide whether there is any solution, short of a complete remedy of the breach, which is acceptable in planning terms and amenity terms. If there is, an Inspector should be prepared to modify the requirements of the notice and grant permission subject to conditions:

"46. As I have said, I would not wish to lay down any general rules. I would accept that as a general proposition, given the limitations of the written representations procedure, an appellant would be well advised to put forward any possible fall-back position as part of his substantive case. It is not the duty of

the inspector to make his case for him. On the other hand the inspector should bear in mind that the enforcement procedure is intended to be remedial rather than punitive. If on his consideration of the submissions and in the light of the site view, it appears to him that there is an obvious alternative which would overcome the planning difficulties, at less cost and disruption than total removal, he should feel free to consider it. In such circumstances fairness may require him to give notice to the parties to enable them to comment on it"

22. **Tapecrown** was a case in which the Inspector had failed to consider whether, as an alternative to demolition, if appropriate modifications were made to an unlawful building, and if all or part of the hardstanding associated with it were removed, the building could be made acceptable in planning terms; see para 35. The case was remitted for redetermination.

23. The enforcement of planning control should not be used to deprive landowners of their lawful rights; for which see ***Graham Oates v Secretary of State for Communities and Local Government v Canterbury City Council*** **[2018] EWCA Civ 2229** citing ***Mansi v Elstree Rural District*** **Council (1965) 16 P. & C.R. 153**

Reasons

24. A summary of the law relating to reasons is well known and can be summarised as follows:

"The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the "principal important controversial issues". An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration (see the speech of Lord Brown of Eaton-under- Heywood in South Bucks District Council and another v Porter (No. 2) [2004] 1 W.L.R. 1953 , at p.1964B-G)."[1]

[1] ***Bloor Homes East Midland Ltd v SSCLG*** **[2014] EWHC 754 (Admin) at [19]**

Submissions

Ground 1: The Inspector misinterpreted section 177(1) of the 1990 Act, and / or failed to give adequate reasons for rejecting the Alternative Development proposals. The approach was irrational.

25. At DL20 (CB/B.4), the Inspector considered that Alternative Development A was a proposal that would form part of the matters as constituting a breach of planning control. No issue is taken with that judgment which is plainly correct. It was a proposal that required modification of the unauthorised development, which itself would remain largely intact. Nor is any issue taken with the planning judgement the Inspector was entitled to exercise, that the scheme remained unacceptable despite the proposed modification.

26. By contrast however, the Inspector considered at DL24-27 (CB/B.5) that neither Alternative Developments B nor C would form part of the matters constituting the breach of planning control because works would be required in respect of the formation of a new roof. The Inspector therefore considered that he could not grant permission for those proposals, irrespective of their merits.

27. That is the only reason given for the Inspector declining to exercise his powers pursuant to section 177(1). He was wrong to do so:

    a. The alleged breach of planning control at §3 of the EN is the erection of a replacement glazed sun room without planning permission.
    b. Both Alternative Developments B and C proposed a glazed sun room. The nature and function of the sun room would remain the same.
    c. The proposals contract the size of the unauthorised development through minor modifications to the roof. The resulting structures would still be wholly contained within the footprint and volume of the sun room as built and enforced against.
    d. Both proposals can properly be regarded as a "part" of the development as built.
    e. The Inspector failed to explain why *"new works in the formation of a roof"* precluded the alternative developments B and C from falling within section 177(a) of the Act in principle.
    f. That narrow approach is contrary to **Ahmed** and finds no support within the wording of the Act. In **Ahmed** partial demolition of the building and remodelling was inevitably required to reduce the four storey flat roof building in that instance to the previously consented three storey butterfly roof building (see para. 17). The Court rejected the argument that such modifications precluded an alternative from falling within the scope of section 177(1) if the alternative was such that a development in

accordance with the 2005 scheme could be regarded as a "part" of the development as built; see paragraphs 19(4) and 27.

28. Accordingly, the Inspector misinterpreted section 177(1), and misunderstood and failed to use his powers to grant planning permission for the Alternative Developments proposed. The Inspector was not fettered by the requirement for works to form a new roof. There is nothing within the Act, or section 177(1) that prevented the Inspector from using his powers pursuant to section 177(1) in the circumstances and in the way that he assumed.

29. Alternatively, the Inspector failed to give adequate reasons why works to form a new roof prevented the Alternative Development proposals from comprising part of the matters stated in the enforcement notice as constituting a breach of planning control. The Claimants are prejudiced by that failure, particularly when the reasoning is contrasted with the approach to Alternative Development, A which also proposed works to the sun room structure by the removal of the canopy, but which was considered by the Inspector to fall within the scope of section 177(1).

30. Further, the Claimants' Statement of Case pp9-14 (CB/B.28-B.33) addressed the relevant legal principles. Despite that, the Inspector failed entirely to refer to the line of authorities, which includes **Tapecrown** and **Ahmed**. His absence of reasoning in the light of those authorities give rise to a substantial doubt as to whether he went wrong in law.

Ground 2: The Inspector misinterpreted sections 173(4)(a) and 176(1)(b) of the 1990 Act, failed to properly assess the obvious Alternative Developments and / or failed to give adequate reasons for rejecting the Alternative Development proposals in relation to the ground f appeal.

31. The Inspector returned to the Alternative Development proposals at Dl32-35 under the ground (f) appeal, and rejected them again because they would not remedy the breach of planning control alleged in the EN.

32. It is important to have in mind the relevant statutory provision (s174(2)(f)), which permits an appeal on the ground:

"(f) that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning

control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach;"

33. However, the Inspector failed entirely to address his mind to the planning merits of the Alternative Development proposals, and whether steps less than full demolition might make the sun room acceptable in planning terms. The Inspector completely misunderstood his task.

34. There is no reference to either local or national policy in this section of the DL in contrast to DL4-17. Similarly, the Inspector failed to have regard to the lapsed permission, and whether a similar form of development would adequately remedy the breach of planning control alleged. Accordingly, the Inspector failed to have regard to material considerations in respect of the Alternative Development proposals.

35. The Inspector appears to have rejected the Alternative Development proposals simply because they were promoting solutions that were less than full demolition. However, as set out above at para. 21, an Inspector has wide powers to decide whether there is any solution, short of a complete remedy of the breach, which is acceptable in planning terms and amenity terms. If there is, an Inspector should be prepared to modify the requirements of the notice and grant permission subject to conditions. The Inspector in this instance failed to apply his mind to that task.

36. The reasoning is deficient, opaque and severely prejudices the Claimants. It is not at all clear what the Inspector meant by the repeated mantra that the Alternative Development proposals at A-C would not remedy the breach of planning control, or why they would not see DL33-35. The conclusion is even more surprising when the Inspector accepted at DL51 that it is clear that the Council considers that some form of extension on the footprint of the unlawful building is acceptable in planning terms as a result of the earlier permission. The two conclusions are entirely at odds, and require further explanation.

37. In this instance, there was clearly a solution, short of a complete demolition that is acceptable in planning terms and amenity terms. The Inspector failed to properly consider and apply section 176(1)(b) of the 1990 Act to vary the requirements of the EN to achieve an acceptable development on site. In particular, section 173(5) sets out the range of requirements that were at the Inspector's disposal in order to achieve a proposed Alternative Developments through the variation of the EN pursuant to the ground (f) appeal.

38. Accordingly, the Inspector's approach is wrong in law and contrary to **Tapecrown**; see paragraphs 33-34 and paragraph 46 in particular.

Ground 3: The Inspector failed to consider and/or exercise his powers in relation to section 176(1) of the 1990 Act, and/or failed to have regard to the consequences of the existing requirements of the EN. Additionally, the Inspector failed to provide adequate reasons in that respect . The approach was irrational.

39. Section 173(3)-(4) requires than an EN must specify the steps to be taken to remedy the breach by making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land, by discontinuing any use of the land or by restoring the land to its condition before the breach took place. By section 173(5), the EN can include a number of requirements including (a) the alteration or removal of any buildings or works; (b) the carrying out of any building or other operations.

40. At DL31, the Inspector considered that the purpose of the requirement to remove the unauthorised development was for the purpose of remedying the breach by restoring the land to its condition before the breach took place. However the requirements go beyond that and are excessive. Prior to the breach, there was an existing sun room which was demolished following the 2016 permission. The front façade of the Four Stones Restaurant was therefore enclosed prior to the breach.

41. However, in this instance, the requirements of the EN would fail to restore the land to its previous condition. Compliance with the EN would mean that a large hole was left in the front façade of the Four Stones Restaurant, with no lawful means of closing it up. The consequences for the structural safety and protection of the building, the running of the Claimants' business and the safety of its occupants are potentially catastrophic. The failure to consider and understand the effect of the unvaried requirements represents a failure to have regard to material consideration, and is irrational. It is a very serious failure by the decision maker in this case.

42. The Claimants sought to address this consequence by offering Alternative Development Option D, which could have been secured by the Inspector exercising his wide discretion pursuant to section 176, having regard to section 173(5). Alternatively, the Inspector could have imposed a requirement to simply restore the land to its condition prior to the breach, to carry out building work to secure the façade of the restaurant, or to construct a new building pursuant to section 173(6).

43. No explanation is given as to why the Inspector failed to exercise his power to vary the notice in light of the serious consequences for the Claimants', their business and their property. The approach at DL36 is wrong and conflates the issue of whether to grant planning permission pursuant to section 177(1), with the power to vary the requirements of the EN pursuant to section 176(1)(b) to prevent

over enforcement.

44. Alternatively, if the Inspector did not have the power to prevent the over-enforcement and the consequent hole in the wall, which is not accepted for the reasons given above, that consequence was a material consideration in the ground (a) appeal that the Inspector failed to have regard to in considering whether or not to grant permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control

Conclusions

45. For all of the foregoing reasons, the decision of the Defendant dated 17 November 2019 is unlawful and ought to be quashed, and that is what the court is respectfully invited to do.

And the Claimant seeks:

1. An Order quashing the Defendant's decisions dated 17 November 2019 and remitting the matter for redetermination; and

2. Costs

THEA OSMUND-SMITH
No5 Chambers
12 November 2019

Witness statement No.1
Of Suzanne Tucker
Dated 12 November 2019
EXHIBIT SRT1
FILED FOR APPELLANT

IN THE HIGH COURT OF JUSTICE **Claim No.:**

QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

BETWEEN

BALJIT SINGH BHANDAL and
AMRIK SINGH BHANDAL and
BALBIR SINGH BHANDAL **INTENDED APPELLANTS**

AND

THE SECRETARY OF STATE
FOR THE MINISTRY OF HOUSING, COMMUNITIES AND LOCAL GOVERNMENT
INTENDED FIRST RESPONDENT

BROMSGROVE DISTRICT COUNCIL **INTENDED SECOND RESPONDENT**

WITNESS STATEMENT OF SUZANNE TUCKER

I Suzanne Tucker, Associate Solicitor employed by, and of, FBC Manby Bowdler LLP Solicitors, Routh House, Hall Court, Hall Park Way, Telford, Shropshire TF3 4NJ say as follows:-

1) I am instructed by the Intended Appellants in these proceedings, Mr Baljit Singh Bhandal of Summerlea, Quarry Park Road, Stourbridge, West Midlands DY8 2RE, Mr Balbir Singh Bhandal of Gateways, Belbroughton Road, Kidderminster DY10 3LL, and Mr Amrik Singh Bhandal of Blakedown House, Belbroughton Road, Kidderminster DY10 3LL and was instructed by the Appellants in the Appeal to the First Respondent against the Enforcement Notice issued on by the Second Respondent in respect of land at Four Stones Restaurant, Adams Hill, Clent, Stourbridge, Worcestershire DY9 9PS.

2) I produce marked "**SRT1**" an indexed bundle comprising the documents specified in the index thereto. To avoid duplication, Appendices 3, 4, and 5 to the Local Authority Statement of Case (Document No. 6 therein) are identified in the Index but not included in the bundle as they are already provided elsewhere in the bundle (as referenced in the Index to Exhibit SRT1). The plans contained within the bundle are not printed to scale.

3) I am instructed by the Intended Appellants and verily understand the following to be true:
   a) The appeal site is owned jointly by the Intended Appellants. The property is subject to a charge in favour of Lloyds Bank PLC of (Co. Regn. No. 2065) Dept.No.9612 of Pendeford Securities Centre, Pendeford Business Park, Wobaston Road, Wolverhampton WV9 5HZ.
   b) It is understood that each of the Intended Appellants and the chargee were served with a copy of the Enforcement Notice by the Second Respondent; Messrs Baljit, Balbir and Amrik Bhandal instructed me to appeal it on their behalf, but the fee for Ground (a) was paid only on behalf of Mr Baljit Singh Bhandal and the appeals for Balbir Singh Bhandal and Amrik Singh Bhandal on that ground therefore lapsed, so that it was only the appeal for Mr Baljit Singh Bhandal (Appeal Reference APP/P1805/C/19/3219678) that proceeded under Ground (a).
   c) The Intended Appellants have read the draft Grounds for Appeal that have been prepared for the application and has confirmed to me that the facts stated in it are true.

Statement of Truth

I believe that the facts stated in this witness statement are true.

Signed S Tucker
Suzanne Tucker, FBC Manby Bowdler LLP

Dated: 13 November 2019

IN THE HIGH COURT OF JUSTICE **Claim No. CO/4504/2019**

QUEEN'S BENCH DIVISION

PLANNING COURT

BETWEEN:

(1) BALJIT SINGH BHANDAL

(2) BALBIR SINGH BHANDAL

(3) AMRIK SINGH BHANDAL

Appellants

and

(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT

(2) BROMSGROVE DISTRICT COUNCIL

Respondents

FIRST RESPONDENT'S SKELETON ARGUMENT

This Skeleton Argument adopts the same nomenclature of the Grounds of Appeal, through referring to the paragraphs of the decision letter by the suffix 'DL' and references to the claim bundle by [CB/x]

1. Introduction

1.1 This is a statutory appeal brought pursuant to section 289 of the Town and Country Planning Act 1990 against the decisions made by the First Respondent's Inspector ('the Inspector') dated 17 October 2019 ('the Decision').

1.2 The Appellant incorrectly describes the parties as Claimant/Defendant in its Grounds of Appeal. In a s.289 statutory challenge the appropriate

description for the parties is 'Appellant/First Respondent'. Furthermore, the Grounds of Appeal list Bromsgrove District Council as an 'Interested Party', whereas they are the Second Respondent. The Claim Form and Claim Bundle Index does correctly recognise this. The Secretary of State simply highlights this to ensure the parties are correctly described in this challenge.

1.3 The appeal relates to the Inspector's decisions to dismiss three conjoined appeals, pertaining to an enforcement notice **[CB/9]**, which was issued by the Second Respondent. The notice was served on land at Four Stones Restaurant, Adams Hill, Clent, Stourbridge, Worcestershire DY9 9PS ('the Property').

1.4 This appeal is brought pursuant to 3 grounds of challenge, none of which are arguable. Accordingly, the First Respondent respectfully invites the Court to: refuse permission; dismiss the appeal; and order the Appellant to pay the First Respondent's costs.

1.5 The Appellant proceeds on an incorrect understanding of the relevant legal principles. The Appellant heavily relies on the Court of Appeal's judgment in ***Mahfooz Ahmed v Secretary of State for Communities and Local Government*** [2014] EWCA Civ 566. The Appellant fails to address the suite of cases from the Court of Appeal that have clarified the scope of an Inspector's duty in respect to 'alternative schemes' in the context of an enforcement appeal. Having regard for these judgments, it is plain that the Appellant's challenge must fail.

2. Law

2.1 General propositions

2.1.1 In ***Bloor Homes East Midlands Limited v Secretary of State for Communities and Local Government*** [2014] EWHC 754 (Admin) at [19], Lindblom J (as he then was) set out the general law on s.288 statutory challenges. Whilst this a s.289 challenge, the same principles apply.

2.1.2 In ***R. (Newsmith Stainless Ltd) v Secretary of State for Environment, Transport & the Regions*** *[2001] EWHC Admin 74*. (emphasis added) the Court held as follows in respect to irrationality:

> *7. In any case, where an expert tribunal is the fact finding body the threshold of Wednesbury unreasonableness is a difficult obstacle for an applicant to surmount.* ***That difficulty is greatly increased in most planning cases because the Inspector is not simply deciding questions of fact, he or she is reaching a series of planning judgments****. For example: is a building in keeping with its surroundings? Could its impact on the landscape be sufficiently ameliorated by landscaping? Is the site sufficiently accessible by public transport? et cetera.* ***Since a significant element of judgment is involved there will usually be scope for a fairly broad range of possible views, none of which can be categorised as unreasonable****. A misconstruction of national policy guidelines will lead to the quashing of the decision: R. (on the application of Lovelock) v First Secretary of State and Surrey Heath DC [2006] EWHC 2423 (Admin).*
>
> *8. Moreover,* ***the Inspector's conclusions will invariably be based not merely upon the evidence heard at an inquiry or an informal hearing, or contained in written representations but, and this will often be of crucial importance, upon the impressions received on the site inspection.*** *Against this background an applicant alleging an Inspector has reached a Wednesbury unreasonable conclusion on matters of planning judgment, faces a particularly daunting task.*

2.1.3 The classic formulation of the standard of reasons in an Inspector's decision was provided by Lord Brown in ***South Buckinghamshire District Council v Porter (No 2)*** [2004] 1 WLR 1953, para 36:

> *The reasons for a decision must be intelligible and they must be adequate.* ***They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved****. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds.* ***But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration****. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact*

upon future such applications. ***Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.***

2.2 The Law on Alternatives

2.2.1 In an enforcement notice, an Inspector can be required to consider alternative developments per section 177(1)(a) of the Town and Country Planning Act 1990 says:

> *(1) On the determination of an appeal under section 174, the Secretary of State may—*
> *[(a) grant planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control, whether in relation to the whole or any part of those matters or in relation to the whole or any part of the land to which the notice relates;]*

2.2.2 However, the Courts have clarified on numerous occasions the narrow scope of this power.

2.2.3 The Appellant relies heavily on ***Mahfooz Ahmed v Secretary of State for Communities and Local Government*** [2014] EWCA Civ 566 in its Grounds of Appeal. However, that matter was significantly different to the facts of the present matter. Lindblom LJ addressed this judgment in ***Arnold v Secretary of State for Communities and Local Government*** [2017] EWCA Civ 231, saying as follows about it:

> *43. I do not see how Mr Turney's argument can gain any support from the decision of this court in Ahmed . There the inspector had gone wrong in failing to consider an alternative scheme for which planning permission had been granted on appeal in 2005.* ***The Court of Appeal emphasized that the question of whether an alternative scheme could be regarded as "part of" the development against which the local planning authority had enforced was a matter of planning judgment for the inspector. In that case the inspector had simply failed to exercise his planning judgment****, having given no consideration to the possibility of granting planning permission for the 2005 scheme (see paragraphs 26 and 27 of the judgment of Richards L.J., with which Underhill and Floyd L.JJ. agreed). On its facts, therefore, Ahmed is not truly comparable to this case. In this case the inspector manifestly did*

consider all of the alternative schemes put forward. In doing so, he was fully aware of the statutory powers available to him and acted in accordance with them.

2.2.4 Accordingly, ***Ahmed*** is a case where an Inspector simply failed to address alternative schemes. That has no bearing on the present matter where the Inspector did address the alternatives throughout the decision letter in detail, reaching the view that in his planning judgement the alternatives could not form part of the development that had been enforced against.

2.2.5 In ***Arnold*** Lindblom LJ went on to say as follows concerning alternative schemes:

44. More in point, I think, is the decision of Ouseley J. in Ioannou . That case is in some respects analogous to this on its facts. The local planning authority had served an enforcement notice requiring the cessation of the use of a dwelling house converted without planning permission into five self-contained flats. On his ground (a) appeal, the appellant presented the inspector with a proposal for the conversion of the building into three flats, which, as the authority accepted, would avoid the planning objections to its use as five flats. The inspector did not, however, grant planning permission for the three-flat scheme. Ouseley J. endorsed his approach. ***It was the matters stated in the enforcement notice as constituting a breach of planning control to which the inspector's attention was directed under section 177(1)(a) , rather than the works in the alternative scheme. He could "only grant permission under ground (a)[,] and on the deemed application, for the alternatives to the extent that that could be achieved by granting permission for the whole or part of the breaches alleged in the notice****" (paragraph 32 of the judgment). Ouseley J. went on to say this (in paragraph 33):*

> *"33. The inspector obviously could [not grant] permission for the whole of the breach alleged in the notice and so achieve the three-flat scheme; that would simply leave the five flats in place. His only other power was to grant permission for part of the breach alleged in the notice. But the three-flat scheme could not be arrived at by granting permission for part only of the matters alleged to constitute the breach of planning control in the notice.* ***Only one of the five flats, the one on the first and second floor, could be left untouched, although an entry door would have to be removed****. …* ***The four flats on the ground floor could not go into two flats without internal alterations to walls, doors, and facilities. Works were required in order to produce three flats, which were not part of the matters alleged to constitute a breach of planning control in the notice****. Granting planning*

permission for the larger flat without more … would not have remedied what the Inspector found to be the objectionable parts of the breach of planning control, nor would it have produced the scheme which the Inspector was prepared to see achieved."

For the appellant's argument on ground (a) and the deemed planning permission to succeed without recourse to the powers governing remedial steps under ground (f), the power in section 177(1)(a) would have to be "read as empowering the grant of permission for a development which is not, and is not part of, the matters alleged to constitute a breach of planning control, and indeed which does not exist". *The wording of section 177(1)(a) , was "too specific and clear for such an interpretation" (paragraph 34). As Ouseley J. went on to say, "something other than the grant of permission for all or part of the matters alleged in the enforcement notice to constitute the breach of planning control would be required to achieve the three-flat scheme" (paragraph 37).*

45. Those conclusions were confirmed by this court (see the judgment of Sullivan L.J., at paragraph 11). The Secretary of State's appeal succeeded on the argument that the inspector was also correct in his conclusion that he did not have the power to consider the three-flat scheme under the appeal on ground (f) (see paragraphs 27 to 40 of Sullivan L.J.'s judgment). But Ouseley J.'s analysis on the ground (a) appeal in that case illustrates very well the practical limits of an inspector's power to grant permission for development which is part of the matters alleged in an enforcement notice to constitute a breach of planning control. The inspector's approach in this case seems entirely congruent with it.

2.2.6 Thus, the Court of Appeal held, in accordance with the previous Court of Appeal's judgment in ***Ioannou v Secretary of State for Communities and Local Government*** [2014] EWCA Civ 1432, that an Inspector can only grant planning permission under s.177(1)(a) for development that:

i. exists; and

ii. is, or is part of, the matters alleged as a breach of planning control in the enforcement notice.

2.2.7 The Appellant's reliance on ***Ahmed*** fails to appreciate that under s.177(1) an Inspector can only grant permission for development that exists. Indeed, this point was made explicitly in ***Ahmed*** at [27]:

… In principle, therefore, planning permission could have been granted for the 2005 scheme if the differences between it and the development as built (ie. The differences identified in the notice as 'unauthorised additions, alterations and variations to the approved scheme') were such that ***a development in accordance with the 2005 scheme could be regarded as a 'part' of the development as built****. This was a planning judgment for the inspector. It was a judgment he did not make because of his failure to give any consideration to the possibility of granting planning permission for the 2005 scheme.*

2.3 Raising arguments not raised before the Inspector

2.3.1 In ***R.(oao Newsmith Stainless Ltd) v Secretary of State for Environment*** [2001] EWHC 74 (Admin), Sullivan J (as he then was) held as follows:

13 Mr Craig drew my attention to the decision of Mr George Barlett QC, sitting as a deputy judge of the High Court, in South Oxfordshire District Council v Secretary of State for the Environment, Transport and the Regions [2000] V2 All ER 667 . The Encyclopedia in paragraph 288.16 summaries the effect of his decision in this way:
"… there was no general rule that a party to a planning appeal was to be prevented from raising, in a challenge to that decision, an argument that had not been advanced in representations made on the appeal. If the inspector had omitted a material consideration, the decision could be unlawful, notwithstanding that the matter had not been raised in representations."

14 It is important that the South Oxfordshire decision is not regarded as a licence to introduce new material, that is to say material that was not before the Inspector, in section 288 applications. That this was not the deputy judge's intention is plain from the manner in which he dealt with the two additional grounds of challenge that were in contention in that case. The background was that the planning authority, whose refusal of planning permission had been overturned on appeal by an Inspector, sought permission to introduce two arguments before the learned deputy judge: firstly, relating to intermittent use; and secondly, relating to the adequacy of a condition.

15 The defendants objected upon the basis that the former argument would require new evidence and the latter could have been dealt with by way of suggested modifications if it had been raised before the Inspector. The judge accepted the validity of those objections and refused to permit the amendments containing the new grounds to be argued.

> *16* ***Whilst I accept that there is no general rule preventing a party from raising new material in a section 288 application, it will only be in very rare cases that it would be appropriate for the court to exercise its discretion to allow such material to be argued. It would not usually be appropriate if the new argument would require some further findings of fact and/or planning judgment (matters which are for the Inspector not the Court).***

2.3.2 In ***Humphris v SSCLG*** [2012] EWHC 1237 (Admin), Ouseley J said as follows where a claimant sought to raise an argument not advanced before an Inspector during a section 78 appeal:

> *27 In my judgment it is wholly inappropriate for those points to be raised by way of a contention that the inspector has ignored a material consideration when these points, far from obvious as they are, were not raised by the claimant before him.*

2.3.3 In ***Francis v First Secretary of State*** [2008] EWCA Civ 890, Keene LJ held as follows:

> *38 I agree. Had the appellant not been professionally represented at the hearing by a chartered town planner who was also a chartered architect, there would have been a stronger argument for a more interventionist role to have been played by the inspector at this informal hearing;* ***but when an appellant is professionally represented, an inspector is normally entitled to expect that the appellant's case will be adequately put forward by that representative and will address at least those issues which have been identified beforehand by the pre-enquiry statements and such other documents as the planning authority's reasons for refusing permission.*** *Such was the situation here. The planning authority's objection to a low level ventilation system had been clearly flagged up in advance of the hearing, and in those circumstances the inspector could properly proceed on the basis that if the appellant sought to establish that that objection was invalid, then evidence would be produced to that effect. That being so, I for my part am not persuaded that the procedure adopted here was unfair. I too would dismiss this appeal.*

2.3.4 In ***David Langmead v Secretary of State for Housing, Communities and Local Government*** [2018] EWHC 2202, Lane J held as follows:

> *20. … an appeal against an Enforcement Notice is not to be equated with an appeal against the refusal of planning permission. The wording*

of the Enforcement Notice, and the activity which is said by it to constitute a breach of development control, must be the focus for the Inspector, who is entitled to expect precision in a case that is being put forward by a professionally-represented Appellant.

2.3.5 In ***Najafi v Secretary of State for Communities and Local Government*** [2015] EWHC 4094 (Admin), the Court reviewed the authorities and held as follows:

20. In truth however that line of authorities does not assist the appellant on the facts of this case. In my judgment, none of them impose on an Inspector a duty to consider whether to seek a less demanding solution that he has not been asked to consider. It is true that in Tapecrown Carnwath J does refer to the restricted opportunities for input in the written representations procedure, but none of the authorities suggests that the Inspector is obliged to cast around for a solution despite the parties' position. In Moore and Ahmed the possibility of the solution sought was clearly raised by the appellants. The appeal against the planning Inspector was allowed in Moore because the Inspector thought he had no jurisdiction to do what he was asked to do, and in Ahmed because he had been clearly asked but had failed to consider the possibility. In Ahmed the position was that the possibility, the obvious alternative, was raised in grounds under paragraph (b) rather than under paragraph (f) but the court held that nevertheless they were put to the Inspector. In Tapecrown itself the problem was that the possibility had certainly occurred to the Inspector. It is not clear on the facts the extent to which the parties had put the point to him, but then the matter having occurred to the Inspector and he having recorded that in his decision he did not go on properly to deal with it. None of this casts doubt on what was said by Schiemann LJ in Taylor & Sons Farm v Secretary of State in the Environment, Transport and Regions [2001] EWCA Civ 1254 , a decision the relevant parts of which was specifically approved by Carnwath J in Tapecrown at paragraph 44. At the risk of not doing justice to the whole of the passage to which Carnwath J referred I will set out the sentences in which appear to me to be of importance in the context of the present case. At paragraph 40 of the judgment in Taylor Farms :

> *21. "It was not incumbent on the Inspector to conduct her own enquiries as to which area might be the most suitable for agricultural use.*

22. At 41:

> *i. "Appellants should contemplate the possibility that their primary contentions may fail and that those of their opponents may succeed. The very reliance on ground (f) shows that this is the position. If there is a fallback position on which they wish to*

rely then they should make this clear to the Secretary of State in their submissions. It is not reasonable to come to court, as has happened here, and ask for the case to be remitted to the inspector so that she may ask for further submissions … "

3. Ground 1: The Inspector misinterpreted and failed to properly apply section 177(1) of the 1990 Act, and/or failed to give adequate reasons for rejecting the Alternative Development proposals

3.1 The Appellant argues that the Inspector failed to properly understand section 177(1) of the 1990 Act in forming the view that he could not grant planning permission for the Appellant's Alternatives B, C and D. This is wrong.

3.2 The Inspector recognised at DL/3 the scope of his powers under s.177(1):

> *… There is no power before me to grant permission for something different to that enforced against, only the whole or part of those matters.*

3.3 The Inspector repeated this, making express reference to s.177(1)(a) at DL/17:

> *Section 177(1)(a) allows permission to be given under the appeal on ground (a) to any part of the matters alleged in the notice. To that end, the appellant has advanced four alternative schemes to that subject of the notice.*

3.4 Accordingly, the Inspector had explicit regard for his powers in determining the appeals.

3.5 The Inspector considered 'Alternative Development A' at DL/18 – DL/22. The Inspector formed the view that this alternative would, in his planning judgement, form part of the matters stated in the notice:

19. It seems to me that the sun room with the canopy removed would form part of the matters stated in the notice and it is therefore open to me to grant planning permission for it under the ground (a) appeal.

3.6 Accordingly, the Inspector recognised that he had the power to grant planning permission for this alternative. The Inspector concluded, however, that this alternative would not overcome the harm to the Green Belt and the Clent Conservation Area at DL/22. Thus, this alternative still warranted the refusal of planning permission.

3.7 Accordingly, the Inspector plainly understood that he had a duty under s.177(1)(a) and recognised that this duty did expand to Alternative Development A, significantly because this alternative involved granting planning permission that was part of the matters stated in the notice and that it existed.

3.8 The Inspector then turned his attention to Alternative Developments B, C and D. In respect to each alternative the Inspector recognised that they would require development that did not presently exist. Indeed:

i. Alternative Development B would require the roof to be replaced and the removal of the sloping roof with panels – per DL/24;

ii. Alternative Development C would require the addition of an upper section and the replacement of the flat roof that constituted new works – per DL/26 – 27;

iii. Alternative Development D would require the installation of folding doors – per DL/28.

3.9 Owing to each of these developments involving the addition of new development, the Inspector formed the view that, in his planning judgement, they constituted development that did not exist and were not part of the matters enforced against in the notice. He made this express finding in respect to each alternative and explained his reasoning for this.

3.10 The Appellant's Grounds of Appeal simply misunderstand the relevant authorities in suggesting that s.177(1)(a) can allow for development that does not exist and has not been enforced against.

3.11 As to the Appellant's suggestion that the Inspector failed to provide reasons, this has no relationship with the decision letter read in full. The Inspector provided reasons in respect to each Alternative Development as to why they would not form, in his planning judgement, the development or part of the development that were enforced against.

3.12 Accordingly, this ground is unarguable.

4. Ground 2: The Inspector misinterpreted sections 173(4)(a) and 176(1)(b) of the 1990 Act, failed to properly assess the obvious Alternative Developments and/or failed to give adequate reasons for rejecting the Alternative Development proposals in relation to the ground f appeal

4.1 This second ground adds nothing to the first ground.

4.2 The Inspector explained in detail that the only Alternative Development that he could grant planning permission was Alternative Development A. He explained why that alternative would be unacceptable in planning terms at DL/22. It is obvious that it would similarly be unacceptable pursuant to ground (f), having regard to the fact that one reads the decision letter as a whole, per Lindblom LJ in ***Arnold***:

> *[20] It is necessary, as always, to read the inspector's relevant conclusions fully, in their proper context, and bearing in mind that the decision letter was written principally for the parties to the appeals, who were of course familiar with the evidence and submissions presented on either side at the inquiry. One should not isolate particular passages in the inspector's conclusions from others which are also relevant to the specific point being considered in the passage in question. The inspector's conclusions on the ground (a) and ground (f) appeals are*

not wholly discrete. They relate to each other, and, to an extent, depend upon each other. They must be considered together."

4.3 In any event, the Inspector expressly acknowledged that Alternative Development A would not remedy the breach of planning control under ground (f) – per DL/33.

4.4 Having recognised that Alternative Developments B, C and D would require the Inspector to grant planning permission in a manner beyond his powers, the Inspector was obliged to reject the proposals under ground f. It was not open to the Inspector to allow the appeal under ground (f) having regard for these alternatives on the basis that, in his planning judgement, they did not form matters that were part of the development being enforced against and they involved development that did not currently exist.

4.5 Finally, no other alternative was presented to the Inspector by the Appellant's professional representatives and thus he could not be criticised for failing to have regard for any other solution.

4.6 Accordingly, this ground adds nothing to Ground 1. It is unarguable as it relies on the same misunderstanding of the law that the Inspector had a power available to him that he did not.

5. <u>Ground 3: The Inspector failed to consider and/or exercise his powers in relation to section 176(1) of the 1990 Act, and/or failed to have regard to the consequences of the existing requirements of the EN. Additionally, the Inspector failed to provide adequate reasons in that respect. The approach was irrational</u>

5.1 The Appellant essentially criticises the Inspector for failing to address arguments that were never presented to him during the appeal. As a matter of principle, having regard for the authorities cited above and the fact that the Appellant was professionally represented during the appeal, the ground should fail on this point alone.

5.2 The Appellant argues that the requirements of the notice go further than what was necessary to remedy the breach of planning control, being that it will not return the land to how it was before the breach of planning control. This is on the basis that the Appellant argues that prior to the breach there was an existing sun room that was demolished and, *'the front façade of the Four Stones Restaurant was therefore enclosed prior to the breach'* (per para 40 of the grounds).

5.3 However, there was nothing in the evidence before the Inspector addressing the state of the Property prior to the breach of planning control. The Appellant never addressed how the front façade was enclosed prior to the breach. This would have required the Inspector to make findings of fact about the land prior to the breach. It is plainly inappropriate for the Appellant to raise this argument now given that the Court is in no position to reach a judgement on this.

5.4 Furthermore, at paragraph 41 of the grounds it is alleged that the Inspector was obliged to consider the effects of complying with the notice as a material consideration. The Claimant alleges that compliance with the notice would have, *'consequences for the structural safety and protection of the building, the running of the Claimants' business and the safety of its occupants'*. However, these points were never made to the Inspector. Indeed, per DL/50, the Inspector explicitly noted the absence of evidence on how the requirements of the enforcement notice would unduly affect the Appellant's business. Had the Appellant wished the Inspector to have regard for the consequences of the enforcement notice as a material consideration, they could have provided some evidence in respect to this. They did not and thus are now precluded from advancing this argument as a 'second bite of the cherry' through this statutory challenge. Moreover, this argument amounts to seeking reasons for reasons.

5.5 Furthermore, at paragraphs 42 and 43 the grounds allege that no explanation was given as to why the Inspector failed to exercise his powers to vary the notice. That submission has no relationship with the decision

letter. The Inspector explained throughout DL/18 – 28 and DL/31 – DL/36 as to why he was not varying the notice in accordance with the proposed alternatives.

5.6 As to the criticism of irrationality, the Appellant comes nowhere near to surmounting the high hurdle of a finding of irrationality. The Inspector had regard for the arguments presented to him and reached lawful conclusions.

5.7 Accordingly, this ground is similarly unarguable.

6. Conclusion

6.1 In the circumstances, the Defendant respectfully invites the Court to:

i. refuse permission;
ii. dismiss the appeal;
iii. order the Appellant to pay the First Respondent's costs.

Killian Garvey
Kings Chambers
6th December 2019

CO/4504/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

IN THE MATTER OF AN APPLICATION UNDER SECTION 289 OF THE TOWN AND COUNTRY PLANNING ACT 1990

BETWEEN:

BALJIT SINGH BHANDAL
BALBIR SINGH BHANDAL
AMRIK SINGH BHANDAL

Appellants

-and-

(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT

(2) BROMSGROVE DISTRICT COUNCIL

Respondents

SKELETON ARGUMENT ON BEHALF OF THE APPELLANTS FOR HEARING ON 13 DECEMBER 2019

For convenience, these grounds will adopt the usual practice of referring to the decision letter of the Defendant by the suffix "DL" followed by the relevant paragraph number. Reference to the Claim Bundle will be [CB/x]. The relevant statutory provisions and case law are contained within a separate bundle [AB/x].

Reference to the First Respondent's Skeleton Argument will be SkA/x. This Skeleton Argument responds to it.

Essential reading

a. Decision Letter dated 17 October 2019
b. Grounds of Appeal
c. ***Mahfooz Ahmed v The Secretary of State for Communities and Local Government, London Borough of Hackney*** **[2014] EWCA Civ 566 [AB/3]**
d. ***Tapecrown Ltd v First Secretary of State*** **[2006] EWCA Civ 1744, [2007] 2 P&CR 7 [AB/13]**
e. Skeleton Arguments

Introduction

1. The Appellants seek permission to bring proceedings challenging the decision of an Inspector appointed by the Defendant dated 17 October 2019 ("the decision"), to dismiss the Appellants' planning appeals pursuant to section 174 of the Town and Country Planning Act 1990 ("the Act") against an Enforcement Notice ("EN") issued by the Interested Party on 27 November 2018 (CB/B.9-10). The Interested Party is the Local Planning Authority with responsibility for planning enforcement in the area of the appeal site. The appeal was determined by way of written representations.

Background

2. The background to this matter is set out at DL2 (CB/B.2). Essentially, the unauthorised development was completed following the grant of planning permission by the Council for the demolition of an existing sun room, and replacement with a new flat roof sun room ("the 2016 permission"). The 2016 permission decision notice can be found at CB/B.1. In due course, a sun room was erected, but it differed in some respects to that which had been permitted. In particular, the roof was sloping and higher, and extended into an overhanging canopy. The canopy has been removed. Photos of the previous structure and the structure now on the site are included at CB/B.42 and CB/B.142-143 respectively.

3. As part of the appeal, the Appellants proposed four alternative schemes to the entire demolition of the sun room that are set out on pages 7-8 of the Statement of Case, CB/B.26-27 (the "Alternative Developments"). Those options included Options B and C which were a reversion to the 2016 permission or similar. However in respect of Options B and C, the Inspector considered that because those alternatives included the formation of a new roof it was not open to him to grant planning permission; see DL23-27 (CB/B.4-B.5). The Inspector was wrong to so conclude.

4. In respect of the fourth proposal, Option D involved making good the frontage of

the restaurant that would be left open and exposed by the removal of the unauthorised sun room. Again, the Inspector considered that it was outwith his powers to grant permission for the proposals; see DL28 and 36 (CB/B.5 and B.6). Again, the Inspector erred in his conclusion.

The EN

5. The EN (Ref:17/00076/PLAN) (CB/B9-10) relates to Four Stones Restaurant, Adam Hill, Clent, Stourbridge, Worcestershire DY9 9PS ("the site"). It alleges a breach of planning control in the following way:

> ***"without planning permission the erection of a replacement glazed sunroom ("the unauthorised development")."***

6. The requirements of the notice were for the Appellants to:

> ***" 1. Remove the unauthorised development from the Land;***
>
> ***2. Remove from the Land all building material and rubble arising from compliance with the requirements of step 1 above."***

7. The Appellants appealed against the EN pursuant to sections 174(2)(a), (f) and (g) of the Act; see AB/1/5.

Relevant Law

8. The relevant law is set out in the Grounds of Appeal, CB/A.17-22, In summary and in relation to the statutory framework:

(i) Section 173 of the Town and Country Planning Act 1990 (AB/1/3) sets out the contents and effect of an EN. Section 173(5) explains that an EN can require (by way of example), the alteration or removal of any buildings, and/ or the carrying out of any building or other operations.

(ii) Section 174 (AB/1/5-6) sets out the provisions for appealing an enforcement notice, and the grounds on which an appeal may be brought; set out in section 174(2). They include:

> *"(a) that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted …;*

…

(f) that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach."

(iii) Section 176 (AB/1/9) contains general provisions relating to the determination of appeals and includes subsection 1(b) that an Inspector may vary the terms of the enforcement notice, if he is satisfied that the correction or variation will not cause injustice to the appellant or the local planning authority.

(iv) In considering an appeal under section 174 the Secretary of State has power, under section 176(1)(b), to vary the terms of an enforcement notice if he is satisfied that the variation will not cause injustice to the appellant or the local planning authority.

(v) Section 177 (AB/1/11) relates to the grant or modification of planning permission on appeals against enforcement notices, and explains that the Secretary of State may grant planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control, whether in relation to the whole or any part of those matters or in relation to the whole or any part of the land to which the notice relates; see AB/11

9. The principles established in ***Tapecrown Ltd v First Secretary of State*** **[2006] EWCA Civ 1744, [2007] 2 P&CR 7** [AB/13] are important in this case.

10. In **Tapecrown**, Carnwath LJ explained, (not for the first time) that the enforcement procedure is intended to be remedial rather than punitive. It was observed at para 33 of his judgment that an Inspector has wide powers to decide whether there is any solution, short of a complete remedy of the breach, which is acceptable in planning terms and amenity terms. If there is, an Inspector should be prepared to modify the requirements of the notice and grant permission subject to conditions:

"46. As I have said, I would not wish to lay down any general rules. I would accept that as a general proposition, given the limitations of the written representations procedure, an appellant would be well advised to put forward any possible fall-back position as part of his substantive case. It is not the duty of the inspector to make his case for him. ***On the other hand the inspector should bear in mind that the enforcement procedure is intended to be remedial rather***

than punitive. If on his consideration of the submissions and in the light of the site view, it appears to him that there is an obvious alternative which would overcome the planning difficulties, at less cost and disruption than total removal, he should feel free to consider it*. In such circumstances fairness may require him to give notice to the parties to enable them to comment on it" (emphasis added)* (AB/13/185)

11. **Tapecrown** was a case in which the Inspector had failed to consider whether, as an alternative to demolition, if appropriate modifications were made to an unlawful building, and if all or part of the hardstanding associated with it were removed, the building could be made acceptable in planning terms; see para 35. The case was remitted for redetermination.

12. The purpose of the statutory scheme was further explored in ***Mahfooz Ahmed v The Secretary of State for Communities and Local Government, London Borough of Hackney*** **[2013] EWHC 2084 (Admin) (AB/2)**, and [**2014] EWCA Civ 566 (AB/3)**. That case is very important in this appeal, and has materially similar facts, which are addressed below. In particular:

    (i) In **Ahmed** Permission was granted in 2005 for the demolition of an existing building, and the erection of a three storey building with a butterfly roof, comprising a retail unit on the ground floor and six flats on the two upper floors;

    (ii) The consent expired on 7 June 2010, and was no longer extant at the time of the appeal.

    (iii) What was built on site, was a 4 storey building with a flat roof. An enforcement notice was served and Mr Ahmed appealed. The appeal was dismissed.

    (iv) As part of his appeal, Mr Ahmed proposed modifying the building as built to bring it into conformity with the lapsed 2005 planning permission.

    (v) That site was also in a Conservation Area.

13. Mr Ahmed contended that the requirement in the enforcement notice for the complete demolition of the building amounted to over-enforcement for the purposes of section 174(2)(f), and that the Inspector erred in law by failing to consider whether the breach of planning control could be rectified by amending the enforcement notice so as to require the partial demolition of the building and its remodelling so as to make it conform to the terms of the 2005 consent.

14. It was argued that the Inspector had power under 176(1)(b) to vary the terms of

the enforcement notice to remedy the breach of planning control, as well as having power under section 177(1) to grant retrospective consent for that part of the structure that was authorised by the 2005 consent.

15. The question in the main appeal was whether the Inspector erred in law on the enforcement notice appeal by failing to consider an "obvious alternative" in accordance with the principles discussed in ***Tapecrown Ltd v First Secretary of State*** **[2006] EWCA Civ 1744, [2007] 2 P&CR 7** and ***Moore v Secretary of State for Communities and Local Government*** **[2013] JPL 192**

16. The Judgment records the Defendant Secretary of State's argument at paragraph 19(4)] (AB/3/31) that:

"On an enforcement notice appeal the Secretary of State is confined to giving planning permission for the development of which the notice complained: Richmond upon Thames Borough Council v Secretary of State for the Environment [1972] EGD 948, as applied in Runnymede Borough Council v Secretary of State for the Environment, Transport and the Regions [2001] PLCR 24. Section 177(1)(a) is not wide enough to empower a grant of planning permission for the 2005 scheme…."

17. Importantly, the argument and others were rejected, and the Court held that in principle, planning permission could have been granted for the 2005 scheme providing that such that a development in accordance with the 2005 scheme could be regarded as a "part" of the development as built. The fact that the unlawful building would need to be modified to achieve the 2005 scheme was not fatal to the argument:

"26. That brings me to the deputy judge's finding that the inspector erred in law by overlooking an obvious alternative by way of granting planning permission for the 2005 scheme and varying the enforcement notice accordingly. It is clear that the inspector did not consider the possibility of that alternative. I do not accept Mr Whale's submission that even if the inspector had considered it he would have had no power to grant permission for the 2005 scheme. Whether it would have been open to him to grant such permission depended, as explained below, on an exercise of planning judgment which he did not undertake. ***It cannot be said, either as a matter of law or on the basis that the facts were capable of leading to only one reasonable answer, that it would have been outside his powers to grant permission for the 2005 scheme.***

27. I agree with Mr Whale that the power under section 177(1) to grant planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control is linked to an appeal under ground (a) rather than under ground (f). But Mr Ahmed's appeal included express reliance

*on ground (a) and he would have been deemed in any event to have made an application for planning permission by virtue of section 177(5) as it existed as the material time. Although his ground (a) appeal sought planning permission only in respect of the development as built, which constituted the whole of the matters stated in the notice as constituting a breach of planning control, the power under section 177(1) was to grant planning permission "in relation to the whole or any part of those matters****". In principle, therefore, planning permission could have been granted for the 2005 scheme if the differences between it and the development as built (i.e. the differences identified in the notice as "unauthorised additions, alterations and variations to the approved scheme") were such that a development in accordance with the 2005 scheme could be regarded as a "part" of the development as built. This was a matter of planning judgment for the inspector.*** *It was a judgment he did not make because of his failure to give any consideration to the possibility of granting planning permission for the 2005 scheme. This court is not in a position to decide what conclusion he would have reached if he had considered that possibility.* ***In particular, we cannot exclude the possibility that he might reasonably have concluded that the 2005 scheme was to be regarded as "part" of the development as built, on which basis he would have had power under section 177(1) to grant planning permission in relation to it.***

….

33. For those reasons I am satisfied that the inspector would have had power to grant planning permission for the 2005 scheme and to vary the enforcement notice accordingly if, having considered the possibility, he had judged the 2005 scheme to be a "part" of the development as built." emphasis added. **(AB/3/33-35)**

18. The enforcement of planning control should not be used to deprive landowners of their lawful rights; for which see ***Graham Oates v Secretary of State for Communities and Local Government v Canterbury City Council*** **[2018] EWCA Civ 2229** citing ***Mansi v Elstree Rural District*** **Council (1965) 16 P. & C.R. 153**

Reasons

19. The law on reasons will be understood. A helpful summary was included in the ***Bloor Homes East Midland Ltd v SSCLG*** **[2014] EWHC 754 (Admin**) per Lindblom J (as he then was) at **[19]:**

"The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the "principal important controversial issues". An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration (see the speech of Lord Brown of Eaton-under- Heywood in South Bucks District Council and another v Porter (No. 2) [2004] 1 W.L.R. 1953 , at p.1964B-G)."

Submissions

Ground 1: The Inspector misinterpreted section 177(1) of the 1990 Act, and / or failed to give adequate reasons for rejecting the Alternative Development proposals. The approach was irrational.

20. The first ground essentially questions whether the Inspector properly understood his powers pursuant to section 177(1) of the Act, and /or whether he gave adequate reasons for rejecting the Alternative Developments proposed by the Appellants.

21. The First Respondent's submissions don't even begin to engage with the substance of the ground, and SkA/3.1 has misunderstood ground 1; it does not relate to Alternative Development D.

22. The Appellant's allegation is not that the Inspector was not alive to the need to consider "obvious alternatives" but that his reasons for rejection demonstrate a misunderstanding of section 177(1) and/ or are inadequate.

23. The First Respondent's response is essentially that because each of the alternatives included "new development", they were excluded from the operation of Section 177(1) of the Act.

24. That is wrong for the following reasons:

    a. The alleged breach of planning control at §3 of the EN is the erection of a replacement glazed sun room without planning permission.
    b. Both Alternative Developments B and C proposed a glazed sun room. The nature and function of the sun room would remain the same.

c. The proposals contract the size of the unauthorised development through minor modifications to the roof. The resulting structures would still be wholly contained within the footprint and volume of the sun room as built and enforced against.
d. Both proposals can properly be regarded as a "part" of the development as built.
e. The Inspector failed to explain why *"new works in the formation of a roof"* precluded the alternative developments B and C from falling within section 177(a) of the Act in principle.
f. That narrow approach is contrary to **Ahmed** and finds no support within the wording of the Act. In **Ahmed** partial demolition of the building and remodelling was inevitably required to reduce the four storey flat roof building in that instance to the previously consented three storey butterfly roof building (see para. 17). The Court rejected the argument (AB/3/31-32 (para 19(4)) that such modifications precluded an alternative from falling within the scope of section 177(1) if the alternative was such that a development in accordance with the 2005 scheme could be regarded as a "part" of the development as built; see paragraphs 19(4) and 27.

25. Accordingly, the Inspector misinterpreted section 177(1), and misunderstood and failed to use his powers to grant planning permission for the Alternative Developments proposed. The Inspector was not fettered by the requirement for works to form a new roof. There is nothing within the Act, or section 177(1) that prevented the Inspector from using his powers pursuant to section 177(1) in the circumstances and in the way that he assumed.

26. The First Respondent has provided no authority to support the Inspector's approach, and does not expand on the reasons given by the Inspector.

27. Crucially, the approach promoted by the Inspector and supported by the First Respondent would have the effect of rendering the "obvious alternative" doctrine obsolete. An "alternative" development is by definition, different to the development that has been enforced against. If works of modification to an unlawful structure exclude such alternatives from the operation of the doctrine and the reach of section 177, it become entirely unclear how the doctrine is to operate in practice.

28. There is no authority for such a restrictive approach, which appears to fly in the face of the Judgment of Carnwath LJ, (as he then was) in **Tapecrown**.[1]

[1] It will be remembered that the enforcement provisions of the Act are based on the main recommendations of the report by Robert Carnwath QC, entitled "Enforcing Planning Control" (February 1989), for the Secretary of State for the Environment:

"33. In short, the inspector has wide powers to decide whether there is any solution, short of a complete remedy of the breach, which is acceptable in planning terms and amenity terms. If there is, he should be prepared to modify the requirements of the notice, and grant permission subject to conditions (or to accept a section 106 agreement, if offered). I would emphasise, however, that his primary task is to consider the proposals that have been put before him. Although he is free to suggest alternatives, it is not his duty to search around for solutions. I will return to the latter point in connection with the grounds of appeal. " (AB/13/182)

And at [46]

"…On the other hand the inspector should bear in mind that the enforcement procedure is intended to be remedial rather than punitive. If on his consideration of the submissions and in the light of the site view, it appears to him that there is an obvious alternative which would overcome the planning difficulties, at less cost and disruption than total removal, he should feel free to consider it. In such circumstances fairness may require him to give notice to the parties enabling them to comment on it. I would expect the Inspectorate to have an established practice for dealing with that situation efficiently and expeditiously." (AB/13/185)

29. **Tapecrown** is clear that an Inspector has "wide powers" to consider alternatives, that are not the unlawful development, but which overcome the planning difficulties at less cost and disruption than complete demolition. Options B and C were such alternatives. The fact that they required modification of the unlawful structure is wholly in accordance with the "obvious alternatives" doctrine, and could not prevent the application of section 177(1).

30. Alternatively, the Inspector failed to give adequate reasons why works to form a new roof prevented the Alternative Development proposals from comprising part of the matters stated in the enforcement notice as constituting a breach of planning control. That "in principle" finding is, without more, contrary to the finding of the Court in **Ahmed,** which rejected the same argument by the Secretary of State. The Appellants are prejudiced by that failure, particularly when the reasoning is contrasted with the approach to Alternative Development, A which also proposed works to the sun room structure by the removal of the canopy, but which was considered by the Inspector to fall within the scope of section 177(1).

31. Further, the Appellants' Statement of Case pp9-14 (CB/B.28-B.33) addressed the relevant legal principles. Despite that, the Inspector failed entirely to refer to the line of authorities, which includes **Tapecrown** and **Ahmed**. His absence of reasoning in the light of those authorities give rise to a substantial doubt as to whether he understood those authorities, and went wrong in law.

Ground 2: The Inspector misinterpreted sections 173(4)(a) and 176(1)(b) of the 1990 Act, failed to properly assess the obvious Alternative Developments and / or failed to give adequate reasons for rejecting the Alternative Development proposals in relation to the ground f appeal.

32. The First Respondent is correct that there is an overlap between grounds 1 and 2, in that both consider the Alternative Developments and the Inspector's treatment of them. However, they relates to different parts of the DL, and so are appropriately kept apart. Ground 1 concerns DL18-29. Ground 2 concerns DL30-35. It is useful to separate them, not least because the Inspector's reasoning is different in respect of the two parts. The First Respondent's SkA fails to acknowledge that.

33. The Inspector's approach at DL30-35 was to consider that none of the alternatives A-C would "remedy the breach of planning control." The findings at DL36 in respect of Alternative D are different and addressed in Ground 3.

34. However, the Inspector's task was to consider whether "*there is any solution, short of a complete remedy of the breach, which is acceptable in planning terms and amenity terms";* see **Tapecrown** at [33]. The Inspector did not do that, but embarked on a journey of entirely circular reasoning that demolition was required to remedy the breach of planning control, and so anything less than demolition would not remedy the breach of planning control. He did not consider the planning merits of any of the alternative developments. The approach again robs the obvious alternatives principle of any utility.

35. In particular, the Inspector appears within this part of the DL to have rejected the Alternative Development proposals simply because they were promoting solutions that were less than full demolition, not because they did not form part of the development enforced against as suggested in the First Respondent's SkA [4.4].

36. However, as set out above, an Inspector has wide powers to decide whether there is any solution, short of a complete remedy of the breach, which is acceptable in planning terms and amenity terms. If there is, an Inspector should be prepared to modify the requirements of the notice (section 176(1)(b)) and grant permission subject to conditions. The Inspector in this instance failed to apply his mind to that task. The approach was punitive and opaque.

37. The reasoning is also deficient, opaque and severely prejudices the Appellants. It

is not at all clear what the Inspector meant by the repeated mantra that the Alternative Development proposals at A-C would not remedy the breach of planning control, or why they would not; see DL33-35. The conclusion is even more surprising when the Inspector accepted at DL51 that it is clear that the Council considers that some form of extension on the footprint of the unlawful building is acceptable in planning terms as a result of the earlier permission. The two conclusions are entirely at odds, and required further explanation.

38. In this instance, there was clearly a solution, short of a complete demolition that is acceptable in planning terms and amenity terms. The Inspector failed to properly consider and apply section 176(1)(b) of the 1990 Act to vary the requirements of the EN to achieve an acceptable development on site. In particular, section 173(5) sets out the range of requirements that were at the Inspector's disposal in order to achieve a proposed Alternative Developments through the variation of the EN pursuant to the ground (f) appeal.

39. Accordingly, the Inspector's approach is wrong in law and contrary to **Tapecrown**; see AB/13 paragraphs 33-34 and paragraph 46 in particular.

Ground 3: The Inspector failed to consider and/or exercise his powers in relation to section 176(1) of the 1990 Act, and/or failed to have regard to the consequences of the existing requirements of the EN. Additionally, the Inspector failed to provide adequate reasons in that respect . The approach was irrational.

40. The First Respondent's defence of this ground is surprising to say the least. It proceeds on the basis that the central point of this ground was not put to the Inspector, which is simply wrong. The Inspector was provided with photographs of the land before the breach took place (CB/B.43), was explicitly directed to the Alternative Development Option D, to prevent the adverse consequences addressed under this ground from materialising, and carried out a site visit, at which the position would have been obvious.

41. In particular, the following are references to the Statement of Case in the Appeal (starting at CB/B.20):

    (i) Para 25 (B.26) refers to the result of compliance with the notice as drafted, being that it would leave a large hole that would need to be enclosed.

    (ii) Para 30 (CB/B.31) highlights that Option D provides for the main building to be made good (by varying the notice to allow the closure of frontage), and that this step also forms part of the default in each of the other alternative options in the case of non-compliance with

the notice as varied);

(iii) Para 54 (CB/B.35) explains that removal of the sun room would leave an opening in the frontage that would require further works,

(iv) Para 76 (CB/B.39) refers to Option D and confirms that stopping up the gap is necessary for the continuing business activity;

(v) Para 81 (CB/B.41) refers to the need to consider the impact on the ongoing business;

(vi) Para 87 (CB/B.41) concludes the case with reference to the need to close the "gaping opening in [the] frontage."

42. It is notable that the First Respondent does not respond at all in the SkA to the point that the Inspector failed to exercise his powers pursuant to section 176(1)(b) to vary the requirements of the EN to allow for the closing up of the hole in the front of the building following demolition of the unauthorised structure. The Appellants are at a loss to understand the argument at SkA/5.5 that the failure to explain why the Inspector failed to vary the notice in this respect has no relationship to the decision letter. First, the Inspector was explicitly invited to consider Alternative Option D as a means of securing the building following complete demolition of the unauthorised structure, second, he was invited simply to vary the notice such that the restaurant was not left with a gaping hole in its frontage. (CB/B.41), para 87.

43. The Inspector failed entirely to address the adverse and perverse consequence of the notice and any way in which that might be ameliorated pursuant to section 176((1)(b): (AB/1/9). Alternative Development D was not an Alternative Development proposal in the sense of options A-C, because it was not something short of demolition. It proceeded on the basis of total demolition of the unlawful structure; it was directed at remedying the land post demolition.

44. The stopping up of the gap simply required a variation of the notice pursuant to section 176(1)(b), in conjunction with section 173(5) (AB/1/3) which provides for a range of requirements.

45. By section 173(5), the EN can include a number of requirements including (a) the alteration or removal of any buildings or works; and (b) the carrying out of any building or other operations.

46. Accordingly, compliance with the EN would mean that a large hole was left in the front façade of the Four Stones Restaurant, with no lawful means of closing it up. The consequences for the structural safety and protection of the building, the running of the Appellants' business and the safety of its occupants are potentially catastrophic. The failure to consider, understand and explain the effect of the unvaried requirements represents a failure to have regard to material consideration, and is irrational. It is a very serious failure by the decision maker in

this case.

47. The First Respondent's defence is that the matters were not raised before the Inspector, they were. The defence therefore fails.

48. No explanation is given as to why the Inspector failed to exercise his power to vary the notice in light of the serious consequences for the Appellants, their business and their property. The approach at DL36 is wrong and conflates the issue of whether to grant planning permission pursuant to section 177(1), with the power to vary the requirements of the EN pursuant to section 176(1)(b) to prevent over enforcement.

49. Alternatively, if the Inspector did not have the power to prevent the over-enforcement and the consequent hole in the wall, which is not accepted for the reasons given above, that consequence was a material consideration in the ground (a) appeal that the Inspector failed to have regard to in considering whether or not to grant permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control. Again, the First Respondent has failed to address that argument in the SkA.

Conclusions

50. For all of the foregoing reasons, the decision of the Defendant dated 17 November 2019 is unlawful and ought to be quashed. The Court is respectfully invited to grant permission to proceed to a substantive hearing.

And the Appellants seek:

1. An Order quashing the Defendant's decisions dated 17 November 2019 and remitting the matter for redetermination; and

2. Costs

THEA OSMUND-SMITH
No5 Chambers
10 December 2019

CO/4504/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

BEFORE HIS HONOUR JUDGE COOKE

IN THE MATTER OF AN APPLICATION UNDER SECTION 289 OF THE TOWN AND COUNTRY PLANNING ACT 1990

BETWEEN:

BALJIT SINGH BHANDAL
BALBIR SINGH BHANDAL
AMRIK SINGH BHANDAL

Appellants

-and-

(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT

(2) BROMSGROVE DISTRICT COUNCIL

Respondents

ORDER

UPON hearing Counsel for the Appellants and Counsel for the Secretary of State, and the Second Respondent not appearing

IT IS ORDERED THAT

1. Permission is granted for the Appellants' appeal pursuant to section 289 of the Town and Country Planning Act 1990 on all three grounds.

2. The First Respondent and any other person served with the claim form who wishes to contest the claim or support it on additional grounds must file and serve detailed grounds for contesting the claim or supporting it on additional grounds and any written evidence, within 35 days of service of this order.

3. Any reply and any application by the Appellants to lodge further evidence must be lodged within 21 days of the service of detailed grounds for contesting the claim.

4. The Appellants must file and serve a trial bundle not less than 4 weeks before the date of the hearing of the statutory challenge.

5. The Appellants must file and serve a skeleton argument not less than 21 days before the date of the hearing of the statutory challenge.

6. The First Respondent and any other party who wishes to defend the claim must file and serve a skeleton argument not less than 14 days before the date of the hearing of the statutory challenge.

7. The Appellants must file an agreed bundle of authorities not less than 3 days before the date of the hearing of the statutory challenge.

8. The statutory challenge shall be listed to be heard at the Birmingham District Registry for one day.

9. Costs in the case.

IN THE HIGH COURT OF JUSTICE **Claim No. CO/4505/2019**

QUEEN'S BENCH DIVISION

PLANNING COURT

BETWEEN:

(1) BALJIT SINGH BHANDAL

(2) BALBIR SINGH BHANDAL

(3) AMRIK SINGH BHANDAL

Appellants

and

(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT

(2) BROMSGROVE DISTRICT COUNCIL

Respondents

DETAILED GROUNDS OF RESISTANCE ON BEHALF OF THE FIRST RESPONDENT

These Detailed Grounds adopt the same nomenclature of the Grounds of Appeal, through referring to the paragraphs of the decision letter by the suffix 'DL' and references to the claim bundle by [CB/x]

1. Introduction

1.1 This is a statutory appeal brought pursuant to section 289 of the Town and Country Planning Act 1990 against the decisions made by the First Respondent's Inspector ('the Inspector') dated 17 October 2019 ('the Decision').

1.2 The appeal relates to the Inspector's decisions to dismiss three conjoined appeals, pertaining to an enforcement notice **[CB/9]**, which was issued by the Second Respondent. The notice was served on land at Four Stones Restaurant, Adams Hill, Clent, Stourbridge, Worcestershire DY9 9PS ('the Property').

1.3 This appeal is brought pursuant to 3 grounds of challenge. By an Order dated 7 January 2020, HHJ Cooke granted permission for the claim to proceed on all 3 grounds.

1.4 For the reasons below, the First Respondent respectfully invites the Court to dismiss and order the Appellant to pay the First Respondent's costs.

2. Law

2.1 General propositions

2.1.1 In ***Bloor Homes East Midlands Limited v Secretary of State for Communities and Local Government*** [2014] EWHC 754 (Admin) at [19], Lindblom J (as he then was) set out the general law on s.288 statutory challenges. Whilst this is a s.289 challenge, the same principles apply.

2.1.2 In ***R. (Newsmith Stainless Ltd) v Secretary of State for Environment, Transport & the Regions*** *[2001] EWHC Admin 74*. (emphasis added) the Court held as follows in respect to irrationality:

> *7. In any case, where an expert tribunal is the fact finding body the threshold of Wednesbury unreasonableness is a difficult obstacle for an applicant to surmount.* ***That difficulty is greatly increased in most planning cases because the Inspector is not simply deciding questions of fact, he or she is reaching a series of planning judgments****. For example: is a building in keeping with its surroundings? Could its impact on the landscape be sufficiently ameliorated by landscaping? Is the site sufficiently accessible by public transport? et cetera.* ***Since a significant element of judgment is involved there will usually be scope for a fairly broad range of possible views, none of which can be categorised as unreasonable****. A misconstruction of national policy guidelines will lead to the quashing of the decision: R. (on the application of Lovelock) v First Secretary of State and Surrey Heath DC [2006] EWHC 2423 (Admin).*

*8. Moreover, **the Inspector's conclusions will invariably be based not merely upon the evidence heard at an inquiry or an informal hearing, or contained in written representations but, and this will often be of crucial importance, upon the impressions received on the site inspection.** Against this background an applicant alleging an Inspector has reached a Wednesbury unreasonable conclusion on matters of planning judgment, faces a particularly daunting task.*

2.1.3 The classic formulation of the standard of reasons in an Inspector's decision was provided by Lord Brown in ***South Buckinghamshire District Council v Porter (No 2)*** [2004] 1 WLR 1953, para 36:

*The reasons for a decision must be intelligible and they must be adequate. **They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved**. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. **But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration**. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. **Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.***

2.2 The Law on Alternatives

2.2.1 In an enforcement notice, an Inspector can be required to consider alternative developments per section 177(1)(a) of the Town and Country Planning Act 1990, which says:

(1) On the determination of an appeal under section 174, the Secretary of State may—
[(a) grant planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control, whether in relation to the whole or any part of those matters or in relation to the whole or any part of the land to which the notice relates;]

2.2.2 However, the Courts have clarified on numerous occasions the narrow scope of this power.

2.2.3 The Appellant relies heavily on ***Mahfooz Ahmed v Secretary of State for Communities and Local Government*** [2014] EWCA Civ 566 in its Grounds of Appeal. However, that matter was significantly different to the facts of the present matter. Lindblom LJ addressed this judgment in ***Arnold v Secretary of State for Communities and Local Government*** [2017] EWCA Civ 231, saying as follows about it:

> *43. I do not see how Mr Turney's argument can gain any support from the decision of this court in Ahmed . There the inspector had gone wrong in failing to consider an alternative scheme for which planning permission had been granted on appeal in 2005.* ***The Court of Appeal emphasized that the question of whether an alternative scheme could be regarded as "part of" the development against which the local planning authority had enforced was a matter of planning judgment for the inspector. In that case the inspector had simply failed to exercise his planning judgment****, having given no consideration to the possibility of granting planning permission for the 2005 scheme (see paragraphs 26 and 27 of the judgment of Richards L.J., with which Underhill and Floyd L.JJ. agreed). On its facts, therefore, Ahmed is not truly comparable to this case. In this case the inspector manifestly did consider all of the alternative schemes put forward. In doing so, he was fully aware of the statutory powers available to him and acted in accordance with them.*

2.2.4 Accordingly, ***Ahmed*** is a case where an Inspector simply failed to address alternative schemes. That has no bearing on the present matter where the Inspector did address the alternatives throughout the decision letter in detail, reaching the view that in his planning judgement the alternatives could not form part of the development that had been enforced against.

2.2.5 In ***Arnold*** Lindblom LJ went on to say as follows concerning alternative schemes:

> *44. More in point, I think, is the decision of Ouseley J. in Ioannou . That case is in some respects analogous to this on its facts. The local planning authority had served an enforcement notice requiring the cessation of*

the use of a dwelling house converted without planning permission into five self-contained flats. On his ground (a) appeal, the appellant presented the inspector with a proposal for the conversion of the building into three flats, which, as the authority accepted, would avoid the planning objections to its use as five flats. The inspector did not, however, grant planning permission for the three-flat scheme. Ouseley J. endorsed his approach. ***It was the matters stated in the enforcement notice as constituting a breach of planning control to which the inspector's attention was directed under section 177(1)(a) , rather than the works in the alternative scheme. He could "only grant permission under ground (a)[,] and on the deemed application, for the alternatives to the extent that that could be achieved by granting permission for the whole or part of the breaches alleged in the notice****" (paragraph 32 of the judgment). Ouseley J. went on to say this (in paragraph 33):*

> *"33. The inspector obviously could [not grant] permission for the whole of the breach alleged in the notice and so achieve the three-flat scheme; that would simply leave the five flats in place. His only other power was to grant permission for part of the breach alleged in the notice. But the three-flat scheme could not be arrived at by granting permission for part only of the matters alleged to constitute the breach of planning control in the notice.* ***Only one of the five flats, the one on the first and second floor, could be left untouched, although an entry door would have to be removed****. … **The four flats on the ground floor could not go into two flats without internal alterations to walls, doors, and facilities. Works were required in order to produce three flats, which were not part of the matters alleged to constitute a breach of planning control in the notice****. Granting planning permission for the larger flat without more … would not have remedied what the Inspector found to be the objectionable parts of the breach of planning control, nor would it have produced the scheme which the Inspector was prepared to see achieved."*

For the appellant's argument on ground (a) and the deemed planning permission to succeed without recourse to the powers governing remedial steps under ground (f), the power in section 177(1)(a) would have to be "read as empowering the grant of permission for a development which is not, and is not part of, the matters alleged to constitute a breach of planning control, and indeed which does not exist". *The wording of section 177(1)(a) , was "too specific and clear for such an interpretation" (paragraph 34). As Ouseley J. went on to say, "something other than the grant of permission for all or part of the matters alleged in the enforcement notice to constitute the breach of planning control would be required to achieve the three-flat scheme" (paragraph 37).*

45. Those conclusions were confirmed by this court (see the judgment of Sullivan L.J., at paragraph 11). The Secretary of State's appeal succeeded on the argument that the inspector was also correct in his

conclusion that he did not have the power to consider the three-flat scheme under the appeal on ground (f) (see paragraphs 27 to 40 of Sullivan L.J.'s judgment). But Ouseley J.'s analysis on the ground (a) appeal in that case illustrates very well the practical limits of an inspector's power to grant permission for development which is part of the matters alleged in an enforcement notice to constitute a breach of planning control. The inspector's approach in this case seems entirely congruent with it.

2.2.6 Thus, the Court of Appeal held, in accordance with the previous Court of Appeal's judgment in ***Ioannou v Secretary of State for Communities and Local Government*** [2014] EWCA Civ 1432, that an Inspector can only grant planning permission under s.177(1)(a) for development that:

i. exists; and
ii. is, or is part of, the matters alleged as a breach of planning control in the enforcement notice.

2.2.7 The Appellant's reliance on ***Ahmed*** fails to appreciate that under s.177(1) an Inspector can only grant permission for development that exists. Indeed, this point was made explicitly in ***Ahmed*** at [27]:

… In principle, therefore, planning permission could have been granted for the 2005 scheme if the differences between it and the development as built (ie. The differences identified in the notice as 'unauthorised additions, alterations and variations to the approved scheme') were such that ***a development in accordance with the 2005 scheme could be regarded as a 'part' of the development as built****. This was a planning judgment for the inspector. It was a judgment he did not make because of his failure to give any consideration to the possibility of granting planning permission for the 2005 scheme.*

2.3 Rationality

2.3.1 For a conclusion to be irrational or perverse it must be one that no reasonable person in the position of the decision-maker, properly directing himself on the relevant material, could have reached (***Seddon v SSE*** (1981)

42 P&CR 26). The Court will require "something overwhelming" from a claimant before allowing a challenge of this sort (***Associated Provincial Picture Houses v Wednesbury Corporation*** [1948] 1 KB 223 at 230 (see also 233-234)). A claimant alleging that a decision-maker has reached a *Wednesbury* unreasonable conclusion on a matter of judgement faces a particularly daunting task (***R (Newsmith Stainless Ltd) v SSETR*** [2017] PTSR 1126 at para 8).

2.4 Raising arguments not raised before the Inspector

2.4.1 In ***R.(oao Newsmith Stainless Ltd) v Secretary of State for Environment*** [2001] EWHC 74 (Admin), Sullivan J (as he then was) held as follows:

> *13 Mr Craig drew my attention to the decision of Mr George Barlett QC, sitting as a deputy judge of the High Court, in South Oxfordshire District Council v Secretary of State for the Environment, Transport and the Regions [2000] V2 All ER 667 . The Encyclopedia in paragraph 288.16 summaries the effect of his decision in this way:*
> *"… there was no general rule that a party to a planning appeal was to be prevented from raising, in a challenge to that decision, an argument that had not been advanced in representations made on the appeal. If the inspector had omitted a material consideration, the decision could be unlawful, notwithstanding that the matter had not been raised in representations."*
>
> *14 It is important that the South Oxfordshire decision is not regarded as a licence to introduce new material, that is to say material that was not before the Inspector, in section 288 applications. That this was not the deputy judge's intention is plain from the manner in which he dealt with the two additional grounds of challenge that were in contention in that case. The background was that the planning authority, whose refusal of planning permission had been overturned on appeal by an Inspector, sought permission to introduce two arguments before the learned deputy judge: firstly, relating to intermittent use; and secondly, relating to the adequacy of a condition.*
>
> *15 The defendants objected upon the basis that the former argument would require new evidence and the latter could have been dealt with by way of suggested modifications if it had been raised before the Inspector. The judge accepted the validity of those objections and refused to permit the amendments containing the new grounds to be argued.*
>
> *16* ***Whilst I accept that there is no general rule preventing a party from raising new material in a section 288 application, it will only be in very***

rare cases that it would be appropriate for the court to exercise its discretion to allow such material to be argued. It would not usually be appropriate if the new argument would require some further findings of fact and/or planning judgment (matters which are for the Inspector not the Court).

2.4.2 In ***Humphris v SSCLG*** [2012] EWHC 1237 (Admin), Ouseley J said as follows where a claimant sought to raise an argument not advanced before an Inspector during a section 78 appeal:

> *27 In my judgment it is wholly inappropriate for those points to be raised by way of a contention that the inspector has ignored a material consideration when these points, far from obvious as they are, were not raised by the claimant before him.*

2.4.3 In ***Francis v First Secretary of State*** [2008] EWCA Civ 890, Keene LJ held as follows:

> *38 I agree. Had the appellant not been professionally represented at the hearing by a chartered town planner who was also a chartered architect, there would have been a stronger argument for a more interventionist role to have been played by the inspector at this informal hearing;* ***but when an appellant is professionally represented, an inspector is normally entitled to expect that the appellant's case will be adequately put forward by that representative and will address at least those issues which have been identified beforehand by the pre-enquiry statements and such other documents as the planning authority's reasons for refusing permission.*** *Such was the situation here. The planning authority's objection to a low level ventilation system had been clearly flagged up in advance of the hearing, and in those circumstances the inspector could properly proceed on the basis that if the appellant sought to establish that that objection was invalid, then evidence would be produced to that effect. That being so, I for my part am not persuaded that the procedure adopted here was unfair. I too would dismiss this appeal.*

2.4.4 In ***David Langmead v Secretary of State for Housing, Communities and Local Government*** [2018] EWHC 2202, Lane J held as follows:

> *20. … an appeal against an Enforcement Notice is not to be equated with an appeal against the refusal of planning permission. The wording of the Enforcement Notice, and the activity which is said by it to constitute a breach of development control, must be the focus for the*

Inspector, who is entitled to expect precision in a case that is being put forward by a professionally-represented Appellant.

2.4.5 In ***Najafi v Secretary of State for Communities and Local Government*** [2015] EWHC 4094 (Admin), the Court reviewed the authorities and held as follows:

> *20. In truth however that line of authorities does not assist the appellant on the facts of this case. In my judgment, none of them impose on an Inspector a duty to consider whether to seek a less demanding solution that he has not been asked to consider. It is true that in Tapecrown Carnwath J does refer to the restricted opportunities for input in the written representations procedure, but none of the authorities suggests that the Inspector is obliged to cast around for a solution despite the parties' position. In Moore and Ahmed the possibility of the solution sought was clearly raised by the appellants. The appeal against the planning Inspector was allowed in Moore because the Inspector thought he had no jurisdiction to do what he was asked to do, and in Ahmed because he had been clearly asked but had failed to consider the possibility. In Ahmed the position was that the possibility, the obvious alternative, was raised in grounds under paragraph (b) rather than under paragraph (f) but the court held that nevertheless they were put to the Inspector. In Tapecrown itself the problem was that the possibility had certainly occurred to the Inspector. It is not clear on the facts the extent to which the parties had put the point to him, but then the matter having occurred to the Inspector and he having recorded that in his decision he did not go on properly to deal with it. None of this casts doubt on what was said by Schiemann LJ in Taylor & Sons Farm v Secretary of State in the Environment, Transport and Regions [2001] EWCA Civ 1254 , a decision the relevant parts of which was specifically approved by Carnwath J in Tapecrown at paragraph 44. At the risk of not doing justice to the whole of the passage to which Carnwath J referred I will set out the sentences in which appear to me to be of importance in the context of the present case. At paragraph 40 of the judgment in Taylor Farms :*
>
> > *21. "It was not incumbent on the Inspector to conduct her own enquiries as to which area might be the most suitable for agricultural use.*
>
> *22. At 41:*
>
> > *i. "Appellants should contemplate the possibility that their primary contentions may fail and that those of their opponents may succeed. The very reliance on ground (f) shows that this is the position. If there is a fallback position on which they wish to rely then they should make this clear to the Secretary of State in their submissions. It is not reasonable to come to court, as has*

happened here, and ask for the case to be remitted to the inspector so that she may ask for further submissions … "

3. <u>Ground 1: The Inspector misinterpreted and failed to properly apply section 177(1) of the 1990 Act, and/or failed to give adequate reasons for rejecting the Alternative Development proposals B and C</u>

3.1 The Appellant argues that the Inspector failed to properly understand section 177(1) of the 1990 Act in forming the view that he could not grant planning permission for the Appellant's Alternatives Development proposals. The Appellant clarified at the permission hearing before HHJ Cooke that this ground only related to Alternative Development proposals B and C.

3.2 The Inspector recognised at DL/3 the scope of his powers under s.177(1):

> … *There is no power before me to grant permission for something different to that enforced against, only the whole or part of those matters.*

3.3 The Inspector repeated this, making express reference to s.177(1)(a) at DL/17:

> *Section 177(1)(a) allows permission to be given under the appeal on ground (a) to any part of the matters alleged in the notice. To that end, the appellant has advanced four alternative schemes to that subject of the notice.*

3.4 Accordingly, the Inspector had explicit regard for his powers in determining the appeals.

3.5 The Inspector considered 'Alternative Development A' at DL/18 – DL/22. The Inspector formed the view that this alternative would, in his planning judgement, form part of the matters stated in the notice:

19. It seems to me that the sun room with the canopy removed would form part of the matters stated in the notice and it is therefore open to me to grant planning permission for it under the ground (a) appeal.

3.6 Accordingly, the Inspector recognised that he had the power to grant planning permission for this alternative. The Inspector concluded, however, that this alternative would not overcome the harm to the Green Belt and the Clent Conservation Area at DL/22. Thus, this alternative still warranted the refusal of planning permission.

3.7 Accordingly, the Inspector plainly understood that he had a duty under s.177(1)(a) and recognised that this duty did expand to Alternative Development A, significantly because this alternative involved granting planning permission that was part of the matters stated in the notice and that it existed.

3.8 The Inspector then turned his attention to Alternative Developments B, C and D. In respect to each alternative the Inspector recognised that they would require development that did not presently exist. Indeed:

i. Alternative Development B would require the roof to be replaced and the removal of the sloping roof with panels – per DL/24;

ii. Alternative Development C would require the addition of an upper section and the replacement of the flat roof that constituted new works – per DL/26 – 27;

iii. Alternative Development D would require the installation of folding doors – per DL/28.

3.9 The Inspector formed the view that, in his planning judgement, Alternative Developments B and C were not part of the matters enforced against in the notice. He made this express finding in respect to each alternative and explained his reasoning for this.

3.10 Whether the development fell within the matters stated in the notice or not was a matter of planning judgement. In ***Ahmed***, the inspector's error was in not exercising a planning judgement. However, in the present matter the Inspector did exercise a judgement on this question. That judgement can only be challenged on irrationality grounds. The Claimant's grounds come nowhere near to surmounting the high hurdle for an irrationality challenge.

3.11 As to the Appellant's suggestion that the Inspector failed to provide reasons, this has no relationship with the decision letter read in full. The Inspector provided reasons in respect to each Alternative Development as to why they would not form, in his planning judgement, the development or part of the development that were enforced against.

3.12 Accordingly, this ground is unarguable.

4. Ground 2: The Inspector misinterpreted sections 173(4)(a) and 176(1)(b) of the 1990 Act, failed to properly assess the obvious Alternative Developments and/or failed to give adequate reasons for rejecting the Alternative Development proposals in relation to the ground f appeal

4.1 This second ground adds nothing to the first ground.

4.2 The Inspector explained in detail that the only Alternative Development that he could grant planning permission was Alternative Development A. He explained why that alternative would be unacceptable in planning terms at DL/22. It is obvious that it would similarly be unacceptable pursuant to ground (f), having regard to the fact that one reads the decision letter as a whole, per Lindblom LJ in ***Arnold***:

> *[20] It is necessary, as always, to read the inspector's relevant conclusions fully, in their proper context, and bearing in mind that the decision letter was written principally for the parties to the appeals, who were of course familiar with the evidence and submissions presented on either side at the inquiry. One should not isolate particular passages in the inspector's conclusions from others which are also relevant to the*

specific point being considered in the passage in question. The inspector's conclusions on the ground (a) and ground (f) appeals are not wholly discrete. They relate to each other, and, to an extent, depend upon each other. They must be considered together."

4.3 In any event, the Inspector expressly acknowledged that Alternative Development A would not remedy the breach of planning control under ground (f) – per DL/33.

4.4 Having recognised that Alternative Developments B, C and D would require the Inspector to grant planning permission for matters not stated in the notice, the Inspector was obliged to reject the proposals under ground f. It was not open to the Inspector to allow the appeal under ground (f) having regard for these alternatives on the basis that, in his planning judgement, they did not form matters that were part of the development being enforced against and they involved development that did not currently exist.

4.5 Finally, no other alternative was presented to the Inspector by the Appellant's professional representatives and thus he could not be criticised for failing to have regard for any other solution.

4.6 Accordingly, this ground adds nothing to Ground 1. It is unarguable as it relies on the same misunderstanding of the law that the Inspector had a power available to him that he did not.

5. <u>Ground 3: The Inspector failed to consider and/or exercise his powers in relation to section 176(1) of the 1990 Act, and/or failed to have regard to the consequences of the existing requirements of the EN. Additionally, the Inspector failed to provide adequate reasons in that respect. The approach was irrational</u>

5.1 The Appellant essentially criticises the Inspector for failing to address arguments that were never presented to him during the appeal. As a matter of principle, having regard for the authorities cited above and the fact that

the Appellant was professionally represented during the appeal, the ground should fail on this point alone.

5.2 The Appellant argues that the requirements of the notice go further than what was necessary to remedy the breach of planning control, being that it will not return the land to how it was before the breach of planning control. This is on the basis that the Appellant argues that prior to the breach there was an existing sun room that was demolished and, *'the front façade of the Four Stones Restaurant was therefore enclosed prior to the breach'* (per para 40 of the grounds).

5.3 However, there was nothing in the evidence before the Inspector addressing the state of the Property prior to the breach of planning control. The Appellant never addressed how the front façade was enclosed prior to the breach. This would have required the Inspector to make findings of fact about the land prior to the breach. It is plainly inappropriate for the Appellant to raise this argument now given that the Court is in no position to reach a judgement on this.

5.4 Furthermore, at paragraph 41 of the grounds it is alleged that the Inspector was obliged to consider the effects of complying with the notice as a material consideration. The Claimant alleges that compliance with the notice would have, *'consequences for the structural safety and protection of the building, the running of the Claimants' business and the safety of its occupants'*. However, these points were never made to the Inspector. Indeed, per DL/50, the Inspector explicitly noted the absence of evidence on how the requirements of the enforcement notice would unduly affect the Appellant's business. Had the Appellant wished the Inspector to have regard for the consequences of the enforcement notice as a material consideration, they could have provided some evidence in respect to this. They did not and thus are now precluded from advancing this argument as a 'second bite of the cherry' through this statutory challenge. Moreover, this argument amounts to seeking reasons for reasons.

5.5 Furthermore, at paragraphs 42 and 43 the grounds allege that no explanation was given as to why the Inspector failed to exercise his powers to vary the notice. That submission has no relationship with the decision letter. The Inspector explained throughout DL/18 – 28 and DL/31 – DL/36 as to why he was not varying the notice in accordance with the proposed alternatives.

5.6 As to the criticism of irrationality, the Appellant comes nowhere near to surmounting the high hurdle of a finding of irrationality. The Inspector had regard for the arguments presented to him and reached lawful conclusions.

5.7 Accordingly, this ground is similarly unarguable.

6. Conclusion

6.1 In the circumstances, the Defendant respectfully invites the Court to:

i. dismiss the appeal;
ii. order the Appellant to pay the First Respondent's costs.

Killian Garvey
Kings Chambers
3 February 2020

CO/4504/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

IN THE MATTER OF AN APPLICATION UNDER SECTION 289 OF THE TOWN AND COUNTRY PLANNING ACT 1990

BETWEEN:

BALJIT SINGH BHANDAL
BALBIR SINGH BHANDAL
AMRIK SINGH BHANDAL

Appellants

-and-

(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT

(2) BROMSGROVE DISTRICT COUNCIL

Respondents

REPLY

For convenience, this Reply will adopt the usual practice of referring to the decision letter of the Defendant by the suffix "DL" followed by the relevant paragraph number.

Reference to the First Respondent's Detailed Grounds of Resistance will be DGR/x.

Reply

1. The DGR largely repeat the contents of the First Respondent's Skeleton Argument dated 6 December 2019. In response to that, the Appellants produced a Skeleton Argument dated 10 December 2019, which it relies on in reply.

2. The only change in the DGR, and it is subtle, is in relation to ground 1.

3. In the First Respondent's Skeleton Argument at paragraph 3.9, the following was

said:

"Owing to each of these developments [1] involving the addition of new development, the Inspector formed the view that, in his planning judgement, they constituted development that did not exist and were not part of the matters enforced against in the notice. He made this express finding in respect to each alternative and explained his reasoning for this. "

4. The DGR at paragraph 3.9 omits the first sentence of the above paragraph, which helpfully explains the Inspector's reasoning as to why the Alternative Developments would not form part of the matters of the notice. It is now not clear what the First Respondent's explanation is for the Inspector's conclusions in respect of the Alternative Developments, and why he did not regard them as forming part of the matters of the notice; see DL24, and DL27.

5. However, it is unequivocal that the Inspector rejected the alternatives proposed, because they included "the addition of new development", and the Inspector considered that the "new works" took the alternatives outside of the scope of section 177(1) of the Act; see again DL24 and DL27:

"24…. Given that, as the appellant accepts, the alternative would require the addition of a flat roof, ***it seems to me that it cannot, by definition of the fact they are new works, form part of the sun room as enforced against****. Consequently, I find that the alternative development would not form part of the matters as enforced against in the notice." Emphasis added*

"27…Again, as this would involve new works in the formation of a roof, ***it seems to me that works would be required that do not form part of the sun room as enforced against. Consequently, I find that the alternative development would not form part of the matters of the notice*** *and it is not, therefore, open to me to grant planning permission for it under the appeal on ground (a)." Emphasis added*

6. Any attempt by the First Respondent to distance himself from that clear reasoning is disingenuous.

7. It is not sufficient for the First Respondent to say this is simply a matter of planning judgment, and not grapple with the issue a the heart of ground (1), which is the correct interpretation of Section 177(1) of the Act. The same criticism was made in the Appellants' Skeleton Argument at the permission hearing (see paragraph 21), and yet the First Respondent continues to offer no assistance on the correct interpretation of Section 177(1) whatsoever. It fails to engage with the

[1] Alternative Developments B, C and D

substance of the point.

Conclusions

8. For all of the reasons set out here, and in the Appellants' Grounds of Appeal and Skeleton Argument dated 10 December 2019, the decision of the Defendant dated 17 November 2019 is unlawful and ought to be quashed.

And the Appellants seek:

1. An Order quashing the Defendant's decision dated 17 November 2019 and remitting the matter for redetermination; and

2. Costs

THEA OSMUND-SMITH
No5 Chambers
27 February 2020

Witness Statement No.2
Of Suzanne Tucker
Dated 1 April 2020
Filed for the Appellants

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

Claim No.: CO/4504/2019

BETWEEN

BALJIT SINGH BHANDAL and
BALBIR SINGH BHANDAL and
AMRIK SINGH BHANDAL **APPELLANTS**

AND

THE SECRETARY OF STATE
FOR THE MINISTRY OF HOUSING, COMMUNITIES AND LOCAL GOVERNMENT
FIRST RESPONDENT

BROMSGROVE DISTRICT COUNCIL **SECOND RESPONDENT**

WITNESS STATEMENT
OF SUZANNE TUCKER

I, Suzanne Tucker, a Solicitor employed by, and of, FBC Manby Bowdler LLP Solicitors, Routh House, Hall Court, Hall Park Way, Telford, Shropshire TF3 4NJ say:

1. I am employed by the practice of FBC Manby Bowdler LLP who act on behalf of the Appellants in respect of the application for an Order under s289 of the Town and Country Planning Act 1990 (as amended) to remit the determination of the First Defendant's Inspector dated 17 October 2019 in relation to an appeal against an Enforcement Notice issued by the Second Defendant relating to Land at Four Stones Restaurant, Adams Hill, Clent, Stourbridge, Worcestershire DY9 9PS for redetermination by the First Defendant.

2. In anticipation of the hearing listed for 5 May 2020 being required to be dealt with remotely, such that there will be no opportunity to present to the court evidence of service of documents in the event that it might be required to do so, this Witness Statement details the steps taken in relation to the service of documents on the parties to the appeal as appropriate, as follows:

3. I confirm that a sealed Appellant's Notice was sent by me by way of service by email and by post on 2 January 2020 to the First Respondent and to the Second Respondent and to Lloyds Bank PLC (being an interested party by virtue of a charge over the Property – "the Interested Party") at the email and postal addresses detailed at paragraph 7 below.

4. I confirm that a copy of the Order stamped 7 January 2019 was sent by me by way of email to the Second Respondent (the First Respondent having received a sealed copy from the court directly) and to the Interested Party on 9 January 2020 to the email addresses detailed at paragraph 7 below.

5. I confirm that a copy of the HM Courts and Tribunals Service correspondence dated 6 February 2020 confirming that this matter had been listed for hearing on 5 May 2020 was sent by me by way of service by email and by post on 7 February 2020 to the First Respondent and to the Second Respondent and to the Interested Party at the addresses detailed at paragraph 7 below.

6. I confirm that a copy of the Appellants Reply to the First Respondent's detailed Grounds for Resistance was sent by me by way of service by email and by post on 28 February 2020 to the First Respondent and to the Second Respondent and to the Interested Party at the addresses detailed at paragraph 7 below.

7. The email and postal addresses to which the documents referred to in paragraphs 3, 4, 5 and 6 above were served in each case were as follows:

First Respondent:

Attention: Ms Valda Kelly
Planning, Infrastructure and Environment Team
Justice and Development Division
Litigation Group
Government Legal Department
102 Petty France
Westminster
London SW1H 9GL
Valda.Kelly@governmentlegal.gov.uk

Second Respondent:

Attention: Claire Felton (Head of Legal Services)
Bromsgrove District Council
Parkside
Market Street
Bromsgrove
Worcestershire
B61 8DA
legalservices@bromsgroveandredditch.gov.uk

Interested Party:

Attention: Zoe Nikolich
Lloyds Bank PLC
2nd Floor
125 Colmore Row
Birmingham
B3 3SD
Zoe.Nikolich@lloydsbanking.com

Statement of Truth

I believe that the facts stated in this Witness Statement are true. I understand that proceedings for contempt of court may be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest believe in its truth.

Signed 

……
Suzanne Tucker

Dated: 1 April 2020

Fig.1

Fig. 2

Fig.3

Fig. 4

Fig. 5

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

No. CO/4504/2019

Rolls Building
Fetter Lane
London, EC4A 1NL

Friday, 13 December 2019

Before:

HIS HONOUR JUDGE COOKE

(Sitting as a Judge of the High Court)

IN THE MATTER OF AN APPLICATION UNDER SECTION 289 OF THE TOWN AND COUNTRY PLANNING ACT 1990

B E T W E E N :

(1) BALJIT SINGH BHANDAL
(2) BALBIR SINGH BHANDAL
(3) AMRIK SINGH BHANDAL — Appellants

- and -

(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT
(2) BROMSGROVE DISTRICT COUNCIL — Respondents

MS T. OSMUND-SMITH (instructed by FBC Manby Bowdler) appeared on behalf of the Appellants.

MR K. GARVEY (instructed by the Government Legal Department) appeared on behalf of the First Respondent.

P R O C E E D I N G S

I N D E X

(Prepared from a poor recording with a background hum and the judge at times dropping his voice)

(10.39 a.m.)

JUDGE COOKE: Yes, Ms Osmund-Smith. Good morning.

MS OSMUND-SMITH: Good morning, my Lord. May it please your Lordship, I appear on behalf of the appellants in this case. My learned friend Mr Garvey appears on behalf of the Secretary of State, the first respondent. I think my Lord now has everything needed, including skeleton argument.

JUDGE COOKE: Yes, I knew I had read something from you but it turned out, when I looked at it, that that was the grounds. So thank you for giving me the skeleton.

MS OSMUND-SMITH: I am very grateful, and I apologise, my Lord, for its late arrival. This is an appeal arising from the decision letter dated 17 October 2019 found as the first document behind tab B in the appeal bundle. It is an appeal against an enforcement notice served in respect of an unlawful sun room attached to the Four Stones Restaurant in Clent, Stourbridge.

The background, my Lord, is set out within my skeleton argument at paras.2 and 4, and also within the decision letter itself. Essentially, prior to the breach of planning control there was a sun room and that was attached to the restaurant. Your Lordship will see that at B43----

JUDGE COOKE: I have seen some pictures of what was built.

MS OSMUND-SMITH: My Lord, that is the picture of what was there previously.

JUDGE COOKE: Okay, yes. Ms Osmund-Smith, can I just see if I can cut this short. Having looked at your skeleton argument, am I right in thinking that you only pursue ground 3 in relation to your alternative D, i.e. the new doors?

MS OSMUND-SMITH: My Lord, yes. That is correct.

JUDGE COOKE: In that case, I think have gasped sufficiently what it is all about. I think I will hear from Mr Garvey first.

MS OSMUND-SMITH: I am grateful, my Lord.

JUDGE COOKE: Thank you.

MR GARVEY: My Lord, do I take it from the court's indication it's simply ground D that I can assist the court with or----

JUDGE COOKE: No.

MR GARVEY: All three grounds?

JUDGE COOKE: Yes.

MR GARVEY: I am grateful, my Lord. In that case, if I can take the court through the authorities, and there are three authorities I am going to refer to, and then go through the relevant grounds, my Lord. My Lord, I am going to begin, with the court's leave, with the judgment of the Court of Appeal in *Ahmed v Secretary of State for Communities and Local Government* which starts in the authorities bundle at p.24.

JUDGE COOKE: Yes.

MR GARVEY: My Lord, para.2 of the judgment tells us what this judgment was about. It is

> "... whether the inspector erred in law on the enforcement notice appeal by failing to consider an 'obvious alternative' in accordance with the principles in *Tapecrown Ltd v First Secretary of State* ... and *Moore v Secretary of State for Communities and Local Government..."*

In that case the obvious alternative was

> "... the grant of planning permission for a scheme previously authorised, departure from which had resulted in the breach of planning control that was the subject of the ... notice."

My Lord, if I can invite the court to turn to p.33 and go to para.27 of the judgment, the court observed:

> "27. I agree with Mr Whale that the power under section 177(1) to grant planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control is linked to an appeal under ground (a) rather than under ground (f). But Mr Ahmed's appeal included express reliance on ground (a) and he would have been deemed in any event to have made an application for planning permission by virtue of section 177(5) as it existed as the material time."

The court goes on to say:

> " Although his ground (a) appeal sought planning permission only in respect of the development as built, which constituted the whole of the matters stated in the notice as constituting a breach of planning control, the power under section 177(1) was to grant planning permission 'in relation to the whole or any part of those matters'. In principle, therefore, planning permission could have been granted for the 2005 scheme if the differences between it and the development as built (i.e. the differences identified in the notice as 'unauthorised additions, alterations and variations to the approved scheme') were such that a development in accordance with the 2005 scheme could be regarded as a 'part' of the development as built. This was a matter of planning judgment for the inspector."

I.e. that the inspector can only grant planning permission for development that forms part of the development as built, and whether it does or not does not form part of the development as built is a question for the inspector, which is a matter of planning judgment.

The court goes on to say:

> "It was a judgment he did not make because of his failure to give any consideration to the possibility of granting planning permission for the 2005 scheme. This court is not in a position to decide what conclusion he would have reached if he had considered that possibility. In particular, we cannot exclude the possibility that he might reasonably have concluded that the 2005 scheme was to be regarded as "part" of the development as built, on which basis he would have had power under section 177(1) to grant planning permission in relation to it."

Then, my Lord, if I can just invite the court to look at para.32 of that judgment. Half-way down, my Lord, five lines down, the sentence begins:

> "The court held that the grant of permission could not go beyond the terms of the notices."

Can the court see where I am?

JUDGE COOKE: Yes.

MR GARVEY: I am grateful, my Lord.

> "That reasoning, however, has no impact on the present case. I have already made clear that there would have been power to grant permission for the 2005 scheme only if, within the terms of section 177(1), it was judged to be 'part' of the matters stated in the enforcement notice as constituting a breach of planning control."

So, my Lord, pausing there, the court recognised in this judgment that the reason why the inspector erred, because my learned friend relies on this judgment, is because the inspector failed to exercise the planning judgment as to whether what was being proposed as an alternative would have formed part of the development. The court did not exercise its own view and seek to substitute its own view for that of the inspector, and say one way or the other whether this could or could not be part of the balance; the court simply said: we cannot rule it out because it is a planning judgment and that is for the inspector.

JUDGE COOKE: Here, is not the difficult that in this case the alternative scheme that the inspector had failed to exercise his judgment about involved a somewhat different development, i.e. one that had been approved and as I understand it, it was going to be three stories high, whereas he actually built four. So, if he was going to consider that and consider whether he, in his judgment (inaudible) part of what had been built, in order to get to it, there would have had to be some works done, i.e. taken off the fourth floor, making a new roof and all that. So, it cannot have been fatal to the error, or fatal to the accusation of error, that some work was required; it cannot have been fatal to the contention that going back to what had previously been approved required some work to be done, because inevitably there would have been work done by way of demolition of what had gone beyond

the 2005 scheme. But in our case, the inspector rejected actually, I think, three of the alternatives purely on the basis that they required additional work to be done.

MR GARVEY: Well, in the inspector's planning judgment they did not form part of the development.

JUDGE COOKE: No, he said - well, he originally said that was in relation to B, C and D. I think it is worded something like "by definition from the fact that they require additional works". So, what he regarded as crucial and determinative was that something had got to be done. That cannot be right, can it, on the basis of this authority because otherwise the Court of Appeal would have said, "There is no point thinking about going back to the 2005 scheme because you could not get there without doing some work."

MR GARVEY: Well, my Lord, the Court of Appeal - and I will take the court to subsequent judgments which go back much further than what was said in this case - the Court of Appeal simply say whether it did or did not require work that could be considered part of the development is a matter of judgment, and it is a matter of judgment that the inspector did not entertain. The inspector just did not consider the question. So, the criticism of the Court of Appeal is that he failed actually to consider this point. My Lord, I say the point becomes clearer when we go through other authorities.

JUDGE COOKE: Right, okay.

MR GARVEY: My Lord, can I invite the court to turn to p.141?

JUDGE COOKE: This is *Arnold*.

MR GARVEY: Indeed, my Lord. Lord Justice Lindblom giving the leading judgment, in para.1 framed what was the scope of the judgment.

> "Did an inspector determining appeals against an enforcement notice in section 174(2) of the Town and Country Planning Act 1990 fail lawfully to consider "alternatives" to the development against which the enforcement action had been taken? That is the central question in this appeal."

My Lord, at p.147 of that judgment, at para.86 there is an extract from the inspector's decision. It says,

> "I have had regard to the 3 modified forms of development that have been supplied on the appellants' behalf by Mr Piper. These show various levels of intervention and reduction in the extent of the front and rear extensions and the removal of the garage with the second and third options. Whilst these options would reduce the floor area and volume of the dwelling they are materially different forms of development to what constitutes the deemed application before me and having regard [the judgments...] I consider that it is, at the very least, questionable in law whether I am in a position to substitute these schemes for consideration under ground (a)."

Then, my Lord, jumping to what was said in respect of the appellant in this case, at p.150, at para.16, my Lord - this was the submission that was made on behalf of the appellant -

> "For Mr and Mrs Arnold, Mr Richard Turney submitted that the inspector misdirected himself as to the correct test for considering alternative forms of development in the ground (a) appeal. He had, said Mr Turney, failed to ask himself whether the alternative schemes put forward were in fact 'part of' the matters that were the subject of the enforcement notice..."

Pausing there, as we will see, my Lord, this inspector did ask himself that question. Then it goes on to say:

> "Instead, as one can see in paragraph 44 of his decision letter, he applied a different test - the test of whether the alternatives were 'materially different' from the development constituting the alleged breach of planning control."

So, there the appellants alighted upon: well, you have used the wrong test - this materially different test. The court, at para.18, said they reject those submissions. Then at para.22, my Lord:

> "22. Mr Ryan Kohli submitted on behalf of the Secretary of State, the inspector, when dealing with the ground (a) appeal, correctly identified the question he had to decide. He referred in paragraph 44 of his decision letter to the provisions of sections 174(2)(a) and 177(1)(a). He recognized the parameters of his power to grant planning permission under ground (a). He directed himself, correctly, that section 174(2)(a) required him to focus on 'breaches of planning control which may be constituted by the matters stated in the notice', and therefore that 'unless the breach of planning control is wrong', which in his view it was not, 'the deemed application in this case is for the dwelling as built[,] on the date the notice was issued'. He also explicitly directed himself that, under section 177(1)(a)..."

- and it quotes from that statutory authority. Just pausing there, my Lord, it is worth noting that this inspector specifically directed himself to those powers in the decision letter at paras.3 and 17. It then goes on to say:

> "He reminded himself, however, that 'what is not possible is to grant planning permission for some alternative form of development that differs from the alleged breach'. He was thus acknowledging that his powers here were circumscribed by the allegation of the breach of planning control in the enforcement notice. Nothing that was said by this court in *Tapecrown* detracts from that basic principle.
>
> "23. It was with that principle in mind that the inspector referred in paragraph 44 to the decision of the Divisional Court in Richmond-upon-Thames London Borough Council. Planning permission, he said, may only be granted 'in respect of the matters stated in the notice as constituting a breach of planning control'. And there was, he reminded himself, 'no power to go beyond the notice' ... Conscious of that constraint, he directed himself that the exercise he was engaged upon was 'not a question of considering alternative proposals which fall outside the scope of

> the notice if they materially differ from what is alleged..." - and significantly as I rely on it, my Lord - "... and has been built' (my emphasis again)."

Those references to "has been built" i.e. what is there, you are effectively removing to result in something that is currently there as opposed to doing works which would add to, increase something new. My Lord, that point is picked up at para.30 over the page on 153:

> "30. The conclusions that follow in paragraph 86 reflect the inspector's self-direction in paragraph 44. He now found, as a matter of fact and degree, that the three 'modified forms of development' provided on behalf of Mr and Mrs Arnold by their architect, Mr Piper, were all 'materially different forms of development to what constitutes the deemed application …'. Such a finding, as a matter of fact and degree, is beyond challenge in proceedings such as these, unless, for example, it can be shown that an inspector has plainly ignored or misunderstood some obvious fact or misread the drawings in which an alternative scheme or schemes are presented to him by the appellant."

My Lord, I will come back to this point, but I say that is what has happened here. This inspector----

JUDGE COOKE: So, is it your contention that all that they have been given permission for under this rule is something that would require taking away part of what has already been built, not interfering with the rest of what has already been built, and giving permission for what remains?

MR GARVEY: Well, I say, my Lord, you can only grant planning permission, going back to the statute, for what is the whole or part of the development.

JUDGE COOKE: Yes.

MR GARVEY: I.e. the development as built.

JUDGE COOKE: But to get to the part that is being given permission, you seem to be suggesting that it is not possible to give permission for anything which requires additional work to be done other than works of removal of some other part of what's been done.

MR GARVEY: Well, that was certainly----

JUDGE COOKE: Is that right?

MR GARVEY: Well, whether that is the case, my Lord, is a question of judgment for each particular inspector.

JUDGE COOKE: Well, if that is the case, how can there be any judgment involved because if all you can do is take away part of what has already been built, leaving something else that already exists, there is no question that it forms a part of what has been built; it must do. If there is a judgment to be exercised, it must involve a judgment, surely, about something that is not there already and therefore it must envisage that something is going to be done which

has not already been done, and the question is whether the effect of that is to leave something which can be regarded as part of the development that has been done, or whether it is something different.

MR GARVEY: Well, I think I follow that submission, but is the court suggesting, my Lord, that the inspector.... If it was currently existing, i.e. as built, necessarily there is no judgment to be made, because it would always be part of the development as alleged.

JUDGE COOKE: Suppose that this enforcement notice had been served part-way through the construction, so let us say the walls were up but the roof was not on, and - it may be an improbable assumption - on service of the enforcement notice the work stopped. On that basis you seem to be suggesting that all that could be approved is the walls that presently exist without a roof.

MR GARVEY: Yes, my Lord, because that is what has been built.

JUDGE COOKE: Would there be a relative purpose in having a statute which allowed the inspector to overturn the enforcement notice to the extent of giving permission for a partly built building?

MR GARVEY: As in would that make sense as Parliament's intention?

JUDGE COOKE: Mmh.

MR GARVEY: Well, yes, my Lord, because that is the breach of planning control that they are seeking to stop. Indeed, the court goes on to say: well, if you find yourself in a scenario where there are alternatives that could come forward, what the inspector can do in that scenario is then just extend the time for compliance, which is exactly what happened here, and say: there might be a solution here that can come forward; I'm going to give you time to go away and try and figure out what that solution is with the local planning authority through a planning application. But an enforcement notice - I can't grant permission for something that is not currently built, because that is not a breach of planning control that currently exists. I would - if I can take the court through because, my Lord, these are tried and tested principles.

JUDGE COOKE: Do any of them say, and I have not seen anything quoted in your skeleton or in the ones that I have read, do any of them say that the necessity for performing any further works is fatal to the grant of a - permission for part of the existing works under section 177?

MR GARVEY: No, my Lord, but neither does the inspector say that.

JUDGE COOKE: Well, I rather think he does. Paragraph 24 under "alternative development B".

"The roof will be replaced with the new flat proposed roof. Given that as the defendant accepts the alternative would require the addition of a flat roof, it seems

to me that it cannot, by definition of the fact that they are new works, form part of the sun room as enforced against."

What he is saying there is you have got to change the roof in order to introduce your alternative. That is new work; therefore it cannot - it is impossible to regard that as being permission for part of what has been built - is it not?

MR GARVEY: My Lord, in that sense I agree with what the inspector says there because in his judgment what is being proposed----

JUDGE COOKE: Well, if the mere fact that additional work was required was fatal, then the authorities might say so, but actually it seems to me they tend to indicate that it is not fatal because there is a judgment to be exercised. There would be no judgment to be exercised if it was the case that permission could not authorise works that had not already been done, and in fact in *Ahmed*'s case it was inevitably that, exercising the judgment that the Court of Appeal said he ought to have done, would have required him to consider the consequence of doing additional work.

MR GARVEY: My Lord, when we say "additional works", there will be inevitably, to comply with an enforcement notice of this nature where there has been material operations, they will be material works, if by that expression we mean a builder will be on site and there's construction works.

MR HASKELL: Well, if in *Ahmed's* case the breach was enforced for a building, a three storey one, you cannot take off the top storey of a four storey building and leave a three storey building because what you are left with is a ceiling and not a roof.

MR GARVEY: Well, whether that is right or not is a planning judgment to be made. My Lord, the point is----

JUDGE COOKE: Well, therefore it would be necessary to form a roof, and therefore the inspector would have to form a judgment as to whether forming a roof left you with part of the development as built or not, but if he did not have to form that judgment because making the new roof constituted additional works and therefore it was impossible to find that it was part of the development that was enforced against, then the Court of Appeal would not bother referring it back to the inspector at all, would they? They would simply have said they cannot ever come to that conclusion because additional work would have been required, and therefore it was not (inaudible).

MR GARVEY: My Lord, I say that falls classically within the realms of a planning judgment, that that inspector in Ahmed did not make, which is: well----

JUDGE COOKE: He did not make----

MR GARVEY: -- would removing this floor----

JUDGE COOKE: -- it and he was required to make it. This inspector seems to have said, simply because additional works are required, there is no judgment to be made----

MR GARVEY: Well, no----

JUDGE COOKE: -- or my judgment must inevitably be that it cannot be part of the works.

MR GARVEY: My Lord, I say----

JUDGE COOKE: -- and that must be right, must it not?

MR GARVEY: I say that is not right at all, my Lord, because the judgment to be made is: does it require works which would take it outside of the remit of what has been----

JUDGE COOKE: If that was the only question to be considered, then the Court of Appeal would not have allowed it in *Arnold*, because additional works was necessary - in *Ahmed,* sorry.

MR GARVEY: No, my Lord. The Court of Appeal in Ahmed made the point that the inspector didn't ask themselves the question: would these additional works result - be inside or outside the scope of what was required? And of course we are not going to exercise that judgment; that was for the inspector to do.

JUDGE COOKE: Okay. I am not sure we are going to take that any further, so let us move on.

MR GARVEY: My Lord, if I can perhaps just take the court through the other submissions - the other authorities to make, hopefully, the point good. My Lord, p.53, para.30. The court says it is a matter of planning judgment as to whether the works - whether they take it inside or outside of the development. Then 33, my Lord: it makes the same point again - it is a matter of fact and degree for the inspector as to whether.... He said:

> "33. ... he found that it was not be possible to sever, or split, the building into separate parts. This was because the development was, as he put it, 'integrated'. That was his critical finding. Once again, it was quintessentially a matter of fact and degree for him as decision-maker. And once again, in my view, he was clearly entitled to make the finding he did; there is no basis for the court to interfere with it."

Then at para.40:

> "40. The inspector's conclusions in paragraphs 94 and 95 - assuming now that 'lesser steps' could in principle be considered - must be read together with his earlier conclusions on the ground (a) appeal. As Mr Kohli submitted, he was entitled at this stage to express himself relatively briefly, provided of course that his approach was sound in law. ... On the assumption that he had to consider 'lesser steps which were less costly or disruptive', he directed himself, rightly, that 'these steps still need to amount to a realistic and obvious alternative which is acceptable' (...) So he was clearly alive to those two questions: realism and acceptability. And he answered both. As he went on to say, he was not able either to find that the suggested alternatives were 'realistically achievable or obvious solutions' or to conclude that they 'would overcome the harm that has been identified'. Thus, as he

also concluded, the jurisprudence in *Tapecrown* was of no help to Mr and Mrs Arnold in their appeals..."

Then at 43, the court discussed the judgment of *Ahmed*. He said:

"43. I do not see how Mr Turney's argument can gain any support from the decision of this court in Ahmed. There the inspector had gone wrong in failing to consider an alternative scheme for which planning permission had been granted on appeal in 2005. The Court of Appeal emphasized that the question of whether an alternative scheme could be regarded as 'part of' the development against which the local planning authority had enforced was a matter of planning judgment for the inspector. In that case the inspector had simply failed to exercise his planning judgment, having given no consideration to the possibility of granting planning permission for the 2005. ... On its facts, therefore, Ahmed is not truly comparable to this case. In this case the inspector manifestly did consider all of the alternative schemes put forward. In doing so, he was fully aware of the statutory powers available to him and acted in accordance with them."

So, my Lord, I say what the court have said there is - and they have summarised what Ahmed was about; that was a judgment where the inspector just has not gone on to consider it. I see what the point's court is. The court is taking an inference and saying: well, by saying the inspector had to consider it, the court were in fact saying it was open to the inspector to form the view that the inspector had the power to do it. Whether the inspector.... Because the first point of call is to say: well, does what they are proposing result in development which would be part of what has been enforced against, and the inspector is saying well, no because necessarily it would result in something different because you are going to end up with a different roof. That was not part of what was enforced against. It is not in existence and therefore the inspector, by definition----

JUDGE COOKE: Well, would that not have been true in *Ahmed's* case because you would end up with a different roof, one storey further down than what had been built?

MR GARVEY: My Lord, we do not know because I do not know what the building was in *Ahmed*. It might not have required a roof, in the sense of if there was three storeys it might have been that they did not require the addition of a roof, or the works would not have necessitated that result. The point is that is for that inspector.

JUDGE COOKE: I am not sure it would have got through building control as a residential property without a roof.

MR GARVEY: I did not----

JUDGE COOKE: I am not sure it would have got through building control as a residential property without a roof.

MR GARVEY: My Lord, the point is the court is making an inference which the appellant invites the court to make which is there the inspector is being criticised for failing to reach a conclusion. One can infer, therefore, that the Court of Appeal were exercising their own planning judgment which is: well, you can do this sort of works, and whether you can or cannot, is for the inspector to determine because one inspector might say: well, you can have the roof and I think that that forms part of this development. Another inspector will say: well, if the roof is fundamentally different, and it is an entirely new building, then I don't think that that does form part of the development, and that is - which way that goes is for the inspector. This inspector has found: if you do a new tiled roof, that's not going to be far from the development that has been enforced against. My Lord, if I can take the court to the final judgment I was going to invite the court to have regard for, which was *Arnold*.

JUDGE COOKE: We were looking at *Arnold.*

MR GARVEY: I do apologise, my Lord. It was *Ioannou,* which was the final one, on p.11 of the authorities bundle. My Lord, para.18 of the judgment clarifies what the appeal is about.

> "... whether the Inspector erred in concluding that he did not have power to enable the implementation of the three flats ... by allowing the appeal under ground (f), varying the steps [of] the notice."

My Lord, the Secretary of State's case in that judgment was set out at p.19.

JUDGE COOKE: Page 19?

MR GARVEY: Page 120, my Lord, para.19.

JUDGE COOKE: Paragraph 19.

MR GARVEY: So, this is the Secretary of State's case being summarised. This is Mr Banner representing the Secretary of State there. The Secretary of State's submissions take the court through the various powers. At (iv) it says:

> "(iv) 'The buildings or works' and 'the activities' were those referred to in paragraph (a) of the subsection, namely those buildings or works which the enforcement notice 'could have required to be removed', or any activity which the enforcement notice 'could have required to cease.' It followed that in order to benefit from subsection 173(11) the buildings or works, or the activities had to have been in existence when the enforcement notice was issued.
>
> "(v) At the time when the enforcement notice was issued on 17th November 2010 there were five self-contained units in No. 15. The enforcement notice could not have required either the new works which would have to be carried out in order to convert the five flats into three to be removed, or the new change of use of the property to three flats to cease. So far as the works were concerned, there was no challenge to Ouseley J's conclusion in paragraph 33 of the judgment that:

'The four flats on the ground floor could not go into two flats without internal alterations to walls, doors and facilities. Works were required in order to produce three flats, which were not part of the matters alleged to constitute a breach of planning control.'"

Which, my Lord, takes us back to the point I bring because here *Ahmed* was a situation where the court did not have a judgment. Here Ouseley J, in the Court of Appeal, in his judgment addressed the exact point that my Lord was raising. The Secretary of State went on to say.

"(vi) It followed that allowing the appeal under ground (f) and varying the steps required to be taken by the enforcement notice would not have resulted in a deemed permission by virtue of subsection 173(11) for the alternative three flat scheme.

"(vii) Where Parliament had expressly provided for planning permission to be granted in response to an enforcement notice appeal, and had deliberately limited the scope of the ground (a) appeal, the deemed application, and any such permission to the whole or any part of the matters stated in the enforcement notice to be a breach of planning control, it would not be appropriate to sidestep that limitation by inferring the existence of a broader power under ground (f), which did not itself confer any power to grant planning permission, when considered in conjunction with subsection 173(11)."

Then in (viii):

"(viii) Submission (vii) (above) was supported by the fact that both the power to grant planning permission under subsection 177(1) and the local planning authority's power to issue an enforcement notice under subsection 172(1)(b) were expressly subject to an obligation to have regard to the provisions of the development plan and other material considerations. The power to allow an appeal under ground (f) was not expressly subject to that obligation, which suggested that Parliament did not intend that it should be used as a means of bringing about a planning permission (under subsection 173(11)) which could not be obtained under subsection 177(1).'"

I.e under ground (f) and ground (a), whichever way you cut it, you(sic) cannot result in something which was not in existence at the point the notice was issued. Mr Justice Ouseley considered the exact scenario, my Lord, that if that required alteration to walls, door and facilities which were not part of the matters alleged to constitute breach of planning control, you could not do it. So that is the Secretary of State's case at 123, my Lord. My Lord, I think, my Lord, it is probably worth just going through this in some detail. This is the actual judgment.

"27. Although Ouseley J referred in paragraphs 38 and 41 of his judgment (see paragraphs 12 and 13 above) to the need for the Inspector to consider the use of the

power in section 173(4)(b), and his failure to do so, subsection 173(4) is directed at the local planning authority which issues the enforcement notice, and prescribes the purposes for which it may require steps to be taken by the notice. The Inspector's power to allow an appeal under the second limb of a ground (f) appeal mirrors the power conferred on the local planning authority to under-enforce conferred by subsection 173(4)(b).

"28. In concluding that the Inspector should have asked himself as a matter of fact and degree under the ground (f) appeal whether the three flats scheme was 'substantially different' from the five flats actually developed (paragraph 44 of the judgment) Ouseley J applied the *Wheatcroft* principle. In my judgment, the *Wheatcroft* principle had no application in the present case. There is no challenge to Ouseley J's conclusion that the principle had no application to the ground (a) appeal or to the deemed application in the light of the clear wording of section 177(1)(a): see paragraph 36 of the judgment. The power to allow an appeal under ground (f) in subsection 174(2) is not a power to grant planning permission. If planning permission is to be granted in response to an appeal under section 174 it may only be granted under section 177(1)."

The court goes on to discuss *Wheatcroft* and why it does not apply. I do not think I need to labour that point, my Lord. But para.30, my Lord, and I am going to take this slowly because I say it is highly relevant to this judgment.

"30. In my judgment, Mr. Wills had no satisfactory answer to Mr. Banner's submission that the only buildings, works or activities which can benefit from subsection 173(11) are those which were in existence when the enforcement notice was issued..."

Pausing there, my Lord, "buildings, works or activities ... which were in existence when the enforcement notice was issued..." That is picking up exactly and it cross-refers the court to the Secretary of State's submissions----

JUDGE COOKE: That is referring to section 173 there, not 177(11), whether that is any different. (After a pause)

"Where -

(a) an enforcement notice ... could have required any buildings or works to be removed or any activity to cease, but does not do so; and

(b) all the requirements of the notice have been complied with,

then, so far as the notice did not so require, planning permission should be treated as having been granted ... in respect of the development consisting of the buildings or works..."

So, is that the same point? That seems to be suggesting that if the enforcement notice is varied so as not to require the removal of something that has been built, then what has been built is deemed to have planning permission. That does not seem to be the same as saying

planning permission may be granted under section 177 for something which may involve the performance of further works beyond what is already on the plan.

MR GARVEY: My Lord, I see that the court in this judgment does draw a parallel between 177(1) and 177(sic) because the court specifically says if you cannot get it under section 177(1) you equally cannot get it under 173(11). That was the point. They said: you cannot do it under ground (a) which Ouseley says, and that is the point I took you to in the discussion.

JUDGE COOKE: Well, yes so the material issue for me is whether what the court said about section 177(1) rules out the possibility of granting permission at this stage, not whether the fall-back position of changing the notice so as to give deemed permission under 173 would have the same effect, surely.

MR GARVEY: My Lord, I say the challenge - and I might have taken it too quickly - the challenge in this case was that they were saying: we cannot do it under ground (a) but maybe under ground (f) we can be allowed to do these additions, and the Secretary of State is saying: no, the restriction under 177(1) is equally applicable under 173(11), i.e. you have got the same restriction - building works or activities that are in existence. But, my Lord, I say that is explicitly what was said at the top of p.121 as part of the Secretary of State's case.

JUDGE COOKE: If it were possible to grant permission under section 177(1) which included performance of further works, then those would be works that have already happened. You would not need to have a deemed permission under 173(1)(sic)

MR GARVEY: Sorry, I did not follow that, my Lord.

JUDGE COOKE: If it were possible to grant permission under section 177(1), which extended to the performance of works that had not already been done, then that permission would authorise those works and there would be no question of having to have them deemed to be authorised under section 173. Section 173 obviously only applies to something that has already been done because the premise is that the enforcement notice could have required improvement but it did not.

MR GARVEY: Sorry, my Lord. It is clearly me. I might have stayed up too late watching the election last night. I am struggling to follow the court's point there because it seems to be that the court is indicating that 177(1) and 173(11) in terms of what they can allow are different. I.e. 177(1): you can go further and grant permission for works, buildings----

JUDGE COOKE: I have your point that that is not possible, but if that is not right or arguably not right, I am not sure what we gain from looking at section 173.

MR GARVEY: My lord, except that this court.... My Lord, you will see, it was common ground that Ouseley J - and he concluded you cannot do this under section 177(1) because it requires----

JUDGE COOKE: Well it is not common ground in this case. I have got to consider whether it is arguable in this case that the inspector could have considered giving permission under section 177(1) but made an error by concluding that he could not do that, simply because additional work was required.

MR GARVEY: My Lord, I am just trying to see - to draw the parallels because the court did acknowledge the parallels between the powers. Yes, my Lord, they do in this judgment. They draw the parallels to say that you cannot do it ether 173(11) or 177----

JUDGE COOKE: That is starting from the agreed position that you could not do it under section 177(1). Section 173 is not an issue in this case, is it? So, looking at what the court said about section 173 in the circumstances in which section 177 was out of the question is not going to help me, is it?

MR GARVEY: I understand, my Lord, it was the agreed position in this case because that is what Ouseley J had concluded. I may be wrong on that. I understand, my Lord, that it was only in the way the judgment was formulated for the Court of Appeal, but my Lord----

JUDGE COOKE: Well, you cannot take the point any further we had better go on.

MR GARVEY: Well, my Lord, I am conscious that this is a permission hearing and given the court's interjection, I think I can keep talking. Obviously I am inviting the court to refuse permission.

JUDGE COOKE: I understand.

MR GARVEY: My Lord, I will have one more crack at this point because I say, my Lord, the point under the statutory scheme, which I say is reinforced in the authorities, which is that the inspector, under 177(1) - and I will turn it up, because we have not actually turned up the authority - is that

> "(1) On the determination of an appeal under section 174, the Secretary of State may -
>
> (a) grant planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control, whether in relation to the whole or any part of those matters or in relation to the whole or any part of the land to which the notice relates."

My Lord, I say it is clear, and I say that the authorities have consistently made the point, and the reason why the point was put in the *Ioannou* case that we just looked at in a different way, is that appellants have consistently tried to make the point: you can give us

planning permission for something that does not currently exist, but that would require works, we say, that would be remedial and that would result in something that would be acceptable; i.e. we would do something that does not currently exist but we will do additional works which do not take away but add to this development, i.e. resulting in something different but equally acceptable and within the broad realms of what is there. Ultimately, whether the inspector has that power open to him requires the inspector to firstly acknowledge they have got the power, which this inspector did; secondly, the inspector has then got to consider what the alternative is, which this inspector did and that was the criticism in *Ahmed*; and, thirdly, the inspector has got to go through and think: is the power available to me in this instance? The inspector can only conclude that the power is open to him on each particular instance when the inspector has regard for: well, does it require works that fall out with the scope of the development that is currently there in existence? This inspector found, in respect of the alternatives that the inspector rejected, the inspector found that it would require additional works, buildings or activities.

My Lord, I suppose the point does not become more forceful the more I say it, so if I can turn my back----

JUDGE COOKE: Well, so far you have been dealing with ground 1, I think. Certainly if there is anything else you want to say about ground 1, then please do. Otherwise, let us go on to ground 2.

MR GARVEY: Well, my Lord, if I can make the discrete point in respect of ground 1, that is also a reasons challenge that is put in there in respect of the reasons challenged, my Lord. My learned friend helpfully, in her skeleton argument, refers to the authorities in respect of reasons challenges at the top of p.8.

JUDGE COOKE: I think it is reasons and irrationality, is it not?

MR GARVEY: Yes, my Lord. At the top of p.8 my learned friend refers to the *Bloor* judgment. In *Bloor*, my Lord, Lindblom LJ (then sitting as a High Court Judge) set out seven familiar principles and this was one of the classic principles of inspector's decisions from the judgment of South Bucks. He said:

> "The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the 'principal important controversial issue'. An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds."

And here is the key point I rely on:

"But the reasons need [only refer] to the main issues in the dispute, not to every material consideration..."

My Lord, the main issues in dispute, the inspector summarised in the decision letter at para.1, which is at p.1 of the bundle.

JUDGE COOKE: The decision letter itself?

MR GARVEY: Yes, my Lord.

JUDGE COOKE: That is B1, I think, in my version of it.

MR GARVEY: I do apologise, my Lord.

JUDGE COOKE: But I have got it anyway.

MR GARVEY: So, my Lord, at p.1 the inspector identifies what the main issues are. Inappropriate development in the green belt; openness to the green belt; conservation area; and whether - the "very special circumstances" test. There is no challenge to the inspector's formulation of what those main issues are.

My Lord, the alternatives were not one of those main issues identified by the inspector so I say that the requirement to address them does not provide reasons in the manner that my learned friend suggests, does not arise because it was not one of the main issues being identified there. But even if there was a requirement to provide reasons, it is clear why the inspector made his decision. It might be that what has been said is the inspector's reasoning was flawed, which is a different challenge, but that in itself does not mean that there was no reasons for the inspector's conclusion because clearly he does go through each of the alternatives, both under the ground (a) and ground (f) appeals. So, my Lord, I say that the reasons challenge must fail and it finds itself in ground 1, ground 2 and ground 3. Clearly the inspector has explained why he has reached the decision he has. As to ground 3, my Lord, which deals with a separate issue----

JUDGE COOKE: Sorry, just coming back to ground 1, which criticises his reasons and in terms says it is arguably irrational, the only one of these alternatives where he exercises his planning judgment was alternative A, was it not, because he ruled out the others on the basis that they required additional work.

MR GARVEY: No, my Lord.

JUDGE COOKE: Well, in relation to ground A he says: "It seems to me the sun roof with the canopy removed..." - not ground A, alternative A -

"It seems to me the sun roof with the canopy removed would form part of the matters stated in the Notice and therefore open to me to grant planning permission under the Ground A appeal."

And he then goes on to give his reasons why he will not do that. In relation to B and C, and I think also D, he says these matters require additional works and therefore it is not open to him to grant planning permission. He did not give any reason for not granting planning permission. He just simply said he cannot. So, what we have got to look at here is what reasons did he give for alternative A or for refusing alternative A, and were those reasons arguably inadequate and/or irrational?

MR GARVEY: My Lord, I do not understand that there is a challenge to the inspector's conclusion in respect of alternative A.

JUDGE COOKE: Is there not? I rather thought there was.

MS OSMUND-SMITH: My Lord, no. In respect of ----

JUDGE COOKE: In that case, say no more.

MS OSMUND-SMITH: It is the contrast between the way in which A was dealt with compared to B and C.

JUDGE COOKE: Right. So you challenge under grounds 1 and 2 is considerations of alternatives B and C. Is that right?

MS OSMUND-SMITH: My Lord, yes.

JUDGE COOKE: Okay. In that case, I am sorry to have diverted you.

MR GARVEY: My Lord, just in terms of the sequence of judgments that need to be made because my Lord suggested that it is only under A that the inspector exercised a planning judgment. With respect, my Lord, that point indicates that the court itself is exercising a planning judgment here as to what matters form part of the development. I say, my Lord, there are two planning judgments. Planning judgment one is: does it fall as part of the development? The inspector says "yes" or "no" to that, and the courts have said that is a matter of planning judgment in all the authorities I have just taken the court through. In respect of A the inspector says: "Yes, it does form part of the development". Then you exercise the second planning judgment, that leads to: is it acceptable? In respect of B and C the court said: I do not think it forms part of the development that is being enforced against because it is going to result in these works that I do not think form part of what has been alleged in the notice. Whether it is or is not is a matter of planning judgment, but ----

JUDGE COOKE: Well, we are going round that point again.

MR GARVEY: Well, I ask the question rhetorically, my Lord: under what scenario could an inspector say "I do not have the power"? Because the inspector has the power, if they think it forms part of the development. Clearly the courts have said it is a matter of planning judgment for the court to exercise.

JUDGE COOKE: I am sorry, I am not going to go... I have read to you what the inspector said at para.24 and what I have to decide today is whether he is arguably in error in saying that.

MR GARVEY: Thank you, my Lord. My Lord, if I can just briefly address ground 3, grounds 1 and 2----

JUDGE COOKE: Sorry, I do not want to move on from ground 2 yet. Ground 2 is directed to the appeal on ground F which is that the notice was excessive to - i.e. goes beyond what was necessary to deal with the purposes of the enforcement notice. What he says about that is that firstly the enforcement notice does not say what its purpose is, so it could be either of the potential statutory purposes. One is remedying the breach of control and the other is remedying any interference with amenity caused by the breach. It could be either of those, he says. Then he says, "Since the work required his demolition of everything, I must conclude that the purpose it sought to achieve was avoiding breach of planning control" and that can only be done by demolishing everything. That seems to be circular. If that were right, then every construction of something that does not conform with the design that was a condition of the permission is, by definition, a breach of planning control and if a notice was served requiring it to be demolished, however minor the deviation was, you would automatically conclude that the purpose was to enable it - to require it to be demolished, and that would not be achieved by anything short of requiring it to be demolished.

MR GARVEY: Yes, my Lord. I think the inspector's conclusions under ground (f) would turn on the inspector's conclusions in respect of ground (a), i.e. does the inspector have the power to grant----

JUDGE COOKE: Well, he has got to consider that separately. If he declines to enforce the enforcement notice because he regards it as excessive, that therefore results in leaving in place something that would otherwise be a breach, and that is when section 173 comes into play because it is deemed to be a permission for what is left in place.

MR GARVEY: Yes, my Lord. I say there is an overlap between grounds 1 and 2 in that respect because if the inspector does not have the power to grant permission for these alternatives under ground (a) similarly, and this is the point *Ioannou* makes, he does not have the power to grant it under ground (f) either. The inspector seemingly makes that point.

JUDGE COOKE: If you look at ground (f) in relation to a breach which constitutes building something different in design from what has permission, is that not always going to be - is not remedying that always going to be a question of interference with amenity? If one does not have permission to build a sun room at all, then building without any permission is plainly a breach of planning control, and you may say: well, the remedy in breach requires

removing the sum room because you did not have any permission for it. But building a sun room which has got - forgive me if I have got the numbers wrong - four glazed panels rather than five is a difference in design. Surely, is it not the case - or could arguably be the case - that remedying the breach of planning control is a question of what is the interference in amenity between having something with four panels rather than five? And if that is right, then he ought to ask himself what is the - does demolition of the entire structure go beyond what is necessary to remedy the difference in harm to the - injury to amenity to the area caused by having four windows rather than five, or five windows rather than four?

MR GARVEY: My Lord, I would say no because the statute is that it can be an injury to amenity or breach of planning control.

JUDGE COOKE: Well, they can be----

MR GARVEY: . They are distinct.

JUDGE COOKE: -- but it seems to me what he has done is compare his view of the damage to the amenity caused by having a sun room as compared with not having a sun room, rather than having a sun room with five windows rather than four windows, or four windows instead of five (I forget which way round it is) and at one point he almost makes the point himself. He says - he regards this as inappropriate because it is a modern structure with aluminium framing set against a historic building, and so on. But then he goes on to say actually the Council had already permitted a modern structure with aluminium framing; it is just that it was slightly different in design. So, if he has got a requirement to look at harm to amenity, has he got to look at the difference in damage to the amenity caused by what has actually been built as compared with what he was allowed to build, or a difference in harm to the amenity caused by building what he has built as compared with not building anything at all?

MR GARVEY: Again, sorry, is the difference between fall-back position and the - what.... Is the court's question: what is his baseline?

JUDGE COOKE: Under ground (f) he has got to consider: is the notice excessive for the purposes of achieving one of the statutory purposes. If the statutory purpose is remedying damage to amenity, one might ask the question whether it is proportionate to require the entire structure to be demolished if hypothetically the damage - the increase in damage to the amenity caused by building a different design is achievable(?). He also says, for instance, that one of the differences is that the roof is sloping. Well, apart from the fact that the roof is slightly higher at the front, it slopes back towards the building, so there is less visibility of the sloping structure than - or at least no more visibility of the sloping structure

than there would be if it was flat. The only difference with this as far as can be seen is, apart from the canopy on the front which was taken off, looking at the pictures, the maximum height of the sloping roof appears to have been 100 or 150 millimetres Mews or something higher than the level of the flat roof that the Council had permitted. Si it arguably going beyond what was necessary to require the demolition of the entire structure in order to achieve a reduction of 100 or 150 millimetres (or whatever it was) in the height?

MR GARVEY: I say ultimately the resolution of the point is resolved by: did the inspector have the power to grant permission or to----

JUDGE COOKE: Well, not under ground (f) because under ground (f) he is not considering should I grant planning permission. He is considering: do I regard this enforcement notice as excessive to serve the statutory purposes?

MR GARVEY: And, my Lord, I suspect I am going to be going over points I have previously made in respect of *Ioannou,* which is specifically referring the 173(11) power which underscores the ground (f) point. The court was saying: if it does require something which the inspector cannot actually grant, then in that scenario the inspector should extend the time. Well, the inspector can consider extending the time; that is what has happened here. My Lord, in *Ioannou* that is 125, para.37 where they considered that exact point. My Lord, at para.38 of the *Ioannou,* the court says:

> "38. I t is unnecessary to adopt a strained interpretation of subsection 173(11) in order to ensure that enforcement proceedings retain their remedial character. If, as in the present case, an alternative scheme is put forward which is not part of the matters stated in the enforcement notice as constituting a breach of planning control, but which the Inspector considers may well be acceptable in planning terms----

JUDGE COOKE: Well, that is where we are not in that situation. What would be considered under ground (f) is leaving in place what has been built and if he decides that it is excessive to require it to be demolished, then section 173 says he is deemed to have given permission for what is left behind. It is not a case in this case, and in *Ioannou's* case they were talking about a different form of sub-division of the property into three flats rather than five, and that is why they started out with the conclusion that that was a different form of development which could not be authorised under section 177; hence it makes sense to be talking about section 173 in saying there is no alternative available under section 173 by simply not - well, concluding that the enforcement notice was excessive and therefore deeming permission to have been given for what is not in the enforcement notice(?).

MR GARVEY: I am sorry, I did not hear.

JUDGE COOKE: There is no alternative available under section 173 which would have to be by granting the appeal on ground (f), disallowing the enforcement notice and then a creation of deemed planning permission under 173. That is why the court is saying you cannot go round by the back door in that relief where one would be authorising a development which is different from what had actually been built. But here the question would be: should he authorise what has been built effectively by concluding that the enforcement notice against what had been built was excessive(?)

MR GARVEY: My Lord, it would be.... My Lord, the inspector's conclusion.... I may be misunderstanding the point you made and I suspect that is the case, but the inspector's conclusion was that in effect he did not have the power to grant the alternatives that were being presented under ground (f) because they were require granting planning permission outside the cope of his power because in his planning judgment they involve matters outside----

JUDGE COOKE: Actually, I do not think that is what he says about that. What he said about ground (f) was that the notices - the purpose of the notice, as he found it, was to secure demolition and the notice was manifestly not excessive to do that.

MR GARVEY: I am looking, my Lord, at para.47 on discussion of ground (f).

JUDGE COOKE: Can we just start at para.31, or para.30.

> "The appeal on ground (f) is on the basis that requirements exceed what is necessary. The purposes are (a) remedying the breach of control or (b) remedying injury to amenity. The notice does not specify which of the two purposes it seeks to achieve. Nevertheless, the requirements are to remove the structure. I am satisfied therefore the purpose falls solely within (a) - that being remedying the breach by restoring the land to its condition before the breaches took place. To that extend the requirements [do not] go beyond what is necessary to remedy the breach."

So, he has gone round in a circle there. He says the notice requires that the structure be demolished. Therefore a notice requiring it to be demolished does not go - therefore, the purpose is to secure restoration of the land and the notice cannot go beyond that purpose.

MR GARVEY: Well, yes, my Lord in terms of the inspector is acknowledging he does not have the power to - in trying to do lesser steps the inspector cannot be granting planning permission for something that is not currently there, which was the alternative thing put before him.

JUDGE COOKE: Unless there is anything else on ground 2 then, shall we have a look at ground 3 which now relates only to alternative 4, i.e. - is it 4 or D? Anyway, putting in the new doors to fill in the hole in the building.

MR GARVEY: Yes, my Lord. Again, I say that ground 3 turns on the scope of the inspector's powers which is covered under grounds 1 and 2. It would simply be if the appellant is wrong on that point, that the inspector did not have the power - the residual point being made, well if the inspector did not have the power to grant these alternatives, it was still incumbent upon the inspector to address the material consideration of the front façade of the Four Stones Restaurant. It is para.46 of my learned friend's skeleton argument which talks about the consequences for the structural safety and protection of the building, the running of the appellant's business and the safety of its occupants being potentially catastrophic. My learned friend says it is a material consideration the inspector needs to address and these are the consequences. My Lord, I make the discrete point that it only really reflects that residual point, that if the primary contention which it is in the inspector's right to conclude, it was not open to him to grant these alternatives, was he still required to consider that point as a material consideration? I say no, my Lord, for a few reasons. Firstly, the inspector is not required to refer to every material consideration. The inspector is only meant to address the main issues. That was not one of the main issues, the consequence to the appellant. It is not uncommon for appellants to put in evidence saying these are the direct consequences for me... and that can become a material consideration but at para.50 of the inspector's decision letter, the inspector notes that he had little evidence it would affect the appellant's business. So, the point is being made there about structural safety and the protection of the building, the running of the appellant's business, safety of its occupants, potentially catastrophic. Those consequences were not specifically raised for the inspector's attention. In any event, the inspector has granted the extension of time from three months to nine months to give the appellant that time to actually seek to resolve the situation that they find themselves, by virtue of the consequence of relying on the enforcement notice. But really, my Lord, that residual point is a reasoned challenge really because it is saying the inspector has not referred to it. I say, my Lord, that there was no requirement to refer to that point because it is not a main issue in dispute and, secondly, it was never put squarely before the inspector on that basis in any event.

My Lord, if I can just turn my back.... (After a pause) Unless I can assist the court further, I have got no further submissions.

JUDGE COOKE: Okay. Thank you very much. Now, Ms Osmund-Smith, I am going to ask you only to deal with ground 3. Having now understood this only relates to alternative D, can

you just take me through what variation you say he could have made which would have allowed you to install the new doors?

MS OSMUND-SMITH: Yes, my Lord. It is not just about installing new doors because it was put to the inspector that "we would rather like to use bi-folds" if we have to demolish the sun room, but in any event this hole needs to be made good. I have given you the references, my Lord, at the bottom of p.12 and 13 as to all of the places in the appellant's statement of common ground where this particular issue was raised, and it was said compliance with the notice will leave a hole, and that is----

JUDGE COOKE: I take the point that that was raised; it would be obvious anyway.

MS OSMUND-SMITH: And that is problematic.

JUDGE COOKE: You have got power under 176 to vary the enforcement notice.

MS OSMUND-SMITH: My Lord, yes. It is----

JUDGE COOKE: Particularly the question is whether he had the power to make the variations which would have authorised you to build new doors at all or particularly the new doors you asked for or whether the only option open to you is to make a fresh planning application for the construction of the new doors.

MS OSMUND-SMITH: My Lord, yes, or to simply fill it in with bricks. that was another option. Option D stands apart from options A, B and C because actually it was post remedy of the breach. It was post demolition of the sun room; it was predicated on that basis. So what the appellant was not doing through option D was seeking planning permission for the breach or part of it because the breach would be resolved. That was the point. It was about remedying the land post compliance with the enforcement notice. My Lord, I say pursuant to section 176 on p.9 of the authorities bundle that the inspector had the authority to vary the terms of the enforcement notice. What that means is that the inspector could have imposed requirements to deal with that particular consequence of complying with the enforcement notice.

JUDGE COOKE: Well, there would still have to be an enforcement notice doing whatever an enforcement notice could do. So, do you say that the Council could have served an enforcement notice on you to start with which said (1) demolish the structure, (2) build a new door?

MS OSMUND-SMITH: Or some other remedy.

JUDGE COOKE: Because what you seem to be saying under ground 3 is the inspector failed to consider varying the notice so that even if it said "demolish the structure" it should also have said "build this door".

MS OSMUND-SMITH: Build the door; make good the land. My Lord, yes, that is p.3 of the authorities' bundle. It is under section 173(5).

JUDGE COOKE:

> "(5) An enforcement notice may, for example, require (a) the alteration or removal... (b) the carrying out of any building or other operations; (c) any activity on the land not to be carried out..."

- and so on. So, you say he could have varied it to require you to build a bi-fold door.

MS OSMUND-SMITH: Absolutely, my Lord, or simply to fill in the gap with matching brickwork. That would have been the most straightforward, perhaps an insensitive solution to the demolition of the sun house but certainly one which would have had the benefit of certainty and also the benefit of not leaving a hole in the side of a restaurant. My Lord, I say it is inappropriate to simply put that off and say: well, the appellants can well make an application and in due course the local authority may or may not choose to consider that, and thereafter they may or may not choose to refuse it or approve it, and if they chose to refuse it then the appellant may or may not choose to appeal. That is simply putting the consequences of this notice, which are obvious on their face, off for a different stage in the process, and that is inappropriate when the inspector plainly had the power to require that building work should be undertaken as part of the variation of the notice. What your Lordship will not see in any of the cases cited to you by my learned friend is a consideration of section 173(5) because it is not what those cases are aimed at. Those cases were aimed at people seeking planning permission prior(?) to the breach of part of it, and this was an alternative that was put - essentially an alternative to having a gaping hole in the restaurant.

So, I say there was a failure to consider that quite obviously, and it is irrational to have allowed that consequence to eventuate when it must have been obvious, as your Lordship says from the site visit that the inspector undertook, but also because it was put to him quite explicitly throughout the appellant's statement of case. Please allow us to use the bi-fold doors or otherwise vary the notice to make good the side of the restaurant once the sun room is demolished.

JUDGE COOKE: Would you need permission anyway just to fill in the hole?

MS OSMUND-SMITH: My Lord, no, and this----

JUDGE COOKE: In that case, if you can stop up the hole without planning permission, but you want to do something different why should you not apply for permission for that?

MS OSMUND-SMITH: Permission for?

JUDGE COOKE: Doing something different. If you can fill in the hole with bricks without planning permission, then you did not need to vary the notice in order to require you to do that, but if you what you want to do is not fill it in with bricks but to put in a bi-fold door, why should you not have to apply for permission for that?

MS OSMUND-SMITH: My Lord, in terms of that you would need permission to put the bricks in because that is a building operation, or the notice can require it. So, looking at section 173(5) that can require operations that would otherwise require planning permission in the ordinary course----

JUDGE COOKE: That is why I asked: would you need permission simply to fill in the hole?

MS OSMUND-SMITH: In the ordinary course of events----

JUDGE COOKE: Yes.

MS OSMUND-SMITH: -- without the enforcement notice, yes.

JUDGE COOKE: Because I thought your first answer was you would not.

MS OSMUND-SMITH: My Lord, I apologise. No. Without the enforcement notice yes, in the ordinary course of events because it is a building operation. If the enforcement notice were to state it explicitly, then it would become a requirement of the notice that would have to be complied with. That was essentially the final alternative that was suggested by those instructing me, that if they cannot keep the sun room then they jolly well need to fill in the gap; otherwise the consequences are obvious, not only for the safety of the building but also for their business and its operation.

My Lord, I said in my skeleton argument that I think the Secretary of State, the first respondent, had gone wrong in suggesting that this was not a matter to put before the inspector. I have dealt with that briefly. The references are given there. My learned friend is wrong in the sense that this is a ground unrelated to grounds 1 and 2. It was not something that required planning permission to be granted under section 177 because the appellant, as part of the alternative at D, were not apply for planning permission for the breach or part of it. It was what was to happen in terms of remedying them and post-compliance with the enforcement notice.

JUDGE COOKE: Thank you very much. Mr Garvey, is there anything you want to say in response on that issue only?

MR GARVEY: No. I am grateful, my Lord.

(See separate transcript for judgment)

JUDGE COOKE: Now, do we need a time estimate?

MR GARVEY: A day I suggest, my Lord.

MS OSMUND-SMITH: Agreed.

JUDGE COOKE: Okay. One day then. Can I leave it to deal with the usual intermediate directions?

MS OSMUND-SMITH: My Lord, yes. I will do that.

JUDGE COOKE: Thank you very much.

(12.10 p.m.)

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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT
[2019] EWHC 3872 (Admin)

No. CO/4504/2019

Birmingham CJC
B4 6DS

Friday, 13 December 2019

Before:

HIS HONOUR JUDGE COOKE
(Sitting as a Judge of the High Court)

IN THE MATTER OF AN APPLICATION UNDER SECTION 289 OF THE TOWN AND COUNTRY PLANNING ACT 1990

B E T W E E N :

(1) BALJIT SINGH BHANDAL
(2) BALBIR SINGH BHANDAL
(3) AMRIK SINGH BHANDAL — Appellants

- and -

(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT
(2) BROMSGROVE DISTRICT COUNCIL — Respondents

MS T. OSMUND-SMITH (instructed by FBC Manby Bowdler LLP) appeared on behalf of the Appellants.

MR K. GARVEY (instructed by the Government Legal Department) appeared on behalf of the First Respondent.

J U D G M E N T

JUDGE COOKE:

1 This is an application for permission to proceed with an appeal under section 289 of the Town & Country Planning Act against the decision of an inspector dismissing an appeal against an enforcement notice. The enforcement notice required the removal of a sun room structure that the appellants had built on the outside of their restaurant premises, accepting that they had permission to build a sun room at the particular time but what was in fact built was to a different design. It is not said that it was any larger in its foot print and it appears to have been of a modern aluminium construction similar to the design that had been approved by the Council, but not identical to it in that the number of glazed panels was different but particularly the roof constructed was not the flat roof that was part of the approved design, but a sloping roof - in fact sloping back towards the building. The effect of the sloping roof was that at the front of the sun room structure the roof was slightly higher than the flat roof that had been permitted. Secondly, the roof structure extended into a canopy which also sloped upwards going away from the building, which had not been part of the approved design at all.

2 In the course of the appeal the appellant put forward four alternatives to the inspector and invited him, in particular, to grant permission for those alternatives pursuant to section 177 of the Town & Country Planning Act or alternatively to allow their appeal on ground (f) on the basis that the enforcement notice requiring demolition was excessive in that it went beyond what was necessary to achieve the statutory purposes for which the enforcement notice could be served.

3 There are three proposed grounds of appeal. Given that I only have to decide today whether they are arguable or permission should be refused on the basis that there is no arguable case for any of those grounds, it would be sufficient if I were to say that in my judgment all of them are arguable. It is not for me to determine the merits of them today. Given that there has been quite a lot of discussions about those issues today, I propose to say a little more than that without in any way of course tying the hands of the judge who ultimately considers the appeal.

4 As regards the first ground, it seems to me that this relates only to alternative B and C or arguably relates only to the alternative B and C that the appellants brought forward. Alternative A was a matter which the inspector considered that would result in the retention of something which formed part of the works that had been constructed and it was therefore open to him to consider the grant of planning permission under section 177 for that structure. He determined that he would not grant that permission and Ms Osmund-Smith has clarified that ground 1 is not intended to challenge his conclusion in relation to that alternative.

5 In relation to alternatives B and C, however, the inspector concluded that it was not open to him to grant that permission because both of those alternatives would require additional works to be done in the partial reduction of the height of the walls that had been constructed and the formation of a new flat roof rather than the sloping roof which had been built. His conclusion, for today's purposes at least arguably, seems to have been that by reason of the fact that such additional works were required, he could not conclude that what he was asked to grant permission for formed part of the works that had been built. Accordingly, he refused to entertain consideration of giving that permission. Arguably, at least, it seems to me that he was in error in doing that.

6 It is suggested that the appellants have misinterpreted the decision of the Court of Appeal in *Mahfooz Ahmed v The Secretary of State for Communities and Local Government & London Borough of Hackney* [2014] EWCA Civ 566 which envisaged that the inspector was required to exercise planning judgment in relation to the question whether the works for which he was asked to give permission formed part of what had been built. It is suggested that it is clear on the authorities that if any additional work is required, it cannot form part of the works that had been built by virtue of the fact that the carrying out of additional work inevitably takes it beyond what has been built. It seems to me arguable at least that the authorities do not go that far. In *Ahmed* itself the alternative that the inspector failed to consider was one which would have involved reduction in the height of the building that had been completed by one storey and the formation of a new roof. If it had been the case that the carrying out of those works and in particular forming a new roof in place of or over the ceiling that would have been left by removing the existing top storey ruled out of consideration whether that work formed part of what had been built, then the Court of Appeal would not have needed to refer the matter to the inspector at all.

7 Furthermore, I do not consider that that construction of the authorities is put beyond argument by reference to the other authorities that have been cited, particular *Ioannou v Secretary of State for Communities and Local Government* [2014] EWCA Civ 1432, which involves the suggestion that whereas the development had been carried on sub-dividing the building into five flats, an alternative scheme might be considered which would have involved dividing it into three flats. It seems to have been clear in that case that the inspector formed the judgment that re-arranging the internal walls so as to constitute three flats rather than five flats would be a different development from that which had been permitted, and the Court of Appeal said that he was entitled to reach that conclusion and it was not one that they would interfere with. This arguably seems to be not an authority which goes as far as Mr Garvey needs to rely on this case and to say that the carrying out of any additional works means that the matter must be outside the scope of section 177.

8 In relation to alternatives B and C it seems to me that ground 1 is arguable. It is true that ground 1 extends to a challenge to the reasons given and to make an allegation of irrationality. It seems to me there is less force in those arguments, but I do not propose to deal with the grounds by removing them because it seems to me that in so far as the inspector addressed his mind at all to the question of whether what would be left was disqualified from being part of the existing building, it may be necessary to criticise the consideration he gave to the differences between what was left and what had been authorised by permission. I do not consider any saving in costs would be achieved by tinkering with the wording of that ground, so I do not propose to do so.

9 Ground 2 criticises the inspector's disposition of the alternative appeal on ground (f), namely that the terms of the enforcement notice went beyond what was necessary to remedy the breach. It seems to me at least arguable for present purposes that the inspector was in error in that conclusion in that he appears to have approached the matter by determining the purpose which the enforcement notice sought to achieve by reference to the works that it required to be done. He concluded, therefore, that given that the notice required demolition of the building, the purpose that it sought to achieve was the prevention of the construction of the infringing works at all, and it followed from that that the notice could not be excessive to achieve that effect. Arguably at least, it seems to me, where the breach consists of the construction of a building which differs in design from one which has been permitted, the purpose of the enforcement notice is to remedy injury to amenity that has been caused by the differences in the design of the building as built as compared with that which has been permitted. If that is right, then the inspector was wrong not to give consideration to

whether the enforcement notice requiring demolition was excessive to remedy any injury to amenity which had been caused by the differences in design that has eventuated.

10 As far as ground 3 is concerned, Ms Osmund-Smith has clarified that this relates only to alternative D, which is premised on the demolition of the sun room but asserts that the inspector was wrong to fail to vary the enforcement notice so as to deal with the fact that the simple demolition of the sun room would leave the remaining structure of the building with an unfilled opening presently occupied via the doorway between the building and the sun room. The inspector was invited to vary the notice so as to authorise or require the bricking up of the opening, which is something which would itself require planning permission, or the construction of a folding door in that opening. I am satisfied that it is arguable that it was open to the inspector to make a variation which would achieve at least one of those effects pursuant to section 173(5). Given that there is an obvious difficulty in an enforcement notice which leaves a building with an insecure unfilled opening in its external wall, it is arguable that the inspector was wrong not to consider a variation which would provide a method of dealing with that satisfactorily. It is right, of course, that the appellant has the alternative option available of seeking planning permission for whatever solution it requires, but it seems to me that it is at least arguable that the inspector was wrong not to provide at least one solution to that difficulty such that the appellants would not be left in the position that they had an unsecured opening unless and until they made an application themselves for further work to be done.

11 So, for those reasons, in my view, all of the grounds are arguable and I grant permission to pursue all of them.

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CO/4504/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

IN THE MATTER OF AN APPLICATION UNDER SECTION 289 OF THE TOWN AND COUNTRY PLANNING ACT 1990

BETWEEN:

(1) BALJIT SINGH BHANDAL
(2) BALBIR SINGH BHANDAL
(3) AMRIK SINGH BHANDAL

Appellants

-and-

(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT

(2) BROMSGROVE DISTRICT COUNCIL

Respondents

SKELETON ARGUMENT ON BEHALF OF THE APPELLANTS FOR HEARING ON 5 MAY 2020

For convenience, this skeleton argument will adopt the usual practice of referring to the decision letter of the Defendant by the suffix "DL" followed by the relevant paragraph number. Reference to the Hearing Bundle will be [HB/x]. The relevant statutory provisions and case law are contained within a separate bundle [AB/x].

Time estimate: 1 day (including judgment)

Time estimate for pre-reading: 3 hours

Essential reading

a. Decision Letter dated 17 October 2019 HB/B2
b. Grounds of Appeal HB/A14-27
c. ***Mahfooz Ahmed v The Secretary of State for Communities and Local Government, London Borough of Hackney*** [**2014] EWCA Civ 566** AB/24-37
d. ***Tapecrown Ltd v First Secretary of State*** **[2006] EWCA Civ 1744, [2007] 2 P&CR 7** AB/175-186
e. Skeleton Arguments

Introduction

1. The Appellants challenge the decision of an Inspector appointed by the Defendant dated 17 October 2019 ("the decision"), to dismiss the Appellants appeals pursuant to section 174 of the Town and Country Planning Act 1990 ("the Act") against an Enforcement Notice ("EN") issued by the Interested Party on 27 November 2018 (HB/B9-14). The Interested Party is the Local Planning Authority with responsibility for planning enforcement in the area of the appeal site. The appeal was determined by way of written representations.

Background

2. The background to this matter is set out at DL2 (HB/B2). Essentially, the unauthorised development at the heart of the matter was completed following the grant of planning permission by the Council for the demolition of an existing sun room, and replacement with a new flat roof sun room ("the 2016 permission").

The 2016 permission decision notice can be found at HB/B101-103. In due course, a sun room was erected, but it differed in some respects to that which had been permitted. In particular, the roof was sloping and higher at one end, and extended into an overhanging canopy. The canopy has been removed. Photos of the previous structure and the structure now on the site are included at HB/B43 and HB/B142-144 respectively.

3. The Council served an EN, which requires the demolition of the sun room and the removal of all building materials and rubble from site. The Appellants appealed, and as part of their appeal, they proposed four alternative schemes to the entire demolition of the sun room that are set out on pages 7-8 of the Statement of Case, HB/B26-27 (the "Alternative Developments"). Those were:

(i) Alternative Development Option A: removal of the overhanging canopy
(ii) Option B: Removal of the unauthorised section of roof which would then be replaced with with a flat glazed roof; see HB/B62
(iii) Option C: This was as option B, but with the addition of an upper section of flat roof to accord with the 2016 Permission; see HB/B76, and B100
(iv) The final Alternative Development Option D was that if none of the three alternatives were acceptable, that "provision should be made to enable the enclosure of the large opening that would result from the removal of the Sun Room…" HB/B27.

The EN

4. The EN (Ref:17/00076/PLAN) (HB/B9-10) relates to Four Stones Restaurant, Adam Hill, Clent, Stourbridge, Worcestershire DY9 9PS ("the site"). It alleges a breach of planning control in the following way:

"without planning permission the erection of a replacement glazed sunroom ("the unauthorised development")."

5. The requirements of the notice were for the Appellants to:

" 1. Remove the unauthorised development from the Land;

2. Remove from the Land all building material and rubble arising from compliance with the requirements of step 1 above."

6. The Appellants appealed against the EN pursuant to sections 174(2)(a), (f) and (g) of the Act; see AB/1

The Decision Letter

7. The Inspector considered the Alternative Developments in two places in the DL. The first begins at DL18, in respect Alternative Development A. The Inspector considered that the had the power to consider that option (DL/19), because it "would form part of the matters stated in the notice and it is therefore open to me to grant planning permission for it under the ground (a) appeal."

8. In respect of Options B and C, the Inspector considered that because those alternatives included the formation of a new roof "by definition" they were new works, would not form part of the development enforced against, and it was not open to him to grant planning permission; see DL23-27 (HB/B4-5). The Inspector was wrong to so conclude.

9. In respect of the fourth proposal, Option D involved making good the frontage of the restaurant that would be left open and exposed by the removal of the unauthorised sun room. Again, the Inspector considered that it was outwith his powers to grant permission for the proposals; see DL28 and 36 (HB/B5 and B6). Again, the Inspector erred in his conclusion.

Relevant Law

10. The relevant law is set out in the Grounds of Appeal, HB/A17-22, In summary and in relation to the statutory framework:

(i) Section 173 of the Town and Country Planning Act 1990 (AB/3-4) sets out the contents and effect of an EN. Section 173(5) explains that an EN can require (by way of example), the alteration or removal of any buildings, and/ or the carrying out of any building or other operations.

(ii) Section 174 (AB/5-8) sets out the provisions for appealing an enforcement notice, and the grounds on which an appeal may be brought as set out in section 174(2). They include (insofar as is relevant):

> *"(a) that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted …;*
>
> …
>
> *(f) that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach."*

(iii) Section 176 (AB/9-10) contains general provisions relating to the determination of appeals and includes subsection 1(b) that an Inspector may vary the terms of the enforcement notice, if he is satisfied that the correction or variation will not cause injustice to the appellant or the local planning authority.

(iv) Section 177 relates to the grant or modification of planning permission on appeals against enforcement notices, and explains that the Secretary of State may grant planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control, whether in relation to the whole or any part of those matters or in relation to the whole or any part of the land to which the notice relates; see AB/11-13.

The Nature of Enforcement Proceedings

11. The principles established in ***Tapecrown Ltd v First Secretary of State*** **[2006] EWCA Civ 1744, [2007] 2 P&CR 7** (AB/38-43) are important in this case.

12. In ***Tapecrown***, Carnwath LJ explained, (not for the first time) that the enforcement procedure is intended to be remedial rather than punitive. It was observed at para. 33 of his judgment that an Inspector has wide powers to decide whether there is any solution, short of a complete remedy of the breach, which is acceptable in planning terms and amenity terms. If there is, an Inspector should be prepared to modify the requirements of the notice and grant permission subject to conditions:

"46. As I have said, I would not wish to lay down any general rules. I would accept that as a general proposition, given the limitations of the written representations procedure, an appellant would be well advised to put forward any possible fall-back position as part of his substantive case. It is not the duty of the inspector to make his case for him. ***On the other hand the inspector should bear in mind that the enforcement procedure is intended to be remedial rather than punitive. If on his consideration of the submissions and in the light of the site view, it appears to him that there is an obvious alternative which would overcome the planning difficulties, at less cost and disruption than total removal, he should feel free to consider it****. In such circumstances fairness may require him to give notice to the parties to enable them to comment on it" (emphasis added)*

13. ***Tapecrown*** was a case in which the Inspector had failed to consider whether, as

an alternative to demolition, if appropriate modifications were made to an unlawful building, and if all or part of the hardstanding associated with it were removed, the building could be made acceptable in planning terms; see para. 35. The case was remitted for redetermination.

Alternative Developments and the ***Ahmed*** Case

14. The purpose of the statutory scheme was further explored in ***Mahfooz Ahmed v The Secretary of State for Communities and Local Government, London Borough of Hackney*** **[2013] EWHC 2084 (Admin)**, and **[2014] EWCA Civ 566**. That case is very important in this appeal, and has materially similar facts, which are addressed below. In particular:

    (i) In ***Ahmed*** Permission was granted in 2005 for the demolition of an existing building, and the erection of a three storey building with a butterfly roof, comprising a retail unit on the ground floor and six flats on the two upper floors (AB/28/para.11);
    (ii) The consent expired on 7 June 2010, and was no longer extant at the time of the appeal (AB/28/para.12);
    (iii) That site was also in a Conservation Area (AB/29).
    (iv) What was built on site was a 4 storey building with a flat roof (AB/28/para.12). An enforcement notice was served and Mr Ahmed appealed. The appeal was dismissed.
    (v) As part of his appeal, Mr Ahmed proposed modifying the building as built to bring it into conformity with the lapsed 2005 planning permission (AB/28/para.14).

15. Mr Ahmed contended that the requirement in the enforcement notice for the complete demolition of the building amounted to over-enforcement for the purposes of section 174(2)(f), and that the Inspector erred in law by failing to consider whether the breach of planning control could be rectified by amending the enforcement notice so as to require the partial demolition of the building and its remodelling so as to make it conform to the terms of the 2005 consent.

16. It was argued that the Inspector had power under section 176(1)(b) to vary the terms of the enforcement notice to remedy the breach of planning control, as well as having power under section 177(1) to grant retrospective consent for that part of the structure that was authorised by the 2005 consent.

17. The question in the main appeal was whether the Inspector erred in law on the enforcement notice appeal by failing to consider an "obvious alternative" in accordance with the principles discussed in ***Tapecrown*** and ***Moore v Secretary of State for Communities and Local Government*** **[2013] JPL 192** [AB/44-54].

18. The Judgment of the Court of Appeal records the Defendant Secretary of State's argument at paragraph 19(4) that section 177(1)(a) was not "wide enough" to grant permission for the 2005 scheme (AB/31):

"On an enforcement notice appeal the Secretary of State is confined to giving planning permission for the development of which the notice complained: Richmond upon Thames Borough Council v Secretary of State for the Environment [1972] EGD 948, as applied in Runnymede Borough Council v Secretary of State for the Environment, Transport and the Regions [2001] PLCR 24. Section 177(1)(a) is not wide enough to empower a grant of planning permission for the 2005 scheme…."

19. Importantly, that argument and others were rejected, and the Court held that in principle, planning permission could have been granted for the 2005 scheme providing that such that a development in accordance with the 2005 scheme could be regarded as a "part" of the development as built. The fact that the unlawful building would need to be modified to achieve the 2005 scheme was not fatal to the argument (AB/33):

"26. …. ***It cannot be said, either as a matter of law or on the basis that the facts were capable of leading to only one reasonable answer, that it would have been outside his powers to grant permission for the 2005 scheme.***

27. … ***In principle, therefore, planning permission could have been granted for the 2005 scheme if the differences between it and the development as built (i.e.***

the differences identified in the notice as "unauthorised additions, alterations and variations to the approved scheme") were such that a development in accordance with the 2005 scheme could be regarded as a "part" of the development as built. This was a matter of planning judgment for the inspector. *It was a judgment he did not make because of his failure to give any consideration to the possibility of granting planning permission for the 2005 scheme. This court is not in a position to decide what conclusion he would have reached if he had considered that possibility.* ***In particular, we cannot exclude the possibility that he might reasonably have concluded that the 2005 scheme was to be regarded as "part" of the development as built, on which basis he would have had power under section 177(1) to grant planning permission in relation to it.***

….

33. For those reasons I am satisfied that the inspector would have had power to grant planning permission for the 2005 scheme and to vary the enforcement notice accordingly if, having considered the possibility, he had judged the 2005 scheme to be a "part" of the development as built." Emphasis added.

20. The enforcement of planning control should not be used to deprive landowners of their lawful rights; for which see ***Graham Oates v Secretary of State for Communities and Local Government v Canterbury City Council*** **[2018] EWCA Civ 2229** citing ***Mansi v Elstree Rural District*** **Council (1965) 16 P. & C.R. 153**

Reasons

21. The law on reasons is well understood. A helpful summary was included in the ***Bloor Homes East Midland Ltd v SSCLG*** **[2014] EWHC 754 (Admin) a per Lindblom J (as he then was) [19]:**

"The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions

were reached on the "principal important controversial issues". An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration (see the speech of Lord Brown of Eaton-under- Heywood in South Bucks District Council and another v Porter (No. 2) [2004] 1 W.L.R. 1953 , at p.1964B-G)."

Submissions

Ground 1: The Inspector misinterpreted section 177(1) of the 1990 Act, and / or failed to give adequate reasons for rejecting the Alternative Development proposals. The approach was irrational.

22. This ground concerns Alternative Developments B and C, and raises an important question of interpretation. Ground 1 related to paragraphs 18-29 of the DL. What is the correct interpretation of section 177(1)(a) of the Act, and does it extend to alternative developments that require new works/ development? The Inspector's position was that new works or development, as a matter of principle (not judgement), cannot form part of the matters enforced against in the EN.

23. The Appellant submits that the Inspector misunderstood his powers pursuant to section 177(1) of the Act, and /or failed to give adequate reasons for rejecting the Alternative Developments proposed by the Appellant.

24. The First Respondent has failed to engage with that important question of interpretation at every stage of the litigation.

25. To be clear, the allegation is not that the Inspector was not alive to the need to consider "obvious alternatives" but that his reasons for rejection demonstrate a misunderstanding of section 177(1) or alternatively are inadequate.

26. The Inspector's position was that because alternatives B and C included "new works", they were excluded from the scope of Section 177(1) of the Act. The First Respondent confirmed that position at para. 3.9 of the Skeleton Argument for the permission hearing[1] that: *"Owing to each of these developments involving the addition of new development, the Inspector formed the view that, in his planning judgement, they constituted development that did not exist and were not part of the matters enforced against in the notice."*

27. That is wrong for the following reasons:

    a. The alleged breach of planning control at §3 of the EN is the erection of a replacement glazed sun room without planning permission (HB/B9)
    b. Both Alternative Developments B and C proposed a glazed sun room. The nature and function of the sun room would remain the same.
    c. The proposals reduced the size of the unauthorised development through minor modifications to the roof. The resulting structures would still be wholly contained within the footprint and volume of the sun room as built and enforced against.
    d. Both proposals can properly be regarded as a "part" of the development as built.
    e. The Inspector failed to explain why *"new works in the formation of a roof"* precluded the Alternative Developments B and C from falling within section 177(a) of the Act in principle.
    f. That narrow approach is contrary to ***Ahmed*** and finds no support within the wording of the Act. In ***Ahmed*** partial demolition of the building and remodelling was inevitably required to reduce the four storey flat roof building in that instance to the previously consented three storey butterfly roof building (see para. 17). The Court rejected the argument (AB/31-32 (para 19(4)) that such modifications precluded an alternative from falling within the scope of section 177(1) if the alternative was such that a development in accordance with the 2005 scheme could "in principle" be

[1] HB/A40/para. 3.9

regarded as a "part" of the development as built; see paragraphs 19(4) and 27.

28. Having heard detailed argument on the issues, HHJ Cooke in granting permission, found as follows:

"6…In Ahmed itself the alternative that the inspector failed to consider was one which would have involved reduction in the height of the building that had been completed by one storey and the formation of a new roof. If it had been the case that the carrying out of those works and in particular forming a new roof in place of or over the ceiling that would have been left by removing the existing top storey ruled out of consideration whether that work formed part of what had been built, then the Court of Appeal would not have needed to refer the matter to the inspector at all." (HB/A116)

29. Accordingly, the Inspector misinterpreted section 177(1), and misunderstood and failed to use his powers to grant planning permission for the Alternative Developments proposed. The Inspector was not fettered by the requirement for works to form a new roof; they did not exclude the Alternative Developments from the reach of section 177(1). There is nothing within the Act, or section 177(1) that prevented the Inspector from using his powers pursuant to section 177(1) in the circumstances and in the way that he assumed.

30. Crucially, the approach promoted by the Inspector and supported by the First Respondent would have the effect of rendering the "obvious alternative" doctrine obsolete. An "alternative" development is by definition, different to the development that has been enforced against. If works of modification to an unlawful structure exclude such alternatives from the operation of the doctrine, it become entirely unclear how the doctrine is to operate in practice.

31. There is no authority for such a restrictive approach, which appears to fly in the face of the Judgment of Carnwath LJ, (as he then was) in ***Tapecrown***. It will be understood that the enforcement provisions of the Act are based on the main

recommendations of the report by Robert Carnwath QC, entitled "Enforcing Planning Control" (February 1989), for the Secretary of State for the Environment:

"33. In short, the inspector has wide powers to decide whether there is any solution, short of a complete remedy of the breach, which is acceptable in planning terms and amenity terms. If there is, he should be prepared to modify the requirements of the notice, and grant permission subject to conditions (or to accept a section 106 agreement, if offered). I would emphasise, however, that his primary task is to consider the proposals that have been put before him. Although he is free to suggest alternatives, it is not his duty to search around for solutions. I will return to the latter point in connection with the grounds of appeal." [AB/182]

And at [46]

"…On the other hand the inspector should bear in mind that the enforcement procedure is intended to be remedial rather than punitive. If on his consideration of the submissions and in the light of the site view, it appears to him that there is an obvious alternative which would overcome the planning difficulties, at less cost and disruption than total removal, he should feel free to consider it. In such circumstances fairness may require him to give notice to the parties enabling them to comment on it. I would expect the Inspectorate to have an established practice for dealing with that situation efficiently and expeditiously." [AB/185]

32. ***Tapecrown*** is clear that an Inspector how "wide powers" to consider alternatives, that are not the unlawful development, but which overcome the planning difficulties at less cost and disruption than complete demolition. Options B and C were such alternatives. The fact that they required modification of the unlawful structure is wholly in accordance with the "obvious alternatives" doctrine, and could not prevent the application of section 177(1).

33. Alternatively, the Inspector failed to give adequate reasons why works to form a

new roof prevented the Alternative Development proposals from comprising part of the matters stated in the enforcement notice as constituting a breach of planning control. The Appellants are prejudiced by that failure, particularly when the reasoning is contrasted with the approach to Alternative Development, A which also proposed works to the sun room structure by the removal of the canopy, but which was considered by the Inspector to fall within the scope of section 177(1).

34. Finally, the Appellants' Statement of Case pp9-14 (HB/B28-B.3) addressed the relevant legal principles. Despite that, the Inspector failed entirely to refer to the line of authorities, which includes ***Tapecrown*** and ***Ahmed***. The absence of reasoning in the light of those authorities, which went to a principal issue in the appeal, gives rise to a substantial doubt as to whether he understood those authorities, and went wrong in law.

35. The First Respondent has provided no authority to support the Inspector's approach. The First Respondent has failed to engage with the substance of the ground. As explained in the Appellants' Reply (HB/A77), it is not sufficient for the First Respondent to say that it the Inspector's approach was simply a matter of planning judgment, not least because the Inspector did not exercise his planning judgement; he considered that "by definition" new works could not form part of the matters enforced again; see DL24 (HB/B5).

36. Accordingly, the First Respondent's explanation does not grapple with the issue at the heart of ground (1), which is the correct interpretation of Section 177(1) of the Act. The same criticism was made in the Appellants' Skeleton Argument at the permission hearing (see paragraph 21), and yet the First Respondent continues to offer no assistance on the correct interpretation of Section 177(1) whatsoever.

Ground 2: The Inspector misinterpreted sections 173(4)(a) and 176(1)(b) of the 1990 Act, failed to properly assess the obvious Alternative Developments and / or failed to give adequate reasons for rejecting the Alternative Development proposals in relation to the ground (f) appeal.

37. The First Respondent is correct that there is an overlap between grounds 1 and 2, in that both consider the Alternative Developments and the Inspector's treatment of them. However, the grounds relate to different parts of the DL where the Inspector addresses the Alternative Development proposals. Ground 2 concerns DL30-35. It is useful to separate out the issues, not least because the Inspector's reasoning is different in respect of the two parts.

38. The Inspector's approach at DL30-35 was to consider that none of the alternatives A-C would "*remedy the breach of planning control*." The findings at DL36 in respect of Alternative D are different and are addressed in Ground 3. The notice did not in fact specify which purpose it was trying to achieve (see section 173(4); the Inspector assumed it was to remedy the breach of planning control rather than the injury to amenity.

39. That matters not however, because the Inspector's task was to consider whether "*there is any solution, short of a complete remedy of the breach, which is acceptable in planning terms and amenity terms";* see ***Tapecrown*** at [33]. The Inspector did not do that, but embarked on a journey of entirely circular reasoning that demolition was required to remedy the breach of planning control, and so anything less than demolition would not remedy the breach of planning control. The Inspector did not consider the planning merits of any of the alternative developments. The approach again robs the obvious alternatives doctrine of any utility.

40. In particular, the Inspector appears to have rejected the Alternative Development proposals simply because they were promoting solutions that were less than full demolition see DL33-35. It should be noted, the EN in ***Ahmed*** was also issued to

reedy the breach of planning control; see AB/30 at [15].

41. However, as set out above, an Inspector has wide powers to decide whether there is any solution, short of a complete remedy of the breach, which is acceptable in planning terms and amenity terms. If there is, an Inspector should be prepared to modify the requirements of the notice (section 176(1)(b)) [AB/9] and grant permission subject to conditions. The Inspector in this instance failed to apply his mind to that task. The approach was punitive and opaque.

42. The reasoning is also deficient, opaque and severely prejudices the Appellants. It is not at all clear what the Inspector meant by the repeated mantra that the Alternative Development proposals at A-C would not remedy the breach of planning control, or why they would not see DL33-35. The conclusion is even more surprising when the Inspector accepted at DL51 that it is clear that the Council considers that some form of extension on the footprint of the unlawful building is acceptable in planning terms as a result of the earlier permission. The two conclusions are entirely at odds, and require further explanation.

43. In this instance, there was clearly a solution, short of a complete demolition that is acceptable in planning terms and amenity terms. The Inspector failed to properly consider and apply section 176(1)(b) of the 1990 Act to vary the requirements of the EN to achieve an acceptable development on site. In particular, section 173(5) sets out the range of requirements that were at the Inspector's disposal in order to achieve a proposed Alternative Developments through the variation of the EN pursuant to the ground (f) appeal; see AB/3.

44. Accordingly, the Inspector's approach is wrong in law and contrary to ***Tapecrown***; see paragraphs 33-34 and paragraph 46 in particular.

Ground 3: The Inspector failed to consider and/or exercise his powers in relation to section 176(1) of the 1990 Act, and/or failed to have regard to the consequences of the existing requirements of the EN. Additionally, the Inspector failed to provide adequate reasons in that respect. The approach was irrational.

45. Section 173(3)-(4) [AB/3] requires than an EN must specify the steps to be taken to remedy the breach by making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land, by discontinuing any use of the land or by restoring the land to its condition before the breach took place. By section 173(5), the EN can include a number of requirements including (a) the alteration or removal of any buildings or works; (b) the carrying out of any building or other operations.

46. At DL31, the Inspector considered that the purpose of the requirement to remove the unauthorised development was for the purpose of remedying the breach by restoring the land to its condition before the breach took place. However the requirements go beyond that and are excessive. Prior to the breach, there was an existing sun room which was demolished following the 2016 permission. The front façade of the Four Stones Restaurant was therefore enclosed prior to the breach.

47. However, in this instance, the requirements of the EN would fail to restore the land to its previous condition. Compliance with the EN would mean that a large hole was left in the front façade of the Four Stones Restaurant, with no lawful means of closing it up. The consequences for the structural safety and protection of the building, the running of the Claimants' business and the safety of its occupants are potentially catastrophic. The failure to consider and understand the effect of the unvaried requirements represents a failure to have regard to material consideration, and is irrational. It is a very serious failure by the decision maker in this case.

48. The Claimants sought to address this consequence by offering Alternative Development Option D, which could have been secured by the Inspector exercising his wide discretion pursuant to section 176 [AB/9], having regard to section 173(5). Alternatively, the Inspector could have imposed a requirement to simply restore the land to its condition prior to the breach, to carry out building work to secure the façade of the restaurant, or to construct a new building

pursuant to section 173(6).

49. The First Respondent's defence of this ground is surprising to say the least. It is notable that the First Respondent doesn't disagree that the Inspector had the powers outlined above and could have exercised them. Instead, the First Respondent proceeds on the basis that the central point of this ground was not put to the Inspector, which is simply wrong. The Inspector was provided with photographs of the land before the breach took place (HB/B43), was explicitly directed to the Alternative Development Option D, to prevent the adverse consequences addressed under this ground from materialising, and carried out a site visit, at which the position would have been obvious.

50. In particular, the following are references to the Statement of Case in the Appeal (starting at HB/B20):

(i) Para. 25 (HB/B26) refers to the result of compliance with the notice as drafted, being that it would leave a large hole that would need to be enclosed.

(ii) Para. 30 (HB/B31) highlights that Option D provides for the main building to be made good (by varying the notice to allow the closure of frontage), and that this step also forms part of the default in each of the other alternative options in the case of non-compliance with the notice as varied);

(iii) Para. 54 (HB/B35) explains that removal of the sun room would leave an opening in the frontage that would require further works,

(iv) Para. 76 (HB/B39) refers to Option D and confirms that stopping up the gap is necessary for the continuing business activity;

(v) Para. 81 (HB/B41) refers to the need to consider the impact on the ongoing business;

(vi) Para. 87 (HB/B41) concludes the case with reference to the need to close the "gaping opening in [the] frontage."

51. It is notable that the First Respondent does not respond at all to the point that the Inspector failed to exercise his powers pursuant to section 176(1)(b) to vary the requirements of the EN to allow for the closing up of the hole in the front of the building following demolition of the unauthorised structure. The Appellants are at a loss to understand the argument at para. 5.5 of the First Respondents' Skeleton Argument and Detailed Ground that the failure to explain why the Inspector failed to vary the notice in this respect has no relationship to the decision letter:

    a. First, the Inspector was explicitly invited to consider Alternative Option D as a means of securing the building following complete demolition of the unauthorised structure.
    b. Second, he was invited simply to vary the notice such that the restaurant was not left with a gaping hole in its frontage. (HB/B41), para 87.

52. The Inspector failed entirely to address the adverse and irrational consequence of the notice and any way in which that might be ameliorated pursuant to section 176(1)(b). Alternative Development D was not an Alternative Development proposal in the sense of options A-C, because it was not something short of demolition. It proceeded on the basis of total demolition.

53. The stopping up of the gap simply required a variation of the notice pursuant to section 176(1)(b), in conjunction with section 173(5), which provides for a range of potential remedies and requirements.

54. Accordingly, compliance with the EN would mean that a large hole was left in the front façade of the Four Stones Restaurant, with no lawful means of closing it up. The consequences for the structural safety and protection of the building, the running of the Appellants' business and the safety of its occupants are potentially very damaging. The failure to consider and understand the effect of the unvaried requirements represents a failure to have regard to material consideration, and is irrational. It is a very serious failure by the decision maker in this case.

55. The First Respondent's defence is that the matters were not raised before the

Inspector; they were. The defence therefore fails.

56. No explanation is given as to why the Inspector failed to exercise his power to vary the notice in light of the serious consequences for the Appellants, their business and their property. The approach at DL36 is wrong and conflates the issue of whether to grant planning permission pursuant to section 177(1), with the power to vary the requirements of the EN pursuant to section 176(1)(b) to prevent over enforcement.

57. Alternatively, if the Inspector did not have the power to prevent the over-enforcement and the consequent hole in the wall, which is not accepted for the reasons given above, that consequence was a material consideration in the ground (a) appeal that the Inspector failed to have regard to in considering whether or not to grant permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control. Again, the First Respondent has failed to address that argument in its response to this appeal.

Conclusions

58. For all of the foregoing reasons, the decision of the Defendant dated 17 November 2019 is unlawful and should be quashed, and that is what the court is respectfully invited to do.

And the Appellants seek:

1. An Order quashing the Defendant's decisions dated 17 November 2019 and remitting the matter for redetermination; and

2. Costs

THEA OSMUND-SMITH

No5 Chambers

14 April 2020

IN THE HIGH COURT OF JUSTICE **Claim No. CO/3903/2019**

QUEEN'S BENCH DIVISION

PLANNING COURT

BETWEEN:

(1) BALJIT SINGH BHANDAL

(2) BALBIR SINGH BHANDAL

(3) AMRIK SINGH BHANDAL

Appellants

and

(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT

(2) BROMSGROVE DISTRICT COUNCIL

Respondents

SKELETON ARGUMENT ON BEHALF OF THE FIRST RESPONDENT

for the hearing on 5 May 2020

This Skeleton Argument adopts the same nomenclature as the Claimant's Skeleton Argument

1. Introduction

1.1 This is a statutory appeal brought pursuant to section 289 of the Town and Country Planning Act 1990 against the decisions made by the First Respondent's Inspector ('the Inspector') dated 17 October 2019 ('the Decision').

1.2 The appeal relates to the Inspector's decisions to dismiss three conjoined appeals, pertaining to an enforcement notice **[CB/9]**, which was issued by the Second Respondent. The notice was served on land at Four Stones Restaurant, Adams Hill, Clent, Stourbridge, Worcestershire DY9 9PS ('the Property').

1.3 This appeal is brought pursuant to 3 grounds of challenge. By an Order dated 7 January 2020, HHJ Cooke granted permission for the claim to proceed on all 3 grounds.

1.4 For the reasons below, the First Respondent respectfully invites the Court to dismiss the claim and order the Appellant to pay the First Respondent's costs.

2. Law

2.1 General propositions

2.1.1 In ***Bloor Homes East Midlands Limited v Secretary of State for Communities and Local Government*** [2014] EWHC 754 (Admin) at [19], Lindblom J (as he then was) set out the general law on s.288 statutory challenges. Whilst this is a s.289 challenge, the same principles apply.

2.1.2 In ***R. (Newsmith Stainless Ltd) v Secretary of State for Environment, Transport & the Regions*** *[2001] EWHC Admin 74*. (emphasis added) the Court held as follows in respect to irrationality:

> *7. In any case, where an expert tribunal is the fact finding body the threshold of Wednesbury unreasonableness is a difficult obstacle for an applicant to surmount.* ***That difficulty is greatly increased in most planning cases because the Inspector is not simply deciding questions of fact, he or she is reaching a series of planning judgments****. For example: is a building in keeping with its surroundings? Could its impact on the landscape be sufficiently ameliorated by landscaping? Is the site sufficiently accessible by*

public transport? et cetera. ***Since a significant element of judgment is involved there will usually be scope for a fairly broad range of possible views, none of which can be categorised as unreasonable****. A misconstruction of national policy guidelines will lead to the quashing of the decision: R. (on the application of Lovelock) v First Secretary of State and Surrey Heath DC [2006] EWHC 2423 (Admin).*

8. Moreover, ***the Inspector's conclusions will invariably be based not merely upon the evidence heard at an inquiry or an informal hearing, or contained in written representations but, and this will often be of crucial importance, upon the impressions received on the site inspection.*** *Against this background an applicant alleging an Inspector has reached a Wednesbury unreasonable conclusion on matters of planning judgment, faces a particularly daunting task.*

2.1.3 The classic formulation of the standard of reasons in an Inspector's decision was provided by Lord Brown in ***South Buckinghamshire District Council v Porter (No 2)*** [2004] 1 WLR 1953, para 36:

The reasons for a decision must be intelligible and they must be adequate. ***They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved****. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds.* ***But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration****. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how*

the policy or approach underlying the grant of permission may impact upon future such applications. ***Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.***

2.2 Section 177 of the Town and Country Planning Act 1990

2.2.1 Section 177(1)(a) of the Town and Country Planning Act 1990 says:

(1) On the determination of an appeal under section 174, the Secretary of State may—
[(a) grant planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control, whether in relation to the whole or any part of those matters or in relation to the whole or any part of the land to which the notice relates;]

2.2.2 The Courts have clarified on numerous occasions the scope of this power.

2.2.3 In ***Richmond upon-Thames BC v SSE*** (Estates Gazettte, December 2, 1972), the Divisional Court held that the Secretary of State had no power to grant planning permission for the parking of motor vehicles of all kinds, where an enforcement notice had merely required the cessation of use of land for the parking of motor coaches.

2.2.4 In ***Arnold v SSCLG*** [2017] EWCA Civ 231, Lindblom LJ held as follows concerning the powers of an Inspector pursuant to s.177 of the Town and Country Planning Act 1990:

22. As Mr Ryan Kohli submitted on behalf of the Secretary of State, the inspector, when dealing with the ground (a) appeal, correctly identified the question he had to decide. He referred in paragraph 44 of his decision letter to the provisions of sections 174(2)(a)and 177(1)(a) . He

recognized the parameters of his power to grant planning permission under ground (a). He directed himself, correctly, that section 174(2)(a) required him to focus on "breaches of planning control which may be constituted by the matters stated in the notice", and therefore that "unless the breach of planning control is wrong", which in his view it was not, "the deemed application in this case is for the dwelling as built[,] on the date the notice was issued". He also explicitly directed himself that, under section 177(1)(a) , "it is possible to grant permission for the whole or any part of the development constituting the breach of planning control". He reminded himself, however, that "what is not possible is to grant planning permission for some alternative form of development that differs from the alleged breach". ***He was thus acknowledging that his powers here were circumscribed by the allegation of the breach of planning control in the enforcement notice.*** *Nothing that was said by this court in Tapecrown detracts from that basic principle.*

23. It was with that principle in mind that the inspector referred in paragraph 44 to the decision of the Divisional Court in Richmond-upon-Thames London Borough Council. Planning permission, he said, may only be granted "in respect of the matters stated in the notice as constituting a breach of planning control". And there was, he reminded himself, "no power to go beyond the notice " (my emphasis). ***Conscious of that constraint, he directed himself that the exercise he was engaged upon was "not a question of considering alternative proposals which fall outside the scope of the notice if they materially differ from what is alleged and has been built"*** *(my emphasis again). The "alternative schemes" produced on behalf of Mr and Mrs Arnold had to be "viewed", he said, "in the context of this legal principle".*

2.2.5 In ***Arnold***, at first instance, Dove J held as follows:

He added that in his view there was "some justification" in the Secretary of State's contention that ***two of the options, the first and third, involved***

a "redesign of the internal arrangements, footprints and elevations at ground floor". *In the light of the decision of Ouseley J. at first instance in Ioannou v Secretary of State for Communities and Local Government [2014] J.P.L. 608 ,* ***this would have "taken the alternative beyond being "part of" the dwelling constructed and enforced against".*** *He said that "[only] the second option in reality could have been properly understood as "part of" the development by simply removing, as it did, the garage and part of the south extension".*

2.2.6 The Court then confirmed that the application of s.177 was a matter of planning judgement:

30. The conclusions that follow in paragraph 86 reflect the inspector's self-direction in paragraph 44. ***He now found, as a matter of fact and degree, that the three "modified forms of development" provided on behalf of Mr and Mrs Arnold by their architect, Mr Piper, were all "materially different forms of development to what constitutes the deemed application …". Such a finding, as a matter of fact and degree, is beyond challenge in proceedings such as these, unless, for example, it can be shown that an inspector has plainly ignored or misunderstood some obvious fact or misread the drawings in which an alternative scheme or schemes are presented to him by the appellant****. But in this case no cogent submission has been made to that effect. In the circumstances,* ***it is not the court's task to unpick the inspector's findings of fact.*** *In my view he was fully entitled to make the findings he did, and to conclude as he did in the light of those findings. In doing so, he expressly had regard to the provisions of section 174(2)(a) and the decision of the Divisional Court in Richmond-upon-Thames London Borough Council – just as he did in paragraph 44.* ***He was plainly well aware of the nature and extent of the relevant statutory powers****. His conclusion that it was, "at the very least, questionable in law whether [he was] in a position to substitute these schemes for consideration under ground (a)" clearly went to the question of whether any of the alternative schemes could properly be regarded as falling within the*

scope of the matters stated in the enforcement notice as constituting a breach of planning control. It discloses no misdirection as to the relevant law.

2.2.7 The Appellant relies heavily on ***Mahfooz Ahmed v Secretary of State for Communities and Local Government*** [2014] EWCA Civ 566 in its Grounds of Appeal. However, that matter was significantly different to the facts of the present matter. Lindblom LJ addressed this judgment in ***Arnold v Secretary of State for Communities and Local Government*** [2017] EWCA Civ 231, saying as follows about it:

43. I do not see how Mr Turney's argument can gain any support from the decision of this court in Ahmed . There the inspector had gone wrong in failing to consider an alternative scheme for which planning permission had been granted on appeal in 2005. ***The Court of Appeal emphasized that the question of whether an alternative scheme could be regarded as "part of" the development against which the local planning authority had enforced was a matter of planning judgment for the inspector. In that case the inspector had simply failed to exercise his planning judgment****, having given no consideration to the possibility of granting planning permission for the 2005 scheme (see paragraphs 26 and 27 of the judgment of Richards L.J., with which Underhill and Floyd L.JJ. agreed). On its facts, therefore, Ahmed is not truly comparable to this case. In this case the inspector manifestly did consider all of the alternative schemes put forward. In doing so, he was fully aware of the statutory powers available to him and acted in accordance with them.*

2.2.8 Accordingly, ***Ahmed*** is a case where an Inspector simply failed to address alternative schemes. That has no bearing on the present matter where the Inspector did address the alternatives throughout the decision letter in detail, reaching the view that in his planning judgement the alternatives did not form part of the development that had been enforced against.

2.2.9 In ***Arnold*** Lindblom LJ went on to say as follows concerning alternative schemes:

> *44. More in point, I think, is the decision of Ouseley J. in Ioannou . That case is in some respects analogous to this on its facts. The local planning authority had served an enforcement notice requiring the cessation of the use of a dwelling house converted without planning permission into five self-contained flats. On his ground (a) appeal, the appellant presented the inspector with a proposal for the conversion of the building into three flats, which, as the authority accepted, would avoid the planning objections to its use as five flats. The inspector did not, however, grant planning permission for the three-flat scheme. Ouseley J. endorsed his approach.* ***It was the matters stated in the enforcement notice as constituting a breach of planning control to which the inspector's attention was directed under section 177(1)(a), rather than the works in the alternative scheme. He could "only grant permission under ground (a)[,] and on the deemed application, for the alternatives to the extent that that could be achieved by granting permission for the whole or part of the breaches alleged in the notice****" (paragraph 32 of the judgment). Ouseley J. went on to say this (in paragraph 33):*
>
> > *"33. The inspector obviously could [not grant] permission for the whole of the breach alleged in the notice and so achieve the three-flat scheme; that would simply leave the five flats in place. His only other power was to grant permission for part of the breach alleged in the notice. But the three-flat scheme could not be arrived at by granting permission for part only of the matters alleged to constitute the breach of planning control in the notice.* ***Only one of the five flats, the one on the first and second floor, could be left untouched, although an entry door would have to be removed****. ...* ***The four flats on the ground floor could not go into two flats without internal alterations to walls, doors, and facilities. Works were required in order to produce three flats, which were not part of the matters alleged to constitute a breach of planning control in the notice****. Granting planning*

permission for the larger flat without more ... would not have remedied what the Inspector found to be the objectionable parts of the breach of planning control, nor would it have produced the scheme which the Inspector was prepared to see achieved."

For the appellant's argument on ground (a) and the deemed planning permission to succeed without recourse to the powers governing remedial steps under ground (f), the power in section 177(1)(a) would have to be "read as empowering the grant of permission for a development which is not, and is not part of, the matters alleged to constitute a breach of planning control, and indeed which does not exist". *The wording of section 177(1)(a) , was "too specific and clear for such an interpretation" (paragraph 34).* ***As Ouseley J. went on to say, "something other than the grant of permission for all or part of the matters alleged in the enforcement notice to constitute the breach of planning control would be required to achieve the three-flat scheme"*** *(paragraph 37).*

45. Those conclusions were confirmed by this court (see the judgment of Sullivan L.J., at paragraph 11). The Secretary of State's appeal succeeded on the argument that the inspector was also correct in his conclusion that he did not have the power to consider the three-flat scheme under the appeal on ground (f) (see paragraphs 27 to 40 of Sullivan L.J.'s judgment). But Ouseley J.'s analysis on the ground (a) appeal in that case illustrates very well the practical limits of an inspector's power to grant permission for development which is part of the matters alleged in an enforcement notice to constitute a breach of planning control. The inspector's approach in this case seems entirely congruent with it.

2.2.10 In ***London Borough of Tower Hamlets v SSHCLG*** [2019] EWHC 2219 (Admin), Kerr J held as follows concerning s.177:

51. Turning to my reasoning and conclusions: I begin with the statutory provisions. Section 174(2)(a) of the TCPA 1990 enables an appeal to be allowed on the ground that planning permission ought to be granted, but only "in respect of any breach of planning control … constituted by the matters stated in the notice". Section 177(1)(a) likewise empowers only the grant of planning permission on appeal "in respect of the matters stated in the enforcement notice as constituting a breach of planning control".

52. The matter stated in the notice was, and was only, demolition of the three houses. Therefore, the inspector could only allow the appeals under ground (a) by granting planning permission for demolition simpliciter *. He could not have granted planning permission for a scheme for development of the site, even if one had been before him. Permission for any such scheme would have to have been sought from the council, not the inspector in the appeals.*

2.3 Section 176(1)(b) of the Town and Country Planning Act 1990

2.3.1 In ***Secretary of State for the Environment, Transport and Regions, Oxfordshire County Council v Wyatt Brothers (Oxford) Ltd*** [2001] EWCA Civ 1560; 2001 WL 1171964, the Court of Appeal held as follows about the power:

32. Quite separate from the power to vary a notice to give effect to a decision on appeal there has, for about 40 years, been a power vested in the Secretary of State to amend an enforcement notice, as Miss Robinson put it "to prevent it from failing on a technicality because of an error in the formulation of the notice as served" (see Miller-Mead v Minister of Housing Local Government [1963] 2 QB 196 , and later statutes and authorities reviewed by Roch J in R v Secretary of State for the Environment ex parte P.F. Ahern (London) Ltd [1989] 2 PLR 96 .) It is this latter power which, Miss Robinson submits, is now to be found in section 176(1) of the 1990 Act. ***It is a wide power of correction, a generously expressed slip rule, it is not a power which can properly be***

used to attack the substance of an enforcement notice. So, for example, a notice which requires the recipient to return the land to its condition before the breach cannot, by reliance on section 176(1)(b) , be turned into a notice which requires something less. *If the recipient of the notice wishes to achieve that result he can do so by appealing on the grounds set out in section 174(2)(a) and pursuing the deemed application for planning permission under section 177 . If he is unwilling to pursue that route or unable to do so because he has not paid the required fee then, as Miss Robinson points out, if the same arguments which would have been advanced in support of the appeal under ground (a) can be advanced in order to persuade the Inspector to exercise his powers under section 176(1)(b) the sanction in 177(5A) loses much of its force.*

33. On behalf of Wyatt brothers Mr Alesbury submits that the words of section 176(1) , which first became part of the Act in 1991 should be read as they are without reference to earlier statutory provisions. If that exercise is undertaken he submits that it is clear that section 176(1)(b) gives to the Secretary of State a power which is different from that which he exercises when correcting defects pursuant to section 176(1)(a) or deciding an appeal under ground (a). It is a power which may be used on the grounds of "expediency" (a word only found in section 172(1)(b) in relation to a local planning authority's decision to issue an Enforcement Notice) to avoid a nonsense or some unsatisfactory over-technical result arising from confirmation of the Enforcement Notice as it stands. In other words if it is a power to require the local planning authority to under-enforce.

34. In my judgment Miss Robinson, supported by Miss Murray, is right for the reasons that she gave. Section 176(1)(b) does not stand alone. It is one of a group of sections which set out an appellate structure. If that structure is not to be undermined section 176(1)(b) does have to read in such a way as not to afford a remedy obtainable by pursuing an appeal under ground (a) in section 174(2) , and the Inspector was right so to

read it. Having so read it he was right to restrict evidence and argument in the way that he did. Mr Alesbury described it as a bold and unusual decision, but it was a decision I would commend. Parties to planning appeals should not be permitted to spend time and incur expense in support of arguments which are bound to fail.

2.4 Section 174(f) of the Town and Country Planning Act 1990

2.4.1 In ***Ioannou*** [2014] EWCA Civ 1432, the Court of Appeal were concerned with ground (f) of section 174(2) of the Town and Country Planning Act 1990. This concerns the issue of whether the steps required to be taken by the Enforcement Notice exceed what is necessary to remedy any breach of planning control or to remedy any injury to amenity caused by any such breach.

2.4.2 In *Ioannou* , the Enforcement Notice related to the unauthorised conversion of a single family dwelling house into five self-contained flats. At the inquiry, the issue arose as to whether the Inspector could vary the steps required to be taken, pursuant to grounds (f), so as to allow the conversion of the house into three flats, which the local planning authority agreed would be preferable to changing the use of the house into one involving multiple occupation (which would be permitted development).

2.4.3 The Court of Appeal held that the power to allow an appeal on ground (f) was not a power to grant planning permission. In an appeal of this kind, such permission could be granted only under section 177(1) . At paragraph 33 of the judgment, Sullivan LJ rejected the submission that section 173(11) , which treats planning permission as having been granted in respect of buildings or works which could have been the subject of an enforcement notice but which were not, provided a mechanism for granting planning permission in an Enforcement Notice appeal for matters other than those specified in the notice as constituting the breach of planning control. In so holding, Sullivan LJ stated, at paragraph 37, that Carnwath LJ's observations in *Tapecrown* were not to be taken as "establishing a free-standing obvious alternative" test as a replacement for the express statutory

limitations imposed by sections 177(1) and 173(11) upon the nature and extent of the planning permissions that may be, or be treated as having been, granted in response to appeals under section 174 .

2.5 Raising Arguments Not Previously Put to an Inspector

2.5.1 This skeleton does not repeat those authorities from the First Respondent's Detailed Grounds on this subject, which are seemingly not disputed.

2.6 Rationality

2.6.1 For a conclusion to be irrational or perverse it must be one that no reasonable person in the position of the decision-maker, properly directing himself on the relevant material, could have reached (***Seddon v SSE*** (1981) 42 P&CR 26). The Court will require "something overwhelming" from a claimant before allowing a challenge of this sort (***Associated Provincial Picture Houses v Wednesbury Corporation*** [1948] 1 KB 223 at 230 (see also 233-234)). A claimant alleging that a decision-maker has reached a *Wednesbury* unreasonable conclusion on a matter of judgement faces a particularly daunting task (***R (Newsmith Stainless Ltd) v SSETR*** [2017] PTSR 1126 at para 8).

3. Ground 1: The Inspector misinterpreted and failed to properly apply section 177(1) of the 1990 Act, and/or failed to give adequate reasons for rejecting the Alternative Development. The approach was irrational

3.1 The Appellant argues that the Inspector failed to properly understand section 177(1) of the 1990 Act in forming the view that he could not grant planning permission for the Appellant's Alternatives Development proposals, specifically proposals B and C.

3.2 The Inspector recognised at DL/3 the scope of his powers under s.177(1):

... There is no power before me to grant permission for something different to that enforced against, only the whole or part of those matters.

3.3 The Inspector repeated this, making express reference to s.177(1)(a) at DL/17:

Section 177(1)(a) allows permission to be given under the appeal on ground (a) to any part of the matters alleged in the notice. To that end, the appellant has advanced four alternative schemes to that subject of the notice.

3.4 Accordingly, the Inspector had explicit regard for his powers in determining the appeals.

3.5 The Inspector considered 'Alternative Development A' at DL/18 – DL/22. The Inspector formed the view that this alternative would, in his planning judgement, form part of the matters stated in the notice:

19. It seems to me that the sun room with the canopy removed would form part of the matters stated in the notice and it is therefore open to me to grant planning permission for it under the ground (a) appeal.

3.6 Accordingly, the Inspector recognised that he had the power to grant planning permission for this alternative. The Inspector concluded, however, that this alternative would not overcome the harm to the Green Belt and the Clent Conservation Area at DL/22. Thus, this alternative still warranted the refusal of planning permission.

3.7 Accordingly, the Inspector plainly understood that he had a duty under s.177(1)(a) and recognised that this duty did expand to Alternative Development A, significantly because this alternative involved granting planning permission that was part of the matters stated in the notice.

3.8 The Inspector then turned his attention to Alternative Developments B, C and D. In respect to each alternative the Inspector recognised that they would require development that, in his planning judgement, would not form part of the matters stated in the notice. Indeed:

i. Alternative Development B would require the roof to be replaced and the removal of the sloping roof with panels – per DL/24;

ii. Alternative Development C would require the addition of an upper section and the replacement of the flat roof that constituted new works – per DL/26 – 27;

iii. Alternative Development D would require the installation of folding doors – per DL/28.

3.9 The Inspector formed the view that, in his planning judgement, Alternative Developments B and C were not part of the matters enforced against in the notice. He made this express finding in respect to each alternative and explained his reasoning for this.

3.10 Whether the development fell within the matters stated in the notice or not was a matter of planning judgement. In ***Ahmed***, the inspector's error was in not exercising a planning judgement. However, in the present matter the Inspector did exercise a judgement on this question. That judgement can only be challenged on irrationality grounds. The Claimant's grounds come nowhere near to surmounting the high hurdle for an irrationality challenge.

3.11 The Appellant contends that the Inspector only reached this conclusion owing to some misunderstanding of his powers. However, nothing in the decision letter suggests that the Inspector misunderstood his powers, given that:

i. the inspector acknowledged the express statutory provision;
ii. the inspector correctly expressed the legal test.

3.12 Rather, what s.177(1) required the Inspector to do was form a planning judgement as to whether the works involved in Alternatives B and C did fall within the remit of the matters enforced against. In the words of Lindblom LJ in ***Arnold***, the Inspector was not to engage with, *'a question of considering alternative proposals which fall outside the scope of the notice if they materially differ from what is alleged and has been built"*.

3.13 The Appellant contends at 27(d) of its skeleton that both proposals B and C were part of the development being enforced against. However, whether that is the case, is not a matter for the Court. It can only be a question of planning judgement. There is no reason to find that the Inspector's planning judgement was flawed in this respect.

3.14 As to the Appellant's suggestion that the Inspector failed to provide reasons, this has no relationship with the decision letter read in full. The Inspector provided reasons in respect to each Alternative Development as to why they would not form, in his planning judgement, the development or part of the development that were enforced against.

3.15 The Appellant takes issue with the fact that the Inspector formed the view that as Options B and C would involve 'new works', which the Appellant submits is an indication that the Inspector misunderstood s.177. However, on any occasion where a decision maker forms the view that the alternative is not part of the matters being enforced against, it necessarily follows that it is new works (i.e. works outside of the development that has been enforced against). This was a legitimate way for the Inspector to express his planning judgement on the question.

3.16 Accordingly, this ground ought to be dismissed.

4. Ground 2: The Inspector misinterpreted sections 173(4)(a) and 176(1)(b) of the 1990 Act, failed to properly assess the obvious Alternative Developments and/or failed to give adequate reasons for

rejecting the Alternative Development proposals in relation to the ground f appeal

4.1 This ground constitutes a misunderstanding of the Inspector's powers.

4.2 Section 173(4)(a) does not give any powers to an Inspector. It is not suggested otherwise. Thus, the Inspector had no power to consider Alternative Developments under this statutory provision.

4.3 The Appellant further contends that s.176(1)(b) gave the Inspector the power to vary the notice and, in effect, consider the alternative developments. However, in ***Wyatt Brothers***, the Court held that this power existed to provide, *'a wide power of correction, a generously expressed slip rule, it is not a power which can properly be used to attack the substance of an enforcement notice. So, for example, a notice which requires the recipient to return the land to its condition before the breach cannot, by reliance on section 176(1)(b), be turned into a notice which requires something less'*.

4.4 Accordingly, section 176(1)(b) does not provide a power to consider alternatives or provide for a lesser requirement.

4.5 However, the Appellant's one request to the Inspector to vary the notice did ask the Inspector to do this at [HB/B41]:

> *87. If those submissions are not accepted, the Inspector is in the least invited to allow more time within which the removal work may be carried out, and to* ***vary the Notice such that the restaurant building is not left with a gaping opening in its frontage.***

4.6 Accordingly, the Appellant's request to the Inspector to vary the enforcement notice, which through this challenge is being specified as a variation pursuant to s.176(1)(b), was not an attempt to vary the notice to correct the notice pursuant to a slip rule. Rather, it was an attempt to attack the substance of the notice.

4.7 It follows that the variation to the Notice requested by the Appellant pursuant to s.176(1)(b) went outside of the powers of the Act and thus it was not open to the Inspector to allow the alternatives pursuant to this power.

4.8 As regards s.174(2)(f), the Inspector expressly acknowledged that Alternative Development A would not remedy the breach of planning control under ground (f) – per DL/33.

4.9 Having recognised that Alternative Developments B, C and D would require the Inspector to grant planning permission for matters not stated in the notice, the Inspector was obliged to reject the proposals under ground f. It was not open to the Inspector to allow the appeal under ground (f) having regard for these alternatives on the basis that, in his planning judgement, they did not form matters that were part of the development being enforced against. Furthermore, they were all developments that required planning permission. However, planning permission cannot be granted under s.174(2)(f). Indeed, in ***Ioannou***, Sullivan LJ held as follows about the power:

> *[28] … The power to allow an appeal under ground (f) in subsection 174(2) is not a power to grant planning permission. If planning permission is to be granted in response to an appeal under section 174 it may only be granted under section 177(1) .*

4.10 Accordingly, the only power that was open to the Inspector to consider the alternatives proposed was s.177(1), which the Inspector concluded, in his planning judgement, was not open to him to rely on.

4.11 Finally, no other alternative was presented to the Inspector by the Appellant's professional representatives and thus he could not be criticised for failing to have regard for any other solution.

5. Ground 3: The Inspector failed to consider and/or exercise his powers in relation to section 176(1) of the 1990 Act, and/or failed to have regard to the consequences of the existing requirements of the EN.

Additionally, the Inspector failed to provide adequate reasons in that respect. The approach was irrational

5.1 The Claimant asserts that pursuant to s.176(1)(b) the Inspector had 'a wide discretion' (skeleton paragraph 48) to vary the enforcement notice to allow for the closing up of the hole in the front of the building following demolition of the unauthorized structure. For the reasons cited above, this is contrary to ***Wyatt***. Section 176(1)(b) allows for corrections to notices, it does not allow the substance of the notice to be challenged or for lesser steps to the notice to be suggested.

5.2 Further, it is alleged that the Inspector was obliged to consider the effects of complying with the notice as a material consideration. The Claimant alleges that compliance with the notice would have, *'consequences for the structural safety and protection of the building, the running of the Claimants' business and the safety of its occupants'*. However, these points were never made to the Inspector. Indeed, per DL/50, the Inspector explicitly noted the absence of evidence on how the requirements of the enforcement notice would unduly affect the Appellant's business. Had the Appellant wished the Inspector to have regard for the consequences of the enforcement notice as a material consideration, they could have provided some evidence in respect to this. They did not and thus are now precluded from advancing this argument as a 'second bite of the cherry' through this statutory challenge. Moreover, this argument amounts to seeking reasons for reasons. This was not a principle important controversial issue (per ***South Bucks***).

5.3 Furthermore, the Appellant alleges that no explanation was given as to why the Inspector failed to exercise his powers to vary the notice. That submission has no relationship with the decision letter. The Inspector explained throughout DL/18 – 28 and DL/31 – DL/36 as to why he was not varying the notice in accordance with the proposed alternatives.

5.4 As to the criticism of irrationality, the Appellant comes nowhere near to surmounting the high hurdle of a finding of irrationality. The Inspector had regard for the arguments presented to him and reached lawful conclusions.

5.5 Accordingly, this ground ought to be dismissed.

6. Conclusion

6.1 In the circumstances, the Defendant respectfully invites the Court to:

i. dismiss the appeal;
ii. order the Appellant to pay the First Respondent's costs.

Killian Garvey
Kings Chambers
17 April 2020

CO/4504/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

IN THE MATTER OF AN APPLICATION UNDER SECTION 289 OF THE TOWN AND COUNTRY PLANNING ACT 1990

BETWEEN:

(1) BALJIT SINGH BHANDAL
(2) BALBIR SINGH BHANDAL
(3) AMRIK SINGH BHANDAL

Appellants

-and-

(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT

(2) BROMSGROVE DISTRICT COUNCIL

Respondents

REPLY TO FIRST RESPONDENT'S SKELETON ARGUMENT FOR HEARING ON 5 MAY 2020

Introduction and Summary

1. This reply has been produced to respond to the arguments raised by the First Respondent Secretary of State in his Skeleton Argument in respect of the scope of section 173(4)(a) and section 176(1)(b). Despite filing Detailed Grounds of

Resistance (dated 3 February 2020) [HB/A8], the First Respondent has not previously raised all of the points now pursued. Thus, the Appellants' Skeleton Argument did not have the opportunity to respond to them.

2. It is also noted that no application has been made by the First Respondent to amend the statement of case. However, given the nature of the hearing, which is proceeding by video technology, this Reply has been submitted to assist the Court and the smooth running of the hearing.

Ground 2

3. As explained in the Appellants' Skeleton Argument ("SkA"), there is overlap between grounds 1 and 2, but they relate to different parts of the decision letter [HB/B1]. At DL23-27 the Inspector rejected Alternative Developments B and C because they involved new works. The Appellants' arguments as to the lawfulness of that approach are clear

4. In DL-33-35 the Inspector rejected the Alternative Developments because they would not "r*emedy the breach of planning control*." That is a different reason to that which is addressed in the first ground.

5. To be clear, it is not the Appellants' case as suggested at §4.2 of the First Respondent's SkA that 173(4)(a), which concerns the contents and effects of an EN, gives any power to the Inspector. The section simply sets out what the purposes of an Enforcement Notice are. The Inspector in this instance assumed the purpose of the EN was to remedy the breach of planning control rather than the injury to amenity, since it did not say so on the face of the EN. The error the Inspector made is set out at paragraph 39 Of the Appellants' SkA.

6. In summary, the Inspector embarked on a journey of circular reasoning which failed to have regard to well established principles of planning enforcement, most notably set out in ***Tapecrown*** [AB/175-186]. His reasoning was that demolition was required to remedy the breach of planning control, and so a solution short of

demolition would not remedy the breach of planning control. Thus the Inspector failed to consider whether "*there is any solution, short of a complete remedy of the breach, which is acceptable in planning terms and amenity terms";* see ***Tapecrown*** at [33]. He should have done so.

7. Further, it is not the Appellant's case that section 176(1)(b) alone gave the Inspector the power to vary the notice to allow the Alternative Developments B and C. As is made clear in the Appellants' SkA[1], section 176(1)(b) operates alongside section 177(1)(a) such that the Inspector had the power to grant planning permission for the Alternative Developments and vary the enforcement notice accordingly; the argument falls squarely within the approach taken by the Court of Appeal in ***Ahmed*** [AB/35] at [33]. In essence, when the grounds contained within sections 174(2)(a) and (f) are used together, they can achieve more than can be achieved under ground (f) alone. It is not argued that the planning merits of an alternative development proposal can be considered under ground (f) alone.

The nature of section 176(1) [AB9-10]

8. It is the First Respondent's case, as now expressed through his Skeleton Argument, that following ***Wyatt Brothers*** [AB/190-201], section 176(1) should be regarded as nothing more than a "generously expressed slip rule."[2] It is important to understand that the law has developed significantly since ***Wyatt Brothers*** in 2001. It has to be read in the light of the Court of Appeal's decisions in ***Tapecrown*** [2006] and ***Ahmed*** [2014] that followed.

9. Section 176 contains general provisions relating to appeals, and section 176(1) contains two limbs explaining what the Secretary of State may do on an appeal. The first limb is procedural in nature, and permits the decision taker to correct any defect, error or mis-description in the enforcement notice. That does appear to be akin to a "slip rule."

[1] See paragraph 41
[2] SkA, §4.3. See Wyatt Brothers at [32]. That was the advocate's rather than the Court's language.

10. The second limb of section 176(1) is that the Secretary of State may "*vary the terms of the enforcement notice*," subject always to the proviso that such variation will not cause injustice to the appellant or the local planning authority.

11. In this case, the Inspector in fact used his powers pursuant to 176(1)(b) to extend the time for compliance with the notice from 3 months to 9 months. That was done in answer to the Appellants' ground (g) appeal rather than any error or mistake by the Council in drafting the EN; see DL49-51.

12. It is clear then that section 176(1)(b) can be used to make substantive changes to an EN in response to an appeal under ground 174(2)(f) that:

"the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach;…"

13. That was the position set out in ***Tapecrown***, where the Court of Appeal explained that an Inspector has "*has wide powers to decide whether there is any solution, short of a complete remedy of the breach, which is acceptable in planning terms and amenity terms*." If there is such a solution,

"…he should be prepared to modify the requirements of the notice, and grant permission subject to conditions (or to accept a section 106 agreement, if offered)." [33]

14. Section 176(1)(b) is the only section that grants an Inspector the power to modify the requirements of the notice.

15. Similarly, in ***Ahmed*** at paragraph 31, the Court of Appeal of Appeal found that if the Inspector had granted permission for the 2005 scheme under ground (a), it would have been open to him to vary the enforcement notice to give effect to that decision. Remembering that the notice required demolition of the unlawful

structure in ***Ahmed***, the decision demonstrates the way in which appeals pursuant to grounds (a) and (f) operate together, and the wide powers of substantive variation that an Inspector has in such circumstances.

16. In any event, ***Wyatt Brothers*** is of limited applicability here, and as instructive here as it was in ***Ahmed***; see especially paragraphs 28-31:

"31…The important point is that there is a power to vary the notice in these circumstances; and what was said in Wyatt about the limits on the exercise of the power in the absence of a ground (a) appeal is again not in point. …"

17. The straightforward point in ***Wyatt Brothers*** was that ground (f) could not sensibly be interpreted in such a way as to allow an Appellant to advance arguments about the planning merits of a proposal. That is the province of ground (a):

"…Section 176(1)(b) does not stand alone. It is one of a group of sections which set out an appellate structure. If that structure is not to be undermined section 176(1)(b) does have to read in such a way as not to afford a remedy obtainable by pursuing an appeal under ground (a) in section 174(2), and the Inspector was right so to read it." [34]

18. That is not what the Appellants' contend for here.

19. The First Respondent appears to further confuse grounds 2 and 3 at §4.5 of the SkA. What is referred to there is Alternative Development D, which was essentially the filling of the hole that would be left by the removal of the unauthorised structure once the requirements of the notice were complied with. That is the subject of the Appellants' Ground 3.

20. The Appellant does not understand the point that is being made, or how a variation of the notice to prevent those circumstances arising could be regarded as an attempt to attack the substance of the notice. That is so for the following reason: - Alternative D relies on the entire removal of the unauthorised structure

in accordance with both of the requirements of the notice. It does not require lesser steps, but rather additional steps to secure the building. The point, which is the substance of Ground 3 concerns the consequences of the notice which go beyond remedying the breach and fail to restore the land to its previous condition.

THEA OSMUND-SMITH

No5 Chambers

30 April 2020