Neutral Citation Number: [2020] EWHC 2724 (Admin)

Case No: 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 & COUNTRY PLANNING ACT 1990

Birmingham Civil Justice Centre
33 Bull Street, Birmingham B4 6DS

Date: 15 October 2020

Before :

THE HONOURABLE MR JUSTICE PEPPERALL

- -

Between :

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

- and -

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

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Thea Osmund-Smith (instructed by **FBC Manby Bowdler LLP**) for the **Appellants**
Killian Garvey (instructed by the **Government Legal Department**) for the **First Respondent**
There being no appearance for the Second Respondent

Hearing date: 5 May 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

THE HONOURABLE MR JUSTICE PEPPERALL :

1. By a written decision dated 17 October 2019, Mr J Whitfield, an inspector appointed by the Secretary of State for Housing, Communities & Local Government, dismissed the majority of the Bhandals' appeal against an enforcement notice issued by Bromsgrove District Council. Baljit Singh Bhandal, Balbir Singh Bhandal and Amrik Singh Bhandal now further appeal against such decision with the permission of His Honour Judge David Cooke.

BACKGROUND

2. The Bhandals own and operate the Four Stones Restaurant in Clent, Worcestershire. In July 2016, Bromsgrove District Council granted planning permission to demolish an existing sunroom at the front of the restaurant and build a replacement sunroom with a flat roof. The replacement building was not, however, built in compliance with the planning permission. Specifically:

   2.1 It has a different number of glazed panels on the front elevation.

   2.2 The upper section of the front elevation is glazed whereas on the approved plans it was not.

   2.3 The roof is sloping rather than flat. Further, it is higher and includes a projecting canopy with support columns.

3. The Bhandals sought planning permission for the sunroom as built. Such application was refused by Bromsgrove in July 2017 and by the Secretary of State on an earlier appeal in April 2018. Subsequently, the council issued an enforcement notice on 27 November 2018 requiring the removal of the unauthorised development and all building materials and rubble within three months of 3 January 2019, being the date when the notice took effect.

4. By an appeal dated 2 January 2019, the Bhandals appealed to the Secretary of State arguing the grounds at ss.174(2)(a), (f) and (g) of the *Town & Country Planning Act 1990*. In support of their appeal upon grounds (a) and (f), the Bhandals proposed four alternative developments:

   4.1 Option A: The removal of the overhanging canopy.

   4.2 Option B: The removal of the unauthorised roof and its replacement with a flat glazed roof.

4.3 Option C: As option B, but with the addition that the upper section of the elevations would comply with the 2016 planning permission.

4.4 Option D: That provision should be made to enable the closure of the opening that would result from the removal of the sunroom.

5. The inspector rejected the appeal upon ground (a). His rejection of option A is not challenged in this further appeal. He concluded that options B-D were outwith his powers to grant planning permission. Further, he rejected the appeal upon ground (f) that the requirements of the enforcement notice exceeded what was necessary. The inspector, however, partially allowed the appeal upon ground (g) and extended time for compliance to nine months to allow the parties time to explore alternative schemes.

6. By this further appeal, the Bhandals argue three grounds:

6.1 Ground 1: First, they argue that the inspector was wrong to conclude that alternative developments B and C would not form part of the matters constituting the breach of planning control because works would be required to build a new roof. Accordingly, they argue that the inspector was wrong to conclude that he had no power to grant planning permission for such alternative development.

6.2 Ground 2: Secondly, they argue that the alternative developments B and C proposed solutions that were short of complete demolition and that the inspector was therefore wrong to reject the appeal upon ground (f).

6.3 Ground 3: If all else fails, they argue that it was irrational to fail at least to grant permission for alternative development D.

THE STATUTORY FRAMEWORK

7. Section 172(1) of the *Town & Country Planning Act 1990* provides that a local planning authority may issue an enforcement notice where it considers that there has been a breach of planning control and it is expedient to issue the notice. The statutory purposes for an enforcement notice are set out at s.173(4) of the Act:

> "(a) remedying the breach by making any development comply with the terms … of any planning permission which has been granted in respect of the land, by discontinuing any use of the land or by restoring it to its condition before the breach took place; or
>
> (b) remedying any injury to amenity which has been caused by the breach."

8. An appeal may be brought on any of seven grounds set out at s.174(2). The relevant grounds in this case are:

> "(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 … exceed what is necessary to remedy any breach of planning control which may be constituted by those matters …
>
> (g) that any period specified in the notice in accordance with s.173(9) falls short of what should reasonably be allowed."

9. By s.177(1)(a), 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." By s.177(3), the permission that may be granted under s.177(1) is any permission that might be granted on an application under Part III of the Act.

GROUND 1: NEW WORKS

10. As explained above, by ss.174(2)(a) and 177 planning permission can be granted on an appeal upon ground (a) in relation to the whole or part of the matters stated in an enforcement notice. Here, the inspector reminded himself, at paragraph 3 of his decision letter, that his power to grant planning permission was limited to permission for the whole or part of the development now enforced against. He concluded, at paragraph 19, that option A would form part of the development enforced against. He nevertheless rejected the appeal on the basis of such alternative development since it would not overcome the harm caused by the unauthorised development.

11. The inspector then concluded that it was not open to him to grant planning permission in respect of options B and C because such options involved new works:

    11.1 As to B, he said, at paragraphs 24-25:

> "24. However, to carry out such an alteration, the canopy would be removed as well as the sloping roof, together with the upper glazed panels on the front and side elevation. The roof would be replaced with a new flat, glazed roof. 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 sunroom as enforced against. Consequently, I find that the alternative development would not form part of the matters as enforced against in the notice.
>
> 25. Regardless of the merits of the alternative, it is not, therefore, open to me to grant planning permission for it under the appeal on ground (a)."

    11.2 As to C, he added, at paragraphs 26-27:

> "26. … This would involve the addition of an upper section which is flat-roofed in line with the approved drawings. The proposal is for this to be aluminium framed and glazed to match the rest of the sunroom.
>
> 27. This too would require the removal of the sloping roof and its replacement with a flat roof in line with the approved plans of the

> 2016 permission. Again, as this would involve new works in the formation of a roof, it seems to me that work would be required that do not form part of the sunroom 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)."

12. Thea Osmund-Smith, who appears for the Bhandals, argues that the inspector was wrong to take such a narrow view of his power to grant planning permission and that he failed therefore to exercise his judgment as to the planning merits of the alternative options proposed by the appellants. Killian Garvey, who appears for the Secretary of State, argues that the inspector properly exercised his planning judgment to conclude that the proposed alternative developments were not part of the development now enforced against. He contended that he was right in his approach to the statutory power but that in any event there were no proper grounds upon which the court could interfere with his exercise of planning judgment.

13. The proper approach to alternative schemes was considered by the Court of Appeal in *Tapecrown Ltd v. First Secretary of State* [2006] EWCA Civ 1744, [2007] P. & C.R. 7. Carnwath LJ, as he then was, first considered the planning authority's discretion pursuant to s.173(3) to seek to enforce the breach of planning control either "wholly or partly." He noted that the recommendation in his landmark 1989 report, *Enforcing Planning Control,* that there should be a "broad discretionary power to deal with the effects of a breach" and that the grounds of appeal should reflect such approach had been implemented by the 1990 Act. He continued, at [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 s.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."

14. He added, at [46]:

> "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."

15. While such observations were strictly obiter, the Court of Appeal's acceptance of this approach in *Moore v. Secretary of State for Communities and Local Government* [2012] EWCA Civ 1202 was not. Citing *Tapecrown,* Sullivan LJ observed in *Moore*, at [40], that where there was an "obvious alternative which would overcome the planning difficulties at less cost and disruption" then the inspector was under a duty to consider it. Such formulation was subsequently approved by the Court of Appeal in *Ahmed v. Secretary of State for Communities & Local Government* [2014] EWCA Civ 566.

16. In *Secretary of State for Communities and Local Government v. Ioannou* [2014] EWCA Civ 1432, an enforcement notice was issued in respect of the unauthorised conversion of a family home into five self-contained flats. On appeal, Mr Ioannou proposed an alternative three-flat scheme. Ouseley J rejected the appeal upon ground (a) on the basis that something other than the grant of permission for all or part of the matters alleged in the enforcement notice would be required to achieve the three-flat scheme. While such ruling was not the subject of the appeal, it is clear from paragraph 11 of his own judgment in the Court of Appeal that Sullivan LJ agreed. The appeal in *Ioannou* concerned the limits of ground (f) and in particular the conclusion, at [28], that planning permission can only be granted upon under ground (a) and s.177(1)(a).

17. Sullivan LJ made the important point that *Tapecrown* does not establish a free-standing "obvious alternative" test as a replacement for the express statutory limitations imposed by the Act. Indeed, the power to grant planning permission in respect of alternative proposals is not unfettered. Sections 174(2)(a) and 177(1)(a) require a comparison between "the matters stated in the enforcement notice as constituting a breach of planning control" and the alternative scheme under consideration. Here, the matter stated in the notice as constituting the breach was the erection of a replacement glazed sunroom. Accordingly, for each proposed alternative development:

    17.1 The inspector first had to exercise his planning judgment to determine whether planning permission for the proposed alternative development would be in relation to the whole or part of the sunroom that had been erected in breach of planning control.

    17.2 If the answer to such question was affirmative, the inspector would then have to exercise his further planning judgment to consider whether, after having regard to the applicable development plan and all other material considerations, permission should be granted for the proposed alternative development.

18. In *Ioannou,* Sullivan LJ observed, at [38]:

> "It is unnecessary to adopt a strained interpretation of ss.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, he can follow the course which the Inspector adopted in the present case: allow the appeal under ground (g) and extend the period for compliance with the notice so that the planning merits of the alternative can be properly

> explored… Local planning authorities usually issue enforcement notices as a last resort when persuasion and negotiation with the landowner has failed. It is open to a landowner who wishes to obtain planning permission for such an alternative scheme to apply for planning permission for that scheme at any time, whether before or after an enforcement notice has been issued. The local planning authority's power in s.70C to decline to determine applications for planning permission made after an enforcement notice has been issued applies only if granting the permission would involve granting permission 'in respect of the whole or any part of the matters specified in the enforcement notice as constituting a breach of planning control.'"

19. This case does not concern s.173(11), but it is equally unnecessary for the court to adopt a strained interpretation of the power to grant planning permission under s.177(1)(a):

    19.1 If the proposed alternative development can properly be regarded as "part" of the matters enforced against then the Secretary of State can grant planning permission under s.177(1)(a).

    19.2 Indeed, in such a case the appellant should seek planning permission through an appeal since otherwise the planning authority will be entitled to decline to determine a fresh application for such alternative development pursuant to s.70C, which provides:

> "A local planning authority may decline to determine an application for planning permission … for the development of any land if granting planning permission for the development would involve granting, whether in relation to the whole or any part of the land to which a pre-existing enforcement notice relates, planning permission in respect of the whole or any part of the matters specified in the enforcement notice as constituting a breach of planning control."

    19.3 If the alternative development is outwith the scope of ss.70C and 177(1)(a) then it can be pursued by a freestanding application for permission. In such a case the inspector may, if he considers that the alternative development might be acceptable in planning terms, allow an appeal upon ground (g) and extend time in order to provide a window during which the planning merits can be explored.

20. In *Arnold v. Secretary of State for Communities and Local Government* [2015] EWHC 1197 (Admin), Dove J noted that there was some justification in the Secretary of State's submission that two proposed alternative developments involved a "redesign of the internal arrangements, footprints and elevations at ground floor level" such that, in accordance with the approach of Ouseley J in *Ioannou*, these alternatives went "beyond being 'part of' the dwelling constructed and enforced against." The appeal against the inspector's decision refusing planning permission on such ground was dismissed both by the judge and, on further appeal, by Davis and Lindblom LJJ in the Court of Appeal: [2017] EWCA Civ 231.

21. The facts of *Ahmed* bear closer examination. Planning permission had been 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 arranged over the upper two floors. In breach of planning control, the developer built a four-storey building with a flat roof. The planning authority issued an enforcement notice requiring the demolition of the four-storey building. As part of his appeal, Mr Ahmed proposed modifying the building in order to comply with the 2005 planning permission which, by then, had lapsed. He argued that the requirement to demolish was over-enforcement. Before the Court of Appeal, the Secretary of State argued that s.177(1)(a) was not "wide enough" to empower the inspector to grant planning permission in accordance with the 2005 scheme. Rejecting such argument, Richards LJ held, at [27]:

21.1 In principle, planning permission could be granted for the 2005 scheme if "the differences between it and the development as built …were such that a development in accordance with the 2005 scheme could be regarded as 'part' of the development as built."

21.2 That was a matter of planning judgment which, on the facts of *Ahmed,* the inspector failed to make because he did not give any consideration to the possibility of granting planning permission for the 2005 scheme.

21.3 The appeal court was not in a position to decide what conclusion the inspector would have reached if he had considered such 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 …"

22. While in *Ahmed* the inspector failed to exercise his planning judgment as to whether the proposed alternative development was part of the development as built, in this case the inspector considered that issue and concluded that options B and C could not be regarded as part of the development as built because they involved new works. Thus, to that extent, Mr Whitfield did exercise his planning judgment. It is, however, striking that if Mr Whitfield was right to take such an approach to his power to grant planning permission then Carnwath LJ was wrong to regard the Act as conferring a wide power to consider alternative schemes. Upon the approach of the inspector in this case, any alternative scheme that did not simply involve partial demolition would necessarily involve some element of new work and would not therefore be open to the inspector under ground (a). Indeed, the appeal in *Ahmed* would have been entirely academic if the new work involved in building the butterfly roof in accordance with the 2005 permission was a complete answer to Mr Ahmed's challenge. Further, there would have been no question of considering an alternative scheme in *Tapecrown* if the works to block up the windows would have prevented the inspector from granting planning permission.

23. I accept that whether planning permission for any proposed alternative development would be in relation to the whole or part of the matters comprising the breach of planning control is a question of planning judgment for the inspector with which the court should be slow to interfere. Further, I acknowledge that there is no need to take a strained interpretation of s.177(1)(a). I am, however, satisfied that the inspector erred in law in taking a very narrow view of his power to grant planning permission upon the Bhandals' appeal. The essential question was not whether the proposed alternative development required some additional work, but rather whether it could properly be described as relating to the whole or part of the matters

enforced against. The extent of new work required by an alternative development might well indicate that, upon analysis, it does not relate to a part of the development as built. The need for new work will therefore be an important factor in the exercise of planning judgment. It is not, however, right to say that the need for *any* new work at all is determinative of the matter.

24. I reject Mr Garvey's submission that the approach in *Ioannou* compels a different conclusion. One can well see that there is a difference between a case such as *Ahmed* where it was a matter of planning judgment whether the alternative proposal for a three-storey building was a part of the four-storey building erected in breach of planning permission and cases like *Ioannou* in which it was not possible to form three flats out of the five developed in breach of planning permission without undertaking significant internal reorganisation. Equally, I reject the submission that the inspector's focus on new work should be seen as a convenient label for the statutory question under s.177(1)(a). Rather he regarded the existence of any new work as determinative of such question.

25. I am fortified in my conclusion by consideration of s.177(1)(a) in its wider statutory context. As explained above, while the section allows the inspector upon an appeal under s.174(2)(a) to grant planning permission in relation to the whole or part of the matters specified in the enforcement notice, conversely s.70C allows a planning authority to decline to determine a separate application in respect of such matters. The scheme of the Act is therefore that the applicant should only get one bite of the cherry to have the planning merits of any alternative scheme considered, whether upon:

    25.1 an appeal against an enforcement notice under s.174;

    25.2 a planning application that was extant at the time of the issue of the enforcement notice pursuant to s.174(2A); or

    25.3 in other cases, a fresh planning application.

    [See *R (Wingrove) v. Stratford-on-Avon District Council* [2015] EWHC 287, [2015] PTSR 708 (Cranston J); *R (Banghard) v. Bedford Borough Council* [2017] EWHC 2391 (Admin), [2018] PTSR 1050 (Nathalie Lieven QC) and *R (Chesterton Commercial (Bucks) Ltd v. Wokingham Borough Council* [2018] EWHC 1795 (Admin), [2019] PTSR 220.]

26. In *Wingrove,* Cranston J observed, at [30]:

> "The legislative history of s.70C demonstrates that Parliament's intention was to provide a tool to local planning authorities to prevent retrospective planning applications being used to delay enforcement action being taken against a development. It seems to me that there is a legislative steer in favour of exercising the discretion, especially since an enforcement notice can be appealed and the planning merits thereby canvassed."

27. If the inspector was right in this case to take a very narrow view of the power under s.177(1)(a) to grant planning permission, then equally the planning authority's own discretion pursuant to s.70C to refuse to entertain a like planning application would

be narrow. While applicants should not get two bites at the cherry, as Nathalie Lieven QC (as she then was) demonstrated in *Banghard*, they must get one. The Bhandals were therefore entitled to have the planning merits of their alternative scheme considered either as part of the appeal process pursuant to s.177(1)(a) or as a freestanding application for planning permission without the restriction imposed by s.70C.

28. Since virtually any alternative scheme is likely to involve at least some element of new work, the inspector's approach, if correct, would have the effect not just of significantly reducing the power to grant planning permission on an appeal against an enforcement notice but also significantly reducing the application of s.70C. This would not just emasculate the utility of the Secretary of State's power to grant permission where some alternative scheme would be acceptable, but it would add delay since the planning authority would then be required to consider a freestanding retrospective application. For the reasons explained by Cranston J, this would be contrary to Parliament's apparent intention in this carefully calibrated statutory scheme.

29. Accordingly, I conclude that the inspector erred in his approach to s.177(1)(a). I therefore allow the Bhandals' appeal and remit the matter back for fresh consideration of options B and C under ground (a). For the avoidance of doubt, I do not suggest that there is only one proper answer upon such reconsideration. I repeat that the inspector would be entitled to take the view that the extent of the new work required by either of the alternative developments would be such that they do not properly fall within the statutory power to grant planning permission. What an inspector is not, however, entitled to say is that the mere fact that *any* new work would be required is a complete answer to an appeal upon ground (a).

30. If I am wrong in these conclusions, then I reject the complaint as to the adequacy of the inspector's reasons. Indeed, in the passages set out above he clearly explained that the alternative developments were not part of the matters enforced against because they involved some element of new work.

GROUND 2: OVER-ENFORCEMENT

31. Having rejected the appeal upon ground (a), the inspector turned to consider the same proposed alternative developments further under ground (f). He concluded that the purpose of the enforcement action was to remedy the breach of planning control. He directed himself, at paragraph 32 of his decision that it was open to him to consider clear and obvious alternatives that would overcome the planning harm at less cost and disruption to the appellant than total demolition.

32. He then turned to each of the alternative developments. As to options B and C, he concluded, at paragraphs 34-35 of his decision:

> "34. The appellants indicate that Alternative B would retain the sunroom as constructed, save for the canopy and the sloping roof. The approach would not therefore remedy the breach of planning control.

> 35. Alternative C would retain part of the unauthorised development, as indicated by the appellants. It would not, therefore, remedy the breach of planning control."

33. I accept Ms Osmund-Smith's submission that the inspector's reasoning was circular since, by definition, any retention of the unauthorised development would not completely remedy the breach of planning control. It may, however, be that the inspector simply had in mind that, having already rejected these alternative developments under ground (a), the Bhandals could not obtain planning permission for the same under ground (f). Certainly, Ms Osmund-Smith does not suggest that the appeal could have succeeded upon ground (f) in respect of alternative developments B and C if the inspector was right to dismiss the appeal upon ground (a). Accordingly, ground 2 adds nothing to the analysis and of course the matter is in any event being remitted in order that a proper planning judgment can be made upon these alternative proposals. I do not therefore allow the appeal upon this ground.

GROUND 3: CLOSING THE HOLE IN THE WALL

34. Option D (the installation of folding doors to fill the hole that would be created by compliance with the enforcement notice) was the Bhandals' final fallback option. It was rejected by the inspector at paragraph 36 of his decision:

> "36. Alternative D would necessitate the installation of folding doors within the external wall of the building. The installation of folding doors within the front elevation of the building does not form part of the development enforced against. Thus, whilst the alternative would remove the sunroom subject of the notice, the variation of the notice to require the installation of folding doors would go beyond what is necessary to restore the land to its condition before the breach took place."

35. Ms Osmund-Smith argues that the rejection of option D lacked any common sense. Prior to the breach, the building was enclosed by the previous attached sunroom. The removal of the replacement sunroom erected in breach of planning control would mean that the restaurant would be left with a gaping hole making the building both insecure and at the mercy of the elements. She argues that the inspector should have used his powers under s.176(1)(b) to vary the enforcement notice.

36. In my judgment, the court should not interfere with the inspector's conclusion that the installation of folding doors does not form part of the development enforced against and that this was a proper case in which to extend time under ground (g) in order that the planning authority could consider the merits of the proposed solution. I reject the argument that the inspector should have used his powers under s.176(1)(b) to vary the notice in order to require the closure of the hole caused by the removal of the sunroom. The sub-section is in essence a "generously expressed slip rule" and cannot be used to obtain permission for alternative development D in this case: *Secretary of State for the Environment, Transport & the Regions v. Wyatt Brothers*

(Oxford) Ltd [2001] EWCA Civ 1560. Accordingly, I do not allow the appeal upon this ground.