Ioannou v Secretary of State for Communities and Local Government

Case Comment

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Cases cited
Ioannou v Secretary of State for Communities and Local Government [2013] EWHC 3945 (Admin); [2014] 1 E.G.L.R. 83; [2013] 12 WLUK 527 (QBD (Admin))

Legislation cited
Town and Country Planning Act 1990 (c.8) s.174(a)

J.P.L. 608 This was an appeal under s.289 of the Town and Country Planning Act 1990 ("TCPA") against the decision of an Inspector on an enforcement notice concerning a single family dwelling house which had been converted, without planning permission, into five self-contained flats. The notice required that use to cease and various facilities necessary for the use as five flats to be removed. Before the Inspector, the appellant argued that if the enforcement notice was upheld he would not need planning permission to return the house to use as a single family house, and that he would not need planning permission to change its use from a single family house into a house in multiple occupation ("HMO"). He put forward to the Inspector plans for the conversion of the house into three flats which he, the local authority and the Inspector regarded as more desirable than use as a HMO, and as a use which avoided the objection to the five flats because of the poor amenities they afforded their occupants. The Inspector did not grant permission for that use nor adjust the steps required to be taken so that a three flat conversion could be brought about.

The appellant contended that the Inspector concluded, wrongly, that he had no power to bring about the scheme in the way contended for, or failed to consider the full extent of his powers. The powers in ss.176 and 177 of the TCPA were sufficiently broad that the Inspector could have granted permission for the use of the property as three self-contained flats, suitably conditioned, or could have varied the remedial steps required to be taken by the notice so as to bring about the three-flat scheme. The balance of the works, or uses which were in breach of planning control, would then receive planning permission under ***J.P.L. 609*** s.173(11) of the TCPA . The Secretary of State placed before the court, subject to the appellant's objection, a witness statement from the Inspector, elucidating according to the Secretary of State and contradicting according to the appellant, the reasoning in his decision letter.

Held, allowing the appeal:

1. The scope of the Inspector's powers in s.177(1) of the TCPA either under s.174(a) or on the deemed planning application under s.175(5) , was to grant permission in respect of "the matters stated in the notice as constituting a breach of planning control". The Inspector directed himself correctly in holding that it was to the matters stated in the notice as the breach that his attention was directed under s.177(1)(a) , rather than to 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. The Inspector 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 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 could be left untouched, although an entry door would have to be removed.

2. For the appellant's submission on ground (a) and the deemed planning permission to succeed without recourse to powers governing remedial steps under ground (f), the statutory power in s.177(1)(a) had to be read as empowering the grant of permission for a development which was not, and was not part of, the matters alleged to constitute a breach of planning control. The wording of s.177(1)(a) was too specific and clear for such an interpretation. Section 177(3) did not advance the submission either. Section 177(3) meant that the permission which could be granted in respect of part or the whole of the matters stated in the enforcement notice as constituting a breach of planning control, was any which could be granted under Pt III of the TCPA . The limit on development which could be granted permission remained governed by the wording of s.177(1)(a) .

3. With regard to the ground (f) appeal, the first question was whether the Inspector considered applying s.173(4)(b) of the TCPA . If he did not do so, he would have failed to consider part of the powers which might have been available to him. The Inspector appeared to have adopted the same approach to his powers on the ground (f) appeal as he did on the ground (a)/deemed application. That was, the steps required had to remedy the matters alleged to constitute the breach of planning control. He confined his use of his powers of variation to those which would achieve the result in s.173(4)(a) . If his powers were so confined, then his decision would have been right. However, the court could not see any consideration of the use of the powers in s.173(4)(b) .

4. The next question was whether the Inspector asked himself as a matter of fact and degree under either ground (a)/deemed application or ground (f) whether the three-flat scheme was substantially different from the five-flats scheme actually developed. The Inspector did not ask himself that question. The Inspector did not consider the power to remedy injury to amenity. The power in s.173(4)(b) alone could have given rise on the ground (f) appeal to an issue of fact and degree about the differences between the five-flats and the three-flat schemes. The court was not prepared to hold that only one view was possible of the issue of fact and degree such that any reasonable inspector would have been bound to conclude that the three-flat scheme was too different from the five-flats to be brought about through variations to the steps required by the notice, and by planning permission on the deemed application or under s.173(11) for the larger flat, or other parts of the works which had been undertaken. It therefore followed that a relevant power, which could have brought about the three-flat scheme had not been considered. It could have led to the appeal being decided differently. ***J.P.L. 610***

5. The court would strongly discourage the use of witness statements from Inspectors in the way deployed here. The statutory obligation to give a decision with reasons had to be fulfilled by the decision letter, which then became the basis for challenge. There was no provision for a second letter or for a challenge to it. The statement was not admissible, elucidatory or not. If that was wrong, the question whether the statement elucidated or contradicted the reasoning in the decision letter and so was admissible or inadmissible could only be resolved once the decision letter had been construed without it. To the extent that a court concluded that the reasoning was legally deficient in itself, or showed an error of law, it was difficult to see how the statement purporting to resolve the issue could ever be merely elucidatory.

Mr Jonathan Wills (Kingsley Smith) for the appellant.
Mr Charles Banner (Treasury Solicitor) for the respondent.

The following judgment was given.

OUSELEY J.:

1. This is an appeal under s.289 of the Town and Country Planning Act 1990 against the decision of a Planning Inspector on an Enforcement Notice appeal. It raises a point, not without difficulty, about the scope of the powers to grant permission on such an appeal, the steps which can be required to remedy the breach of planning control or harm to amenity and their relationship to alternative schemes. It concerns a single family dwelling house which was converted without the necessary planning permission into five self-contained flats.

2. The notice required that use to cease and various facilities necessary for the use as five flats to be removed. The appellant failed in a prolonged and disgraceful effort to deceive the planning authority about when the use began, and it appears, for a while or in some aspects, in an effort to deceive the Inspector about that as well. But as a fall-back, he argued correctly that, if the enforcement notice were upheld, he would not need planning permission to return the house to use as a single family house, and correctly that he would not need planning permission then to change its use from a single family house into a house in multiple occupation, HMO. He put forward to the Inspector plans for a conversion of the house into three flats, which he, the local authority and the Inspector regarded as more desirable than use as a HMO, and as a use which avoided the objection to the five flats because of the poor amenities they afforded their occupants. The Inspector did not grant permission for that use nor adjust the steps required to be taken so that a three flat conversion could be brought about. He thought that the extended time for compliance with the notice requirements would give time for an application for permission for the three-flat scheme to be made to Enfield LBC, the local planning authority. That application was made but refused, and that decision was not appealed.

3. Mr Wills for the appellant contends that the Inspector concluded, wrongly, that he had no power to bring about the scheme in the way contended for, or failed to consider the full extent of his powers. Mr Banner for the Secretary of State contended that the inspector had concluded that the three-flat scheme was substantially different from the five-flat use, and so could not be permitted on the appeal against the use described in the enforcement notice.

4. The Secretary of State has placed before the court, subject to the appellant's objection, a witness statement from the Inspector, elucidating, says Mr Banner, and contradicting, according to Mr Wills, the reasoning in his decision letter. I shall deal with that controversy since it appears to be becoming more common for such statements to be put in evidence.

The enforcement notice

5. The breach of planning control alleged is:

"Without planning permission the unauthorised conversation of the Premises into 5 self-contained residential units (4 x bedsits, 1 x 2 bed flat). ***J.P.L. 611*** "

6. The reasons for issuing it are that the substandard internal floor areas, poor internal configuration and stacking, the over-intensive use and poor living conditions resulted in the loss of a property better used as a single family dwelling house, contrary to various policies. Planning conditions could not overcome these objections.

7. The steps required were: "Cease the use of the Premises as 5 separate units of accommodation", the removal of all bar one kitchen area, cooker, gas and electricity meter, and an internal door leading to the first floor flat. The resulting materials were to be removed from the premises. The notice gave two months for compliance.

The inquiry

8. The appellant appealed, so far as now material, on three grounds as set out in s.174(2) of the 1990 Act : ground (a) is that permission should be granted for the development struck at by the notice; ground (f) is that the notice requirements exceed what is necessary to remedy the breach of planning control or the amenity harm it does. The precise language of those grounds of appeal is important in the arguments, and I shall set them out later. He appealed also on ground (g) that the period for compliance with the notice was unreasonably short.

9. The Inspector said that the ground (a) appeal was "that planning permission should be granted for the notice works"; [41]. A number of plans had been tabled at the inquiry showing alternative layouts with different numbers of flats for the property; "But it is the notice works rather than these other schemes which I must consider under this ground"; [43].

10. He then set out the shortcomings of the five flats: they were particularly cramped producing an unacceptable quality of accommodation with little space for furniture other than the beds. The small floor areas fell below those in the relevant Council supplementary guidance and even further below the recently issued guidance in the London Plan. Even in the larger first and second floor flat, the accommodation was still cramped, substandard by reference to the guidance figures, and mostly unusable on the second floor because of the low headroom. The development was "wholly unacceptable and cramped". The notice works "have had a most damaging impact on the living conditions of the occupants of the residential units". He refused planning permission for the notice works.

11. The Inspector next considered the fall-back argument to see if it persuaded him to grant permission, not for a fall-back position, but for the notice use notwithstanding its deficiencies. In reaching the conclusion that planning permission for the notice works should be withheld, he said in [50]–[52]:

"I have taken into account what the Appellant is likely to do following a refusal of planning permission (his fall-back position); that is converting No 15 into a HMO following the building's reinstatement to a single dwelling house. Mr Ioannou made it clear that he wanted to maintain an income from the appeal property and would not be letting, or using, it as a single dwelling house should his present appeal be dismissed.

Although the development plan seeks to protect the borough's stock of family sized houses, like the appeal property, this objective has been severely undermined by the new C4 Use Class, Houses in Multiple Occupation, and the subsequent changes to the Town and Country Planning (General Permitted Development) Order 1995 (as amended)(GPDO) making such a change of use, from C3 to C4, for up to 6 people, permitted development not requiring planning permission (under GPDO, Schedule 2, Part 3 , Changes of Use, Class I(b)). Mr Warden admitted that no Article IV Direction was in place here to control such permitted development. But this eventuality, the appellant's likely conversion of any dwelling house to a HMO, does not overcome the harm caused to the living conditions of residents by the appeal works. ***J.P.L. 612***

The Council's planning witness agreed, under cross examination, that he would prefer a scheme which produced 2 genuine, ground floor single bedroom, studio flats and a 1 bed, first and second floor flat, to that of a HMO. I also agree that such an alternative would be able to provide a more acceptable level of accommodation for residents than that produced by a HMO. But this is not the scheme for determination under this ground of appeal. I will consider the implications of this matter later but under this ground such other material considerations are not sufficient to overcome my conclusions on the main issue which are that planning permission should not be granted."

12. The Inspector introduced his consideration of ground (f) by summarising it as being that the notice requirements exceeded what was necessary "to overcome the breach of planning control". At [54] and [56], he said:

"The notice seeks to return the house to its lawful single dwelling house use. Since it is the provision of 5 sets of kitchens and facilities for cooking, with their associated separate metering and services, which allows the notice uses to proceed, then removal of relevant duplicates seems to me to be the minimum changes which would have to be made to overcome any breach of planning control. The appeal under this ground fails.

In reaching this conclusion I have considered the relevance of the alternative plans already referred to in ground (a) above. The changes suggested by these schemes are not lesser requirements as such and do not directly relate to the allegations the subject of this appeal."

13. The parties had agreed that the time for compliance should be extended to six months. But he added in [59]:

"Although I was not able to grant planning permission for the 3 flats scheme, described in my paragraph 52 above, it is clear that this is the Council's and my preferred option. The extended period for compliance will give time for the Appellant to explore this alternative with the Council and make any appropriate planning application. Bearing in mind the discretion given to the Local Planning Authority to extend any period for compliance, by section 173A of the Act , 6 months should be sufficient to gauge whether agreement on such an alternative scheme is likely."

14. I have been provided with Mr Wills' written submissions to the Inspector, so as to show that he raised the point at issue, i.e. that the fall-back arguments extended beyond their unsuccessful role in persuading the Inspector to grant permission for the retention of the five-flat use, and extended to arguing that he could and should grant permission for the three or four-flat scheme either under ground (a), or by way of variation to the notice requirements under ground (f). Under the heading "The HMO fallback", after the threat that the house would be turned into a HMO without the need for planning permission, to which the use as five flats should be considered preferable and so permitted, Mr Wills wrote:

"In the further alternative, the alternative layouts submitted by the Appellant with fewer flats are preferable to an HMO in amenity terms. In the final alternative, the requirements of the Notice should be amended such as to allow use as a C4 property, it being irrational to demand the conversation to a C3 style property where a change can immediately be made to that of a C4 style property."

15. I accept that, albeit briefly and as a further alternative, Mr Wills did argue that the four- or probably three-flat scheme should be permitted or brought about by changes to the notice requirements. There was no legal analysis of the nature provided to me in submission by Mr Wills.

16. I was also shown the floor plans for the three- and four-flat schemes placed before the Inspector. Even if Mr Wills is right that the works of conversion from the existing unlawful five flats to the three or four flats would not have been difficult to specify or that, if lawfully available as a solution, the steps in the notice could have incorporated reference to the plans, the Inspector was not provided with an alternative ***J.P.L. 613*** schedule of steps to help his consideration, since the appellant was content to leave the drafting task to the Inspector, unaided. A list of steps would have assisted him to focus on the issues which the appellant says arise on his alternative further fall-back, now the entire focus of the appeal.

The statutory provisions

17. I first set out the provisions which prescribe the contents and effect of the enforcement notice. Section 173 requires the notice to state the breach of control alleged. By subs. (3) and (4):

> (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."

Subsection (11) is important and it was agreed that its effect applied to any enforcement notice as upheld or varied on appeal:

> (11) "Where—
>
> > (a) an enforcement notice in respect of any breach of planning control 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,"
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> then, so far as the notice did not so require, planning permission shall be treated as having been granted by virtue of section 73A in respect of development consisting of the construction of the buildings or works or, as the case may be, the carrying out of the activities.

18. Put shortly, it means that planning permission is granted for those aspects of the development in breach of planning control which the notice, when complied with, does not require to be remedied.

19. Section 174(2) governs the grounds of appeal. The precise terms of grounds (a) and (f) matter:

> (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 or, as the case may be, the condition or limitation concerned ought to be discharged;"
>
> (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."

20. I now set out those provisions which contain the powers of the Inspector on an appeal. Section 176(1) enables the Inspector to correct any error or misdescription in the notice or to vary its terms provided that will not cause injustice to the appellant or local planning authority. The powers in s.177(1) include the power to:

> (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. ***J.P.L. 614*** "

21. Subsection (5) deems the appellant, if appealing on ground (a), 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".

22. By s.177(2) , in considering the grant of such a permission, the Inspector has to have regard to the development plan and other material considerations, and under subs. (3) may grant under subs. (1) "any planning permission that might be granted under Part III" of the 1990 Act . These provisions have to be read with the effect if s.173(11) in mind as well.

The submissions

23. Mr Wills submitted that the powers outlined were sufficiently broad that the Inspector could have granted permission for the use of the property as three self-contained flats, suitably conditioned or could have varied the remedial steps required to be taken by the notice so as bring about the three-flat scheme on the plan shown. The balance of the works or uses which were in breach of planning control would then receive planning permission under s.173(11) . The Inspector did not exercise those powers. He appeared to have concluded that they were not available to him to achieve that end. He did not say that he was declining to use the powers because he thought that the three-flat scheme was objectionable; quite the reverse—he and the local planning authority, through its witness, favoured it over the HMO fall-back. The Inspector did not suggest that the HMO would not follow, if the three-flat scheme were not permitted.

24. Mr Wills relied on two decisions of the Court of Appeal on the scope of these powers. In *Tapecrown Ltd v First Secretary of State [2006] EWCA Civ 1744; [2007] 2 P. & C.R. 7* , the court dealt with an enforcement notice appeal in which it was found that, although the Inspector had considered whether the notice should be varied on the ground (f) appeal so as to require steps which would have brought the offending building into line with that which would have amounted to permitted development, he had failed to consider whether there were steps which could be taken which would have made the building acceptable in planning terms, even if not then amounting to permitted development.

25. Carnwath L.J., with whom Hughes and Wilson L.JJ. agreed, drew on his 1989 report "Enforcing Planning Control" which was the basis of the current legislative provisions. He had proposed in the report that there should be "a broad discretionary power to deal with the effects of a breach" of planning control. He believed that that objective had been achieved "although the drafting might perhaps have been clearer".

26. He said that there was "a possible gap" in relation to the remedying of an injury to amenity, and continued in [32]–[34]:

"Repairing the damage to *amenity* may be only part of what is needed. Even a physically unobtrusive development may be objectionable in planning terms, but it may be made more acceptable by steps short of total demolition. That is the province of ground (a), which needs to be read with section 177 . The latter makes clear that, on an enforcement appeal, planning permission may be granted in respect of the matters alleged in the notice ‘in relation *to the whole or any part* of those matters’ (s.177(1)(a)); that for this purpose ordinary planning considerations (including the development plan) must be taken into account (s.177(2)); and that the permission is to be treated as though granted on an application (s.177(3)(6)), and so (at least by implication) may be subject to any necessary conditions.

> 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. ***J.P.L. 615***

The ground (f) appeal in this case:

> 34. To return to the present case, having rejected the ground (c) appeal, and so identified a breach requiring remedy, the inspector's task was to decide what was the appropriate solution. This required him to consider, not simply what would be necessary to bring the building into compliance with class A, but more generally whether the building could be made acceptable in terms of both planning policy and amenity by any proposed modifications, supported if necessary by planning conditions."

27. Carnwath L.J.'s warning that this did not mean the Inspector had to search around for alternatives does not apply in this case since the alternatives in question were placed before him. But Mr Wills drew support from [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.

28. *Tapecrown* was applied in *Moore v Secretary of State for Communities and Local Government [2012] EWCA Civ 1202* . Sullivan L.J., with whom Lord Dyson M.R. and Longmore L.J. agreed, said that the mere fact that the issue of whether the enforcement notice was too wide, covering both that which was and that which was not a breach of planning control, was raised under ground (b), namely that the alleged breach had not in fact occurred, did not mean that the Inspector lacked power to consider it under ground (f) where it more appropriately arose. That was an illustration of an obvious alternative which the Inspector, without being under a duty to make the appellant's case for him, should have considered.

29. Mr Banner submitted that the Inspector had concluded that, as a matter of fact and degree, the three-flat scheme was so substantially different from the five-flat scheme, that permission for it could not be granted on the deemed application, or by altering the steps required to be taken under ground (f), together with the grant of planning permission for those parts of the breach not enforced against in the notice, as varied. This was because of the terms of s.177(1)(a) and the *Wheatcroft* principle; *Bernard Wheatcroft Ltd v Secretary of State for the Environment (1982) 43 P. & C.R. 233* ; Forbes J. The issue in that case was whether a condition could be imposed on a permission for a residential development limiting the number of houses to 250 on 25 acres of the site, on an application for permission for 420 houses on the whole 35 acre site. The test for whether a condition could be imposed reducing the development below that for which permission had been applied was whether the development remained in substance that which had been applied for. Such a condition would then fairly and reasonably relate to the permission applied for. The main, but not the only, criterion was whether the development was so changed that those who should have been consulted on the changed development had been deprived of that opportunity. Severability, as applied by the Secretary of State, was not the right test.

30. Mr Wills did not dispute that the *Wheatcroft* principle applied to the exercise of the powers by an Inspector on an enforcement notice appeal to reach a decision which had the effect of granting permission for development on the deemed application or by way of permitting that which was not enforced against under s.173(11) . Mr Wills contended that no such decision, on an issue of fact and degree for the planning judgment of the Inspector, had been reached by him. The Inspector had power, in conformity with the *Wheatcroft* principle, on an application for permission for the five facts covered by the enforcement notice, to grant permission for the three flats as a lesser scheme.

31. A witness statement saying otherwise from the Inspector should not be admitted, as it contradicted the reasoning of the Inspector. He relied on well-known passages in *R. v Westminster CC Ex p. Ermakov [1996] 2 All E.R. 302* at 315g–317a, especially at 315h–316d, and *R. (on the application of Lanner Parish Council) v Cornwall CC [2013] EWCA Civ 1290* . Mr Banner said that the statement merely elucidated ***J.P.L. 616*** the Inspector's reasoning, and was admissible within the principles set out in *Ermakov* , applied more recently in a planning context by Cranston J. in *R. (on the application of Gleeson Developments Ltd) v Secretary of State for Communities and Local Government [2013] EWHC 3166 (Admin)* . The Secretary of State recovered jurisdiction over a planning appeal, giving his reason for doing so, as he was required to do by statute. But his reason merely referred to one of the criteria set out in his statement of policy as to when he would recover jurisdiction. Cranston J. admitted a witness statement on his behalf exhibiting a ministerial letter which explained the thinking behind the recovery decision. It elucidated and did not contradict the "statutory" reasons.

Conclusions

32. I deal first with the powers in respect of ground (a) and the deemed planning application for the notice works. The scope of the Inspector's powers in s.177(1) , either under s.174 ground (a) or on the deemed planning application under s.177(5) , is to grant permission in respect of "the matters stated in the notice as constituting a breach of planning control". This reflects the language of ground (a). In my judgment, the Inspector directed himself correctly in holding in [41] and [43] that it was to the matters stated in the notice as the breach that his attention was directed under s.177(1)(a) , rather than to the works in the alternative schemes. 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.

33. The Inspector obviously could grant not 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. (Despite the Inspector's conclusion that this particular flat was also substandard, he appears to have accepted that it could be part of the three-flat scheme as shown on the appellant's drawings, although they appear to show negligible change to it). 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.

34. For Mr Wills' submissions on ground (a) and the deemed planning permission to succeed without recourse to powers governing remedial steps under ground (f), the statutory power in s.177(1)(a) has 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 s.177(1)(a) is too specific and clear for such an interpretation.

35. Section 177(3) does not advance his submission either. One purpose of s.177(3) is to empower planning permission to be granted subject to conditions. The permission is as wide as may be the matters alleged to constitute breaches of development control in an enforcement notice, but it is not wide enough to cover consents required under other provisions. Section 177(3) means that the permission which may be granted in respect of part or the whole of the matters stated in the enforcement notice as constituting a breach of planning control, is any which can be granted under Pt III . The limit on the development which can be granted permission remains governed by the wording of s.177(1)(a) .

36. Section 177(3) does not mean that the deemed application is for permission to retain the whole or part of the matters alleged in the enforcement notice, or anything else which is not substantially different from those matters, but which are not alleged in the notice. The *Wheatcroft* principle has no application ***J.P.L. 617*** to ground (a) or to the deemed application in the light of the clear wording of s.177(1)(a) . Mr Wills placed considerable reliance on what Carnwath L.J. said in *Tapecrown* to support his contentions under ground (a) as well as under ground (f). But the Act is quite specific about the relationship between the power to grant permission and the matters alleged in the notice to constitute the breach of planning control. Nothing in that decision was intended to or could have altered that.

37. Taking the ground (a) appeal and the deemed planning application by themselves, the Inspector was bound to dismiss the appeal as a matter of his statutory powers. It is clear that 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.

38. I turn to examine the ground (f) appeal, bearing in mind that the variation of the steps required to be taken by the notice can be allied to the powers available on the ground (a) appeal, if used conformably with the specific wording of the Act which governs them. These powers together, it is said, would have covered those works necessary to bring about the three-flat scheme and remedy all that needed remedying in the notice. In reality, it seems to me that if the steps required to be taken could be varied so as to require the four flats to be converted to two, together with the removal of the ground floor door, the effect of s.173(11) would have been to permit the larger flat to remain, once all the works had been carried out. On that basis the ground (f) route would have been sufficient by itself to achieve the appellant's favoured further fallback position.

39. It was accepted by Mr Wills that the power to vary the requirements of the notice under s.173(4)(a) by making the development comply with any planning permission granted in respect of the land, by discontinuing any use or restoring the land

to its previous condition, could not assist. The only relevant power would be to vary the notice so that the new steps required were those remedying "any injury to amenity which has been caused by the breach"; s.173(4)(b) .

40. It was not disputed by Mr Banner that the poor quality of accommodation in the four flats led to injury to their occupants' amenity, albeit not to the amenity of others, and therefore fell within the scope of s.173(4)(b) . I have strong reservations about that, as I shall come to. Mr Banner relied on the language of s.177 . He also submitted and again it was accepted in principle by Mr Wills that the *Wheatcroft* principle would affect the steps which could be required under s.173(4)(b) , together with the effect of s.173(11) . The upshot could not be a grant of permission for a development substantially different from that which was the subject of the deemed application.

41. The first question is whether the Inspector considered applying s.173(4)(b) . If he did not do so, he would have failed to consider part of the powers which might have been available to him to bring about what all parties seemed to have thought was the best solution, which was to bring about the three-flat scheme by somehow imposing it through the requirements of the notice. The answer lies in what he said in [54] and [56]. He appears to have adopted the same approach to his powers on the ground (f) appeal as he did on the ground (a) appeal/deemed application. That is, the steps required had to remedy the matters alleged to constitute the breach of planning control. The steps required to bring about the three-flat scheme did not and could not be made to do so. He reached the conclusion he did as a result of the view he took of the extent of his powers, which is why he extended time for compliance to enable a planning application for the three-flat scheme to be made to Enfield LBC. He confined his use of his powers of variation to those which would achieve the result in s.173(4)(a) . If his powers were so confined, then his decision would undoubtedly have been right. I do not see, however, any consideration of the use of the power in s.173(4)(b) .

42. Now, there may be a very good reason for that. It might very well not have occurred to him that "remedying an injury to amenity caused by the breach" could assist when the amenity injured by the development was itself created by the development, and would not have existed at all without it. I have a great deal of sympathy for him if he did take that view. The phrase "injury to amenity caused by the ***J.P.L. 618*** breach" is obviously apt to cover injury to amenity which existed before the breach, and which the breach then injures; whether it covers a substandard development which fails to provide adequate amenity for its occupiers but which does not injure any pre-existing amenity is entirely another matter. The concept of an inadequate amenity being an injured amenity where none existed before does not seem to fit the intention of s.173(4)(b) . But that was not Mr Banner's argument on behalf of the Secretary of State.

43. Without however approving his submission as correct, I have to accept that if it is correct, the Inspector ought to have gone on and considered whether the power in s.173(4)(b) would be capable of leading to the three-flat scheme, and he did not do so.

44. The next question is whether the Inspector had asked himself as a matter of fact and degree under either ground (a)/deemed application or ground (f) whether the three-flat scheme was substantially different from the five flats actually developed. I do not think, on a fair reading of the decision letter, that he did ask himself that question. I see no sign of a decision as a matter of fact and degree. The passages quoted from his decision in relation to ground (a) and ground (f) all focus on the powers in relation to remedying the breach as alleged in the notice. He did not consider the power to remedy injury to amenity. The power in s.173(4)(b) alone could give rise on the ground (f) appeal to an issue of fact and degree about the differences between the five-flats and the three-flat scheme.

45. I am not prepared to admit the Inspector's witness statement. I have read it. I do not doubt that he is telling the truth when he says that he did consider the issue of fact and degree. But I am satisfied that that does not appear from the decision letter. Accordingly the statement would contradict and not elucidate his decision.

46. It follows that Mr Banner's contention that the Inspector reached a decision on a planning judgment as a matter of fact and degree, that the three-flat scheme was too different to be permitted under any of the possibly available powers, fails.

47. The question which the *Wheatcroft* principle raises is whether the permission which would be granted is significantly different from rather than essentially the same as that originally applied for. This may bring in considerations other than whether the changes make the development smaller, or overcome an objection. As Mr Banner pointed out, in *Wessex RHA v Salisbury DC [1984] J.P.L. 344* , Glidewell J. had treated a change to a residential development down from 48 to 37 houses as failing the *Wheatcroft* principle.

48. I am not prepared to hold that only one view was possible of the issue of fact and degree such that any reasonable Inspector would have been bound to conclude that the three-flat scheme was too different from the five-flats to be brought about through

variations to the steps required by the notice, and by planning permission on the deemed application or under s.173(11) for the larger flat, or other parts of the works which had been undertaken. Nor am I prepared to hold that any reasonable Inspector would have been bound to conclude that the differences were not substantial, and that as there were no third party objections even to the five flats, and the changes were all internal, there was no need to be concerned about consultation. It is certainly more than an immaterial variation to the application. It is an application for a clearly different planning permission in the context of the deemed application.

49. It therefore follows that a relevant power, which could bring about the three-flat scheme has not been considered. It could have led to the appeal being decided differently.

Discretion

50. I do not accept Mr Banner's contention that the decision should not be remitted, in the exercise of the court's discretion. He submitted that the appellant should have pursued an appeal against the refusal by Enfield LBC to grant permission for the three-flat scheme, which would have avoided the need for these proceedings and, were the appellant successful, the need for a further stage in the enforcement notice appeal. The appellant, in my judgment, faced with a decision which contained an arguable error of law, ***J.P.L. 619*** was entitled to have it resolved, even if that enabled him to continue with the unlawful development for longer. That may be an unfortunate aspect of the enforcement regime sometimes, but not one to be remedied in the way contended for. Permission was refused by Enfield LBC, so there would have had to be an appeal, and something would still have had to be done about the enforcement notice; the challenge to the decision was being resisted by the Secretary of State. He could have conceded earlier.

The witness statement

51. I add that I would strongly discourage the use of witness statements from Inspectors in the way deployed here. The statutory obligation to give a decision with reasons must be fulfilled by the decision letter, which then becomes the basis of challenge. There is no provision for a second letter or for a challenge to it. A witness statement should not be a backdoor second decision letter. It may reveal further errors of law. In my view, the statement is not admissible, elucidatory or not.

52. However, if that is wrong, the question whether the statement elucidates or contradicts the reasoning in the decision letter, and so is admissible or inadmissible on *Ermakov* principles, can only be resolved once the decision letter has been construed without it. To the extent that a court concludes that the reasoning is legally deficient in itself, or shows an error of law for example in failing to deal with a material consideration, it is difficult to see how the statement purporting to resolve the issue could ever be merely elucidatory. A witness statement would also create all the dangers of rationalisation after the event, fitting answers to omissions into the already set framework of the decision letter, risking demands for the Inspector to be cross-examined on his statement, and creating suspicions about what had actually been the reasons, all with the effect of reducing public and professional confidence in the high quality and integrity of the Inspectorate.

53. Inspectors could be required routinely to produce witness statements when a reasons challenge was brought or when it was alleged that a material consideration had been overlooked, since the challenging advocate would be able to say that, in its absence, there was nothing to support the argument put forward by counsel for the Secretary of State, when there so easily could have been, and he must therefore be flying kites of his own devising. This is not the same as an Inspector giving evidence of fact about what happened before him, which can carry some of the same risks, but if that is occasionally necessary, it is for very different reasons.

54. Accordingly, this appeal succeeds. I will hear counsel on the terms of relief.

Comment:

This decision explores the extent to which an Inspector can approve a scheme other than the unlawful development in an enforcement notice appeal. The issue was a pure matter of legal powers as the appellant had raised the possibility of turning the five residential units into three residential units and the Inspector had identified that as his and the Council's preferred option. However, he considered that he did not have the power to grant such planning permission. In respect of the deemed planning application and the ground (a) appeal, that was right, permission could not be granted for the whole or part of the breach or land and achieve that result, even when subject to conditions.

The court suggested that the potential solution would have been to vary the notice on the basis of a ground (f) appeal to convert four of the flats into two [38]. The consequence would be that those two new flats and the remaining flat would become lawful because of compliance with the notice under s.173(11) of the Town and Country Planning Act 1990 . Whether that course could be pursued depended on the court's view on whether the change from five to three units was so substantial that it offended the *Wheatcroft* principle [47]–[48]. In very broad terms the question would be whether the change affects those who might wish to be consulted upon it. This reads in the interests of third parties, as the Inspector's power to vary or correct in s.176(1) is only expressly subject to not causing injustice to the appellant or the local planning authority. ***J.P.L. 620***

The ability to vary an enforcement notice following a ground (f) appeal is problematic for a reason not explored in the judgment. The purpose of issuing an enforcement notice may be to end the breach of planning control, remedy any injury to amenity or for both purposes (see ss.173(3) and (4)). In *Wyatt Bros (Oxford) Ltd v Secretary of State for the Environment, Transport and the Regions [2001] EWCA Civ 1560; [2002] P.L.C.R. 18* it was held that the ground (f) appeal that the steps exceed what is necessary to remedy any injury to amenity only apply if the enforcement notice (or that part of the steps) are concerned with remedying such injury to amenity rather than ending the breach of planning control. Enforcement notice steps which were targeted against a breach of planning control could not be varied simply to remedy any harm to amenity. The reasons for the present enforcement notice mentioned the substandard internal accommodation provided which resulted in the loss of a property better used as a single family dwelling house, so it might be that this was in part an 'amenity' notice.

A further caution is that a local planning authority drafting an enforcement notice, or an Inspector varying one, so as to grant planning permission under s.173(11) will need to have in mind that such permission is unconditional. That may be a potent reason against proceeding by a variation.

The judgment is also notable, and quotable, for a robust reaffirmation of the inappropriateness of Inspectors producing witness statements to expand upon their statutory reasons [51]–[53]. Either the reasons are good enough, or they are not.

