Neutral Citation Number: [2022] EWHC 1062 (Admin)

Case No: CO/2387/2021

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

In the matter of An Appeal under Section 289 of the Town and Country Planning Act 1990

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 May 2022

Before :

MR JUSTICE LANE

- -

Between :

Manchester City Council	**Claimant**
- and -	
The Secretary of State for Levelling Up, Housing and Communities	**First Respondent**
(ii) Shamuna Kousar	**Second Respondent**

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- -

Ms A Graham Paul (instructed by **The Solicitor, Manchester City Council**) for the **Claimant**
Mr C Streeten (instructed by **The Government Legal Department**) for the **First Respondent**
The Second Respondent did not appear and was not represented

Hearing date: 16 March 2022

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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 HON. MR JUSTICE LANE

Mr Justice Lane :

1. This is an appeal under section 289 of the Town and Country Planning Act 1990 ("the 1990 Act") in respect of an order of the first respondent dated 14 June 2021, validating the second respondent's planning enforcement appeal concerning premises at 24 Broadway, Manchester, M40 3LN and accepting that the enforcement notice appeal should proceed on ground (a) of section 174 (2) of the 1990 Act.

2. Section 174(1) of the 1990 Act provides that a person having an interest in the land to which an enforcement notice relates or a relevant occupier may appeal to the Secretary of State against the notice. Section 174(2) allows an appeal to be brought on any of the grounds specified in paragraphs (a) to (g) of that subsection. The ground in paragraph (a) is:-

> "(a) that, in respect of any breach of planning control which may be constituted by the matter 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;"

3. The validation order followed correspondence between the appellant and the first respondent, in which the appellant contended that the second respondent's enforcement notice appeal should not proceed under ground (a) because it is precluded from doing so by reason of section 174(2A) and (2B) of the 1990 Act. Notwithstanding that no reasons were given in the 14 June 2021 order, the appellant and the first respondent are agreed that the latter's decision to allow the ground (a) appeal to proceed stems from his earlier position, as expressed in the correspondence.

4. It is also now agreed that the appropriate means of challenge is an appeal under section 289, rather than a judicial review. Permission to bring such an appeal was granted, following an oral hearing, by HHJ Bird, sitting as a Judge of the High Court, on 16 September 2021.

5. Section 174 (2A) & (2B) of the 1990 Act provide as follows:-

> "(2A) An appeal may not be brought on the ground specified in subsection (2)(a) if—
>
> (a) the land to which the enforcement notice relates is in England, and
>
> (b) the enforcement notice was issued at a time—
>
> (i) after the making of a related application for planning permission, but
>
> (ii) before the end of the period applicable under section 78(2) in the case of that application.
>
> (2B) An application for planning permission for the development of any land is, for the purposes of subsection (2A), related to an enforcement notice if granting planning permission for the development would involve granting planning permission in

> respect of the matters specified in the enforcement notice as constituting a breach of planning control."

6. In granting permission, HHJ Bird observed there was no dispute that the enforcement notice was issued after an application for planning permission had been made. He held that it was arguable the application was a related application, within the meaning of section 174(2B).

Factual background

7. The factual background is essentially as follows. 24 Broadway is a detached two-storey brick-built slate-roofed dwelling house, on the western side of the A663, about four miles north-west of central Manchester. Although the ground floor was previously in commercial use, in May 2009 planning permission was granted for change of use of the ground floor to use as a house. Accordingly, 24 Broadway is, at present, a single dwelling house for planning purposes.

8. On 12 February 2021, the second respondent sought planning permission for what was described as "proposed extension at first floor, loft conversion with rear dormer, including change of use of partial ground floor to shop". The appellant categorised this as follows:-

> "Part retrospective application for the change of use of ground floor to a shop (Class E) together with elevational alterations to the front, erection of first floor rear extension and installation of rear roof dormer to create a 3 bedroomed duplex, flat (Class C3)."

9. The retrospective element comprised a first-floor rear extension and rear roof dormer, which had already been constructed.

10. On 8 April 2021, the appellant issued an enforcement notice in respect of 24 Broadway. For our purposes, the relevant provisions of the notice were as follows:-

> "3. THE BREACH OF PLANNING CONTROL ALLEGED
>
> Without planning permission, erection of first floor rear extension and installation of rear roof dormer.
>
> 4. REASONS FOR ISSUING THE NOTICE
>
> It appears to the Council that the above breach of planning control has occurred within the last four years.
>
> The Council considers that it is expedient to issue this notice because the first floor rear extension and rear roof dormer results in an overly dominant feature at the rear of the property creating an unsatisfactory relationship with neighbouring properties resulting in overbearing and overshadowing, particularly on 30 Broadway and 67 Heppleton Road.

> The siting, scale and appearance of the development has resulted in an overly dominant and incongruous feature at the rear of the property which is out of character and detrimental to the visual amenity of the property and the wider area and as such the retention of the development would be contrary to the Policies SP1, EN1 and DM1 of the of the Core Strategy of the Local Development Framework and Saved Policy DC1 of the Unitary Development Plan for the City Of Manchester.
>
> 5. WHAT YOU ARE REQUIRED TO DO
>
> 1) Demolish the first floor rear extension and return the property to its condition before the breach took place as shown in the attached image ENF/01, using materials to match the original rear elevation, together with reinstatement of the roof of the remaining single storey rear extension, using materials that are similar in appearance to the original roof, in terms of size, colour and texture.
>
> 2) Remove the rear dormer in its entirety and return the roof to its previous condition before the breach took place as shown in the attached image ENF/01, using materials that are similar in appearance to the original roof, in terms of size, colour and texture.
>
> 3) Remove from the land all building materials, rubble and waste arising from carrying out the above steps."

11. On 9 April 2021, the appellant refused the second respondent's application of planning permission, in the following terms:-

> "The first floor rear extension and rear roof dormer results in an overly dominant feature at the rear of the property creating an unsatisfactory relationship with neighbouring properties resulting in overbearing and overshadowing, particularly on 30 Broadway and 67 Heppleton Road to the detriment of residential amenity.
>
> The siting, scale and appearance of the development has resulted in an overly dominant and incongruous feature at the rear of the property which is out of character and detrimental to the visual amenity of the property and the wider area and as such the retention of the development would be contrary to the Policies SP1, EN1 and DM1 of the of the Core Strategy of the Local Development Framework and Saved Policy DC1 of the Unitary Development Plan for the City Of Manchester."

12. The second respondent did not appeal against the refusal of planning permission. On 4 May 2021, however, she appealed against the enforcement notice on the grounds specified in section 174(2)(a) and (f) of the 1990 Act. I have set out ground (a) above. Ground (f) is that:-

> "(f) 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. The delegated officer report in respect of the planning application explains the appellant's reasoning in more detail. The proposed development comprising "an extension to create a residential dwelling and the creation of additional retail floor space at ground floor level" was not considered to be acceptable as it would, "by virtue of the siting, scale and appearance of the rear extension and dormer, create an overly dominant and incongruous feature at the rear of the property to the detriment of visual and residential amenity." Although the first floor rear extension did not extend into the main roof, when combined with the dormer, the first floor extension and dormer created "a large boxy feature to the rear which appears overly dominant and is not subservient to the existing property".

14. Under the heading "Residential Amenity", the report said that by virtue of the "height, width and rearward projection of the first floor extension, the development has created significant bulk and built development on the neighbouring boundaries". This had had a detrimental effect on neighbouring properties "particularly numbers 30 Broadway and 67 Heppleton Rd which can be readily viewed from the rear habitable room windows of these properties". The dormer extension element could also be "readily viewed from the rear habitable rooms of 30 Broadway and 67 Heppleton Rd".

15. The development had therefore harmed the living conditions of neighbouring occupiers, bringing the development into conflict with various policies of the appellant, which required development to make a positive contribution to the health and wellbeing of residents, having regard to the effects on the amenities of neighbouring occupiers.

16. The second respondent's planning consultant, Civitas Planning Limited, produced an appeal statement of case in respect of grounds (a) and (f). As regards ground (a), the consultant pointed out that, as a result of the extant planning permission for use of the premises as a single dwelling, the second respondent could make use of permitted development rights in the Town and Country Planning (General Permitted Development) (England) Order 2005 to extend the dwelling house at ground and first floor level and install a rear roof dormer, without the need for an application for planning permission.

17. At Appendix C, the statement of case set out a scheme showing how the second respondent could carry out such work without requiring planning permission. However:-

> "4.7. The permitted development scheme (Appendix C) would vary from the unauthorised development. In order to comply with the permitted development rights it would be necessary to reduce the extent of development on site. Taking first the rear roof dormer; it would be necessary to set the rear elevation of the dormer back from the existing eaves by 200mm.

> 4.8. In regards an extension at the rear of the property, in order to ensure compliance with permitted development rights the unauthorised development would have to be reduced in scale. Where a first floor extension is built atop an existing ground floor extension any total enlargement, ground and first floor taken together, must comply with all limits set out in the Order for the development to comply (Schedule 2, Part 1, Class A (A.1(ja)."

18. The statement said that the second respondent could therefore construct a two storey extension, although it could not span the full width of the dwelling house because, in in accordance with A.1(j), development is not permitted where the enlarged part of the dwelling house would be within two metres of the boundary of the curtilage of the dwelling house and the height of the eaves of the enlarged part would exceed 3 metres. Accordingly, Appendix C showed the two-storey extension set in by 2 metres from the northern boundary of the property.

19. The statement then said:-

> "4.10. The scheme presented at Appendix C is therefore the Appellant's fall-back position. In the event that this Notice is upheld the Appellant can carry out a two-storey rear extension and installation of a rear roof dormer without the requirement for planning permission.
>
> 4.11. For a fall-back position to be a material consideration it need only be possible, not probable. In the Court of Appeal Decision in Mansell v Tonbridge and Malling Borough Council (2017) (Appendix D) the decision of the High Court that the Council had correctly given weight to a 'PD fall-back position' was upheld.
>
> 4.12. Lindblom LJ endorsed the position whereby full weight should have been given to a permitted development (PD) fall-back position as a material consideration commenting at para.27(3) that '*..there is no rule of law that, in every case, the "real prospect" will depend, for example, on the site having been allocated for the alternative development in the development plan or planning permission having been granted for that development, or on there being a firm design for the alternative scheme, or on the landowner or developer having said precisely how he would make use of any permitted development rights available to him under the GPDO. In some cases that degree of clarity and commitment may be necessary; in others, not. This will always be a matter for the decision-maker's planning judgment in the particular circumstances of the case in hand.*

> 4.13. The weight to be attributed to a fall-back position is a matter for the decision taker, but given the level of investment on this site it is clearly the Appellant's intention to have a larger dwellinghouse."

20. At 4.15, the second respondent's consultant submitted that "significant weight should be attributed to the presence of a fall-back position and not to give due weight to this would run contrary to well-established case law". Under ground (a), paragraph 4.6 contended that planning permission ought to be granted for the unauthorised development and that the grounds for the refusal of that application did not "stand up to scrutiny when considered against the impact that would arise as result of development that can be legitimately undertaken under householder permitted development rights in any case".

21. At 4.18, concerning the effect on the amenity of 30 Broadway and 67 Heppleton Road, the statement pointed out that the fall-back scheme in Appendix C could be legitimately undertaken under permitted development rights, which would see the development "equally as close to the boundary of these properties"; and that the impacts of the unauthorised development on the occupiers of those other premises "were not significantly different to that which they would experience as a result of the permitted development scheme (Appendix C)".

22. As for ground (f), the statement referred to the second respondent's fall-back position in respect of ground (a) so that, if planning permission was not forthcoming under ground (a), the appellant "would extend the property under householder permitted development rights". Accordingly, it was contended that the steps required to be taken in section 5 of the enforcement notice "go beyond what is necessary to remedy the breach". Section 5(1) and (2) should be varied to either demolish the first floor rear extension and return the property to its condition before the breach took place; or else to reduce the scale of the existing ground and first floor rear extensions to ensure compliance with the GPDO. The rear dormer should either be removed in its entirety or reduced in scale in order to ensure compliance with the GPDO.

23. The statement continued:-

> "4.28. It would be unreasonable to require the [second respondent] to remove the development in its entirety, in order to satisfy the notice, only for the [second respondent] to be able to extend the property under permitted development rights the very next day. This would not be a sustainable approach to remedying the breach when large proportions of the unauthorised development could be "re-used" in a permitted development compliant scheme of extension."

The first respondent's decision

24. On 11 May 2021, the appellant wrote to the defendant's Planning Inspectorate (PINS) concerning the second respondent's appeal against the enforcement notice. Reference was made to the letter that had been sent by PINS to the second respondent's planning

consultant, pointing out that "if you have submitted a retrospective planning application for the development and the LPA issued the enforcement notice after the submission of the application but before the time for determination expired you are not permitted to appeal on ground (a) by virtue s.174(2A)" of the 1990 Act.

25. The appellant pointed out that in the planning application of 12 February 2021, the second respondent had sought permission for a "part retrospective application for ... erection of first floor rear extension and installation of roof dormer to create a 3 bedroom duplex flat class C3". The appellant emphasised that the enforcement notice of 8 April 2021 was directed at the following alleged breach of planning control: "Without planning permission, erection of first floor rear extension and installation of rear roof dormer". That was, the appellant said, the part-retrospective application which had been refused by the appellant on 9 April 2021.

26. Accordingly, the appellant told PINS it was of the opinion that section 174 (2A) of the 1990 Act barred an appeal by the second respondent on ground (a); and that the appeal "would therefore only be capable of proceeding on ground (f)".

27. Ms Madeline Fox of PINS responded to the appellant on 17 May 2021, as follows:-

> "There has been an application for development, which incorporates the operational development identified in the enforcement notice… . The description of development for that application, as confirmed by the agent, is:
>
> > 'part retrospective application for the change of use of ground floor to a shop (Class E), together with elevational alterations to the front, **erection of first floor rear extension and installation of rear roof dormer** to create a 3 bedroom duplex, flat class (C3)'
>
> Having regard to s174(2B), [the application] would appear to be related to the enforcement notice in that granting planning permission for the application development would involve granting planning permission in respect of the matters alleged in the notice as constituting the breach of planning control (highlighted in bold above).
>
> However, it is also clear from the description of development that the LPA has considered the acceptability of the matters alleged in terms of facilitating the material change of use to "create a 3 bedroom duplex flat" rather than as just being part of the existing dwelling house. The substance of the development being considered under [the] application... is therefore significantly different to that which would be considered under the ground (a) appeal. For this reason [the application] is not a single 'related application' having regard to s.174(2A) & (2B) of the 1990 Act. An appeal on ground (a) is not therefore precluded by s.174 (2A).

> The appeal will continue on Grounds (a) and (f) subject to a fee being paid to be cancelled...
>
> The Planning Inspector will not respond to any further correspondence relating to this matter and any correspondence received will be placed on our appeal records for when we have an Inspector appointed to determine this case".

28. In its pre-action protocol letter, the appellant pointed out that it was clear from the delegated report that the harm caused by the unauthorised development related to the dominance of the building itself, causing overshadowing to neighbouring properties and adverse visual effects, rather than there being any objection to any use of the building *per se*. The letter submitted that section 174(2A) is designed to prevent a ground (a) appeal being made in order to delay enforcement and that the provision is aimed at the situation where a developer has the opportunity to appeal against the refusal of retrospective permission and an enforcement notice at the same time. Although the developer should not be shut out from having the planning merits of the development in the enforcement notice assessed, the developer should not, on the other hand, be allowed "multiple bites of the cherry"

29. The PAP letter stated that PINS fell into error in seeking to distinguish the two developments comprising the first floor rear extension and the installation of the rear roof dormer, on the basis that the operational development to achieve these features had been refused planning permission in the context of the proposed material change of use, which was not part of the enforcement notice. The PAP letter contended that no distinction fell to be drawn by reason of the fact that the refusal of planning permission concerned the operational development in the context of the prospective change of use of the building.

30. There could be no doubt, the PAP letter said, that had the retrospective planning application been granted, then all of the development now being enforced against would have been authorised and regularised. Thus, the test for "related development" in section 174(2B) was clearly met on its face and nothing further was needed.

31. In any event, PINS was factually wrong to draw a distinction between the enforcement notice development and the planning application development. The reason that the appellant refused to grant permission for the rear extension and dormer "had nothing to do with the use of those parts as a separate flat. The reason was all to do with visual appearance, overbearingness and impacts on neighbouring residential amenity". Those considerations, the appellant said, would apply in exactly the same way in a ground (a) appeal against the enforcement notice as they would in the context of the planning application.

Legal framework and cases

32. Section 174(2A) and (2B) of 1990 Act were inserted by section 123 (retrospective planning permission) of the Localism Act of 2011 ("the 2011 Act"). Section 123 of the 2011 Act also amended section 177 of the 1990 Act (grant or modification of planning permission on appeals against enforcement notices). Amongst other things, section 177(1) enables the Secretary of State on the determination of an appeal under section

174, to "grant planning permission in respect of matters stated in the enforcement notice as constituting a breach of planning control".

33. The 2011 Act amended section 177(5) so as to make it read as follows:-

> "(5) Where-
>
> (a) an appeal against the force of section 174, and
>
> (b) 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 matter stated in the enforcement notice as constituting a breach of planning control."

34. Section 123 of the 2011 Act also amended the 1990 Act by inserting in it the following section:

> "(1) **70C. Power to decline to determine retrospective application.**
>
> (1) A local planning authority in England 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.
>
> (2) For the purposes of the operation of this section in relation to any particular application for planning permission, a "pre-existing enforcement notice" is an enforcement notice issued before the application was received by the local planning authority."

35. There is no decided case of which the parties are aware that specifically addresses the interpretation of section 174(2A) and (2B) of the 1990 Act.

36. Section 70C has, by contrast, received judicial attention in a number of cases.

37. In R (Banghard) v Bedford Borough Council [2017] [EWH] 2391 (Admin), Nathalie Lieven QC, sitting as a deputy High Court judge, considered a judicial review concerning land that was the subject of a grant of planning permission to erect a storage building. Although the claimant constructed the building on the correct footprint, he used it as a dwelling house rather than as a storage building. The local planning authority served an enforcement notice, alleging a breach of planning control. The planning inspector dismissed the claimant's appeal, stating, amongst other things, that he was precluded from considering the planning merits of a storage building, as the

enforcement notice referred to a building constructed as a dwelling house. The claimant applied for retrospective planning permission to retain some parts of the building which the enforcement notice required to be demolished, to be used as a storage building rather than as a residence. Purporting to exercise its discretion under section 70C, the authority declined to determine the application.

38. The claimant's judicial review of that decision was granted. The judge held that section 70C was designed to ensure that an applicant cannot insist on two separate considerations of the planning merits of development, by having both a right of appeal against a refusal of planning permission and a right of appeal against the enforcement notice, on effectively the same grounds. The judge considered it to be a fundamental principle that an individual is entitled to have the merits of a planning application determined once, either via one or other of those routes. It could not properly be said that the retrospective permission sought by the claimant for a storage building was part of the breach of planning control set out in the enforcement notice; namely, the unauthorised erection of a dwelling house.

39. The following conclusions of the judge merit setting out at full:-

> "29. The purpose of s.70C is as explained by Lewis J in O'Brien v South Cambridgeshire District Council [2016] EWHC 36, to ensure that the applicant cannot insist on two separate considerations of the planning merits, by having a right to appeal the refusal of planning permission and an appeal against the EN on effectively the same grounds. As Cranston J put it in Wingrove the applicant cannot have multiple bites of the cherry. However in the present case the effect of the Council's interpretation of s.70C is that rather than the Claimant having multiple bites of the cherry, he has had none. He has not been able to have the planning merits of the storage building he now wishes to construct considered by the local planning authority and ultimately on appeal. The Inspector on the EN appeal could not consider them because he had an EN against residential use before him, and the ground (a) appeal could only relate to that use, and the Council's decision to rely on s.70C means that the Claimant cannot have the matter considered under s.70 TCPA as would usually be the case."
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> 30. In terms of the correct approach to s.70C, I do not agree with Mr Smyth that Parliament intended to balance some potential unfairness against the need for effective enforcement action. Rather the Parliamentary intention was to ensure fairness in all cases, because an applicant could have his or her application determined under either the EN appeal or through the medium of the planning application, but not both. If this approach is taken there is no necessary unfairness in any individual case and in every case the individual can have the application determined. There may of course be cases where the developer fails to appeal, as happened in Wingrove, and s.70C can still be used. But in such cases the developer had a full opportunity to a fair process and did not avail himself of it. There may also be cases where

> the developer makes a very minor change from what was considered in the enforcement appeal, whether in terms of a minor change to the nature of the use applied for, or a minor change to the built form. In those circumstances it will be open to the local planning authority to rely on s.70C. Such a decision will indeed involve the exercise of planning judgement by the authority. However, on the facts of this case I think the position is clear. The matter specified in the enforcement notice as constituting the breach was the unauthorised erection of a dwelling house. Planning permission was for a storage use, so in my view it cannot be said on the facts of the case, that s.70C could lawfully be engaged.
>
> 31.On the facts of the present case, it is correct as Mr Smyth says, that the Claimant chose not to implement the 2010 permission and therefore is to some extent the author of his own misfortune. However, it seems to me that that is beside the point in analysing the correct approach to s.70C. The fundamental principle must be that that an individual can have their application determined once.
>
> 32. The planning authority under s.70C does have a wide discretion and there is necessarily an element of planning judgment in whether the development for which permission is being sought involves "any part of the matters specified..." in the EN as constituting the breach of planning control alleged. However, on the facts of this case I do not see how it can properly be said that the permission sought for a storage building is part of the breach of planning control in the EN, namely the erection of a dwelling house. The fact that some part of the building is the same and it is on the same footprint is not sufficient to mean that part of the matters is those specified in the EN.
>
> 33. If one takes the statutory purpose as to be to ensure that effective enforcement cannot be avoided or delayed by those in breach of planning control having multiple bites of the cherry, then it is easy to see on the facts of this case why that situation does not arise. The EN Inspector was clear that he did not have the power to consider the proposed storage use within the s.174 EN appeal. That is a very clear indication that the storage use was not part of the matters being enforced against. The point is further strengthened by the fact that there are also proposed to be changes to the building itself, so that it becomes suitable for a storage use."

40. In R (Chesterton Commercial (Bucks) (Ltd) v Wokingham Borough Council [2019] PTSR 220, Upper Tribunal Judge Martin Rodger QC, sitting as a High Court Judge, dismissed a judicial review brought against the use of section 70C by a local planning authority, where the latter took the view that the planning application related to matters specified in an extant enforcement notice and, in the exercise of its discretion, declined to consider the claimant's planning application.

41. At paragraph 38 , the judge considered section 70C and section 174(2A):-

> "38. The provisions appear to be complementary. Under section 174(2A) an appeal may not be made against an enforcement notice issued after an application for planning permission which is related to the matters constituting the breach specified in the enforcement notice, since the merits of the proposal can be determined once and for all when the application is determined by the local planning authority (or on appeal from its decision). The ambit of section 70C is slightly wider and its use more flexible. Wider because it covers situations in which the coincidence of the matters constituting the breach specified in an enforcement notice and the matters for which planning permission is sought is not complete (but is more than *de minimis*); more flexible, because in such a case the making of an application for planning permission is not prohibited altogether (as the bringing of an appeal would be by section 174(2A)), and instead the local planning authority is given a discretion to decline to determine it."

42. At paragraph 40, the judge considered that the logic of the discretion conferred by section 70C was clear. Where an enforcement notice had already been served, there was less likely to be any proper justification for a related application for planning permission "since the opportunity to obtain a full consideration of the planning merits of the proposal is already available, or was available, in the form of an appeal under section 174(2A) against the pre-existing enforcement notice".

43. Thus, at paragraph 41, the judge considered that the object of the provision was "not to prevent the merits of an authorised development from being considered but to avoid delay in enforcement by ensuring that they should be considered only once."

44. Also of relevance (as we shall see) is paragraph 70:-

> "70. It is now common ground that the claimant could have invited the inspector to consider a reduction in the link section of the building, to leave only the balcony, as part of its appeal under section 174(2)(f). That was not the claimant's case when it sought and obtained permission; at that stage it maintained (at paragraph 19.4 of its grounds) that, like the claimant in Banghard, it had been prevented from having any consideration of the planning merits of the balcony. If, as Mr White suggested, the presentation of the appeal on that basis would have been forensically difficult, and would have risked undermining the claimant's appeal under ground (a) seeking retention of the whole structure, that is a difficulty of the claimant's own making. There is no reason why it should be allowed to influence the proper construction and application of the section 70C power."

45. In R (Finnegan) v Southampton City Council, [2020] PTSR 974, Lang J, having approved the judgment in Chesterton, had this to say about section 70C:-

> "44. I agree with the Council's submission that the authorities repeatedly emphasise the need for effectiveness of enforcement action when considering the purpose of section 70C. It would be contrary to that purpose to allow an application for a proposal which overlaps with a previously issued enforcement notice to proceed if it would merely and self-evidently create further enforcement issues down the line.
>
> 45. I also accept the Council's submissions that the claimant's formulation of the purpose of the section, namely to prevent an applicant from having the merits considered twice, is too narrow, because confining its purpose in that way restricts the broad scope of the Council's discretion. The Council is entitled to take into action the fact that the applicant had an opportunity to have the planning merits considered , which is not taken.
>
> 46. In my judgement, the claimant is incorrect to submit that, in the exercise of its discretion, the local planning authority must not have regard to the terms of section 70C of the TCPA 1990 as they only relate to the initial question as to whether or not the section is engaged. No such limitation on the local planning authority's discretion is contained in Section 70C of the TCPA1990 and, as a general principle, a decision-maker is entitled to have regard to the statutory basis upon which his decision-making powers have been conferred, and to the statutory purpose."

Discussion

46. On behalf of the appellant, Ms Graham Paul's primary submission is that the plain and ordinary meaning of the words used by Parliament in section 174(2A) and (2B) demonstrates the correctness of the appellant's approach. For the first respondent, Mr Streeten submits that the natural and ordinary meaning of the words used demonstrates the correctness of the approach taken by PINS. Mr Streeten says that, in order to fall within section 174(2B), there must be no material distinction between the development for which planning permission was sought and the matters specified in the enforcement notice in respect of which allowing the appeal on ground (a) would involve granting planning permission. In his submission, the requirement that granting planning permission for the development would involve granting permission in respect of the matters specified in the enforcement notice as constituting a breach of planning control plainly envisages coincidence between the matters specified in the notice and the development for which planning permission is sought. This construction accords with the mischief at which section 174(2A) is directed. The intention is not to prevent the merits of an unauthorised development from being considered on appeal at all, but, rather, to ensure that they need to be considered only once.

47. Mr Streeten submits that the correctness of this approach is demonstrated by the facts of the present case. The "fall-back" position adopted in the second respondent's statement of case, in respect of her appeal against the enforcement notice, concerns the permitted development rights conferred in respect of dwelling houses. These rights do not apply to mixed-use buildings. They were not, therefore, relevant considerations in

the context of the planning application made by the second respondent to the appellant, since that application involved the mixed use of the building as a dwelling and a shop. By contrast, those rights are highly material in considering the merits of the development for the purposes of the second respondent's enforcement notice appeal on ground (a). The relevance of the fall-back is a material distinction between the development sought under the planning application and the development specified as being in breach of planning control in the enforcement notice.

48. Despite the skill with which Mr Streeten advanced his submissions, I accept Ms Graham Paul's primary submission on the construction of the relevant legislation. The plain and ordinary meaning of section 174(2B) accords with the approach taken by the appellant.

49. Examining each element of section 174(2B) in turn, the application of 12 February 2021 was for "change of use of ground floor to a shop (Class E) together with elevational alterations to the front, erection of first floor extension and installation of rear roof dormer to create a 3 bedroom duplex flat (Class C3)". Plainly, that application encompassed the building operation of the first-floor extension and rear roof dormer. The matters specified in the enforcement notice as constituting a breach of planning control are "Without planning permission, erection of a first-floor extension and installation of rear roof dormer". If the appellant had granted planning permission for the totality of the development applied for, it would therefore have granted planning permission, *inter alia*, for the erection of the first-floor rear extension and the installation of the rear roof dormer. It would have granted permission "for the matters specified in the enforcement notice as constituting a breach of planning control", precisely as stated in section 174(2B).

50. That, I find, is the clear effect of the ordinary and natural meaning of the words in section 174(2B). The first respondent's contention that there must be coincidence between the matters specified in the enforcement notice and the development for which planning permission is sought finds no expression in subsection (2B). On the contrary, the drafter, in using the words "for the development" and "would involve granting planning permission" has been careful to provide that planning permission for the development can be greater than the planning permission in respect of the enforcement notice matters.

51. I do not consider the first respondent's case is assisted by the submission that the building operation comprising the extension and rear dormer cannot be divorced from the use of those constructed elements. There is nothing in subsection (2B) to support this proposition. The second respondent has not sought to impugn Part 3 of the appellant's enforcement notice, which specifies only the "erection" of the extension and "installation" of the rear roof dormer, on the basis that it should have referred to the nature of the use made or to be made of these features. In any event, as a matter of fact, I agree with Ms Graham Paul that the appellant has, at all times, been concerned solely with the effect on the amenity of the physical presence of the extension and dormer.

52. As Upper Tribunal Judge Rodger QC observed at paragraph 38 of Chesterton, the ambit of section 70C is wider than that of section 174(2A), in that section 70C covers cases where the matters specified the enforcement notice would not be entirely covered by the grant of planning permission. By contrast, section 174(2A) and 2(B) require that everything covered by the enforcement notice must be within the ambit of the

hypothetically granted planning application. If that were not so, then the applicant would not be able to advance, in the context of an appeal against the refusal of planning permission, a matter specified in the enforcement notice. He or she would, accordingly, not receive even one "bite of the cherry" in respect of that matter. For the reasons I have given, however, that is not the position here.

53. The first respondent seeks to make much of the fall-back case, articulated in the statement of case of the second respondent's consultant in respect of the enforcement notice appeal. The first respondent says this fall-back case is merely concerned with the argument the second respondent may be able to deploy in ground (a) in her enforcement notice appeal, as opposed to an appeal against refusal of planning permission. As we have seen, however, the operation of section 174(2A) does not depend on whether the reasons a person might be able to deploy in such an appeal are the same as those that he or she could employ in the enforcement notice appeal brought on ground (a). The test is merely whether the grant of the application for planning permission for the development, for whatever reason, would involve granting planning permission in respect of the matters specified in the enforcement notice as constituting a breach of planning control.

54. As I have mentioned, Mr Streeten submits that his client's construction of section 174(2A) and (2B), accords with addressing the mischief at which those provisions were directed, which is not to prevent the merits of an unauthorised development from being considered on appeal at all, but to ensure that they need to be considered only once. I agree; but this does not mean the person concerned is entitled to appeal both against the refusal of planning permission and on ground (a) in section 174(2), merely because he or she may have different arguments to deploy in the latter, compared with the former.

55. At paragraph 70 of Chesterton, Upper Tribunal Judge Rodger QC did not consider it relevant, in the context of the challenge to the exercise of the power under section 70C, that the claimant could not deploy an argument in the enforcement notice appeal, which he did not deploy. The fact that such an argument had been forensically difficult in the context of the enforcement notice was, the judge held, of the claimant's own making and was no reason why it should be allowed to influence the proper construction and application of the power under section 70C.

56. By the same token, in the present case, the fact that permitted development rights were not formally in issue, in the context of the planning application, is not a reason to give the legislation the markedly different interpretation for which the first respondent contends, as opposed to its ordinary and natural meaning. Despite Mr Streeten's contention that his client's interpretation is needed in order to avoid absurdity, we are, here, in truth far removed from the factual matrix in Banghard and from any "unfairness" or "injustice" that might require a different approach to the construction of the relevant statutory provisions than that of seeking their ordinary and natural meaning. The second respondent's planning application (and any appeal against refusal) did cover the very matters specified in the enforcement notice. To use the analogy of the cherry, that was her bite of that fruit. The "cherry" does not change merely because her arguments might be different in an enforcement notice appeal.

57. In any event, I accept Ms Graham Paul's submission that, if the second respondent had chosen to appeal the refusal of her planning application, she could, in that appeal, have advanced the argument that, given she could exercise permitted development rights in

respect of the current use of the building as a single dwelling, the acceptability in planning terms of the first-floor extension and rear dormer (that is to say, in terms of their effect on the amenity of neighbouring properties) should accordingly be considered on the basis that she enjoys those permitted development rights. In other words, the second respondent would have been able to advance precisely the case set out in paragraphs 4.10 to 4.18 of her enforcement notice statement of case. The fact that the refusal of planning permission did not address this aspect is not a reason to let her belatedly advance it in the context of an enforcement notice appeal.

58. Mr Streeten submits that the fall-back position in respect of ground (a) is potentially critical to the determination of the ground (f) appeal against the enforcement notice. This results from section 177(1C) of the 1990 Act. The effect of this provision is that planning permission may be granted under section 177(1)(a) following the enforcement notice appeal only if the section 174(2)(a) ground has been specified by the person bringing the appeal. Only if there is a ground (a) appeal can the second respondent have the enforcement notice amended so as to limit its effect to so much of the unauthorised development that exceeds what is permitted under the GPDO. In other words, it is material that in the context of enforcement action against an extension to a dwelling house, the second respondent may choose to appeal under grounds (a) and (f) so as to seek the grant of permission for a smaller extension, which accords with the GPDO, rather than to require the entirety of the extension to be demolished. That, Mr Streeten says, is impossible in the absence of a ground (a) appeal.

59. This submission founders on the plain wording of section 174(2B). The statutory question is whether granting planning permission for the development which was the subject of the application would involve granting planning permission in respect of the matters in the enforcement notice. The argument advanced by the second respondent in respect of ground (f) requires one to read subsection (2B) so that the words "it would in granting planning permission in respect of the matters specified in the enforcement notice as constituting a breach of planning control" do not apply, where the applicant now wishes to argue for a grant of planning permission in respect of something less than those matters; in this case, the grant of permission for a smaller extension that accords with the GPDO. There is, I find, simply no justification for such a strained construction of the subsection. If that had been Parliament's intention, it could easily have said so. I do not consider that the first respondent's ground (f) argument comes close making a case for departing from the plain meaning of the statutory language.

60. In any event, there is, I find, also force in Ms Graham Paul's submission that, as regards ground (f), the inspector has power to modify the steps required by the enforcement notice if they are excessive in relation to the issue of amenity. Thus, the steps could be varied to change the extent of any demolition required with regard to the extension and dormer.

61. Mr Streeten submits that it is for PINS to determine as a matter of judgment whether there is a material difference between the development for which planning permission was sought and the breach of planning control alleged in the enforcement notice. For the reasons I have given, this is not the correct approach. PINS should simply apply the plain words which Parliament has chosen to use in section 174(2B). If Ms Fox had done so in her email of 17 May 2021, she would have stopped after finding that the second respondent's application "would appear to be related to the enforcement notice in the granting planning permission for the application development would involve

granting planning permission in respect of the matters alleged in the notice that constituted a breach of planning control…". That finding was the proper application of Parliament's words. Instead, she wrongly went on to determine the matter by applying a different test.

Decision

62. The appellant's appeal is allowed.