Neutral Citation Number: [2014] EWCA Civ 566

Case Nos: C1/2013/2200 and C1/2013/2727

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
Mr Ben Emmerson QC
[2013] EWHC 2084 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 7th May 2014

Before :

LORD JUSTICE RICHARDS
LORD JUSTICE UNDERHILL
and
LORD JUSTICE FLOYD

- -

Between :

Mahfooz Ahmed	**Respondent**
- and -	
Secretary of State for Communities and Local Government	**Appellant**
- and -	
London Borough of Hackney	

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Stephen Whale (instructed by **The Treasury Solicitor**) for the **Secretary of State**
Andrew Fraser-Urquhart (instructed by **Wedlake Bell**) for **Mr Ahmed**
The London Borough of Hackney was not represented on the appeal

Hearing date : 5 March 2014

- -

Judgment

Lord Justice Richards :

1. This case concerns a planning enforcement notice issued by the London Borough of Hackney ("the council") in respect of land at 103-105 Stoke Newington High Street, London. Mr Ahmed, the owner of the land, appealed to the Secretary of State under section 174 of the Town and Country Planning Act 1990 ("the 1990 Act") against the notice. By a decision dated 31 March 2011 an inspector appointed by the Secretary of State dismissed the appeal. Mr Ahmed appealed to the High Court under section 289 of the 1990 Act against that decision. By an order dated 16 July 2013 Mr Ben Emmerson QC, sitting as a deputy judge of the High Court, allowed the appeal but made no order as to the costs of the appeal. The Secretary of State now appeals to this court, with permission granted by Sullivan LJ, against the deputy judge's order in so far as it allowed Mr Ahmed's appeal to the High Court. There is a separate application by Mr Ahmed for permission to appeal against the deputy judge's order with regard to costs. Sullivan LJ ordered that application to be listed with the hearing of the main appeal but it has turned out not to be opposed. I deal with it briefly at the end of this judgment.

2. The question in the main appeal is whether the inspector erred in law on the enforcement notice appeal by failing to consider an "obvious alternative" in accordance with the principles discussed in *Tapecrown Ltd v First Secretary of State* [2006] EWCA Civ 1744, [2007] 2 P&CR 7 ("*Tapecrown*") and *Moore v Secretary of State for Communities and Local Government* [2013] JPL 192 ("*Moore*"). The "obvious alternative" relied on is the grant of planning permission for a scheme previously authorised, departure from which had resulted in the breach of planning control that was the subject of the enforcement notice.

The legislative framework

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

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

> "173 … (3) An enforcement notice shall specify the steps which the authority require to be taken, or the activities which the authority require to cease, in order to achieve, wholly or partly, any of the following purposes.
>
> (4) Those purposes are:
>
> (a) remedying the breach by making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land, by discontinuing any use of the land or by restoring the land to its condition before the breach took place; or

(b) remedying any injury to amenity which has been caused by the breach."

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

> "(a) that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted …;
>
> (e) that copies of the enforcement notice were not served as required by section 172;
>
> (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."

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

> "176(1) On an appeal under section 174 the Secretary of State may –
>
> (a) correct any defect, error or misdescription in the enforcement notice; or
>
> (b) vary the terms of the enforcement notice,
>
> if he is satisfied that the correction or variation will not cause injustice to the appellant or the local planning authority.
>
> (2) Where the Secretary of State determines to allow the appeal, he may quash the notice.
>
> (2A) The Secretary of State shall give any directions necessary to give effect to his determination on the appeal."

7. Section 177 relates to the grant or modification of planning permission on appeals against enforcement notices. At the material time it read:

> "177(1) On the determination of an appeal under section 174, the Secretary of State may –
>
> (a) grant planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control, whether in relation to the whole or any part of those matters or in relation to the whole or any part of the land to which the notice relates …

…

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

…

(5) Where an appeal against an enforcement notice is brought under section 174, the appellant shall be deemed to have made an application for planning permission in respect of the matters stated in the enforcement notice as constituting a breach of planning control."

Subsection (5) was subsequently amended to provide that an appellant is deemed to have made an application for planning permission if (a) the land is in Wales or (b) the land is in England and the statement under section 174 specifies ground (a). Since Mr Ahmed's statement did specify ground (a), the amendment would not affect the analysis of this case.

8. The appeal against the enforcement notice in this case was governed by the Town and Country Planning (Enforcement Notices and Appeals) (England) Regulations 2002 ("the Enforcement Notices and Appeals Regulations") and the Town and Country Planning (Enforcement) (Written Representations Procedure) (England) Regulations 2002 ("the Procedure Regulations"). There are only a few points to be noted about those two sets of regulations.

9. Regulation 4 of the Enforcement Notices and Appeals Regulations provides that an enforcement notice shall specify "the reasons why the local planning authority consider it expedient to issue the notice". Regulation 6 provides that a person who makes an appeal to the Secretary of State under section 174(3) of the Act shall submit a statement in writing (i) specifying the grounds on which he is appealing against the notice and (ii) setting out briefly the facts on which he proposes to rely in support of each of those grounds.

10. Regulation 3 of the Procedure Regulations provides that the Procedure Regulations are to apply where an appellant informs the Secretary of State in the notice of appeal that he wishes the appeal to be disposed of on the basis of written representations. Regulation 7 provides that the notice of appeal, the documents accompanying it and any statement submitted under regulation 6 of the Enforcement Notices and Appeals Regulations shall comprise the appellant's representations in relation to the appeal; and it goes on to make provision for the possibility of further representations by the appellant and for written representations by the local planning authority. Regulation 10(1) provides that the Secretary of State may proceed to a decision on an appeal taking into account only such written representations as have been submitted within the relevant time limits.

The factual history

11. On 7 June 2005 planning permission was granted on appeal for the demolition of an existing property on the land and the erection of a three storey building with a butterfly roof, comprising a retail unit on the ground floor and six flats on the two upper storeys. The terms of the permission required the development to begin within five years of the date of the grant.

12. Construction began in 2007 and was completed in 2009. The building erected was not, however, in accordance with the approved plans: in particular, it had four storeys, providing space for a seventh flat and with a different roof arrangement. The consequence of the departure from the approved plans was that the building was in breach of planning control and also that its erection did not constitute lawful commencement of the development permitted by the 2005 planning permission, so that the 2005 permission expired on 7 June 2010.

13. The council issued an enforcement notice dated 3 September 2010. In material part and as subsequently corrected by the inspector, it read:

> "**1. This Notice** is issued by the Council because it appears to it that there has been a breach of planning control, within paragraph (a) of section 171A(1) of [the 1990 Act], at the land ….
>
> …
>
> **3. The matters which appear to constitute the breach of planning control**
>
> Without planning permission, the erection of a 4 storey building comprising of seven (7) self contained flats on the upper floors and commercial units on the ground floor.
>
> **4. Reasons for issuing this Notice**
>
> …
>
> Development proceeded on the site pursuant to the scheme approved on appeal on the 7th June 2005, however, the development as built on the site is materially different from the approved development.
>
> The rear and side elevations of the property as built do not correspond to those as shown on the approved plans.
>
> An additional third storey has been constructed squaring off the building and its original valley roof and increasing the overall height of the property. A stepped flat roof arrangement has also been added to the rear of the property at ground and first floor levels creating outdoor roof terraces. The rear windows and doors have also been relocated and additional pipework has been added to the outside of the building. These aspects of the

development are significantly different from the development which was approved on appeal on 7th June 2005.

These unauthorised additions, alterations and variations to the approved scheme have resulted in a development that is excessive in height, and out of scale and character with the other properties in the area and further detracts from the character of the Stoke Newington Conservation Area within which the site is located.

Furthermore, the creation of high level outside amenity areas detracts from the building itself and the general character of the terrace of which it forms a part. In addition the use of the terraced areas for residential sitting out purposes would detract from the amenity of occupiers of neighbouring and adjoining properties to the rear of the said site by reason of overlooking and a potential loss of privacy.

A total of 7 self contained flats have been created within the property with a change of common access from the rear to the side elevation. The increase in the number of flats within the property from 6 flats to 7 flats may constitute overdevelopment of the site resulting in decreased room sizes within the property which may be harmful to present and future occupiers ….

Overall the unauthorised development is contrary to the following policies ….

The Council does not consider that planning permission should be granted, because planning conditions could not overcome these objections to the development.

5. What you are required to do

(i) Permanently and completely remove the unauthorised four storey building from the site.

(ii) Permanently and completely make good all damage resulting from the compliance with the other requirements of this Notice and restore the relevant parts of the building to their position before the unauthorised development was carried out on the site ….”

14. Mr Ahmed appealed under section 174(2) grounds (a), (e) and (f) against the enforcement notice. He opted for the appeal to be determined by the written representations procedure. In his written statement he admitted that the building departed in the respects alleged from the scheme approved in 2005. He dealt first with ground (e) which is no longer of any relevance. He then dealt with ground (f) and ground (a), in that order:

(1) Under ground (f) he argued that "the steps required to be taken exceed what is necessary to remedy any injury to amenity that may have been caused by the breach of planning control". He referred to the scheme approved in 2005 and argued that that scheme "would still have been acceptable in planning terms at the time the enforcement notice was issued". He said that "in light of the fact that the approved scheme was achievable by modification of the development", the council's requirement that the whole of the development be removed was unnecessary and punitive and amounted to over-enforcement, and that all that was required to make the development acceptable in planning terms was for it to be modified to comply with the design of the approved scheme. He asserted in conclusion that the steps required in the enforcement notice clearly exceeded the steps required to remedy any breach of amenity.

(2) Under ground (a) he argued that the development as built was acceptable in planning terms and that planning permission ought to be granted. Starting from the proposition that the scheme approved in 2005 was still acceptable in planning terms, he focused on the elements of the development that differed from the approved scheme. From the way the argument was advanced, it is clear that under this ground he was seeking permission for the development as built, not for the scheme approved in 2005. It appears that he believed at the time that the 2005 planning permission was still extant.

15. In his decision on the appeal the inspector considered ground (a) before ground (f). In relation to ground (a) he, too, compared the development as built with the scheme approved in 2005 in reaching his conclusion that planning permission for the development as built should be refused and that the appeal on ground (a) therefore failed. In relation to ground (f), he concluded that the appeal failed for the following reasons:

> "27. The ground of appeal is that the steps required to comply with the requirements of the notice are excessive and lesser steps would overcome the breach of control.
>
> 28. The notice requires removal of the building in its entirety and the restoration of the relevant parts of the building to their position before the unauthorised development was carried out. I acknowledge that an alteration to the building which resulted in it complying with the application that was previously granted might be sufficient to remedy the injury to amenity. It would be for the council to consider a fresh application for this, or for an alternative scheme, in the first instance. However the powers available to me under s.176(1) of the Act as amended do not allow me to turn a notice which is intended to rectify a breach of planning control into something else.
>
> 29. As matters stand there is no extant planning permission, the previous permission having expired, and no alternative permission having been granted. There is no planning permission for the building which now stands on the site, or any fall-back position which can be implemented.

> 30. The Council has made it clear that the purpose of the notice is to rectify the breach of planning control, rather than to remedy the injury to amenity. In these circumstances, where there is no extant planning permission which can be implemented, the breach of control can only be rectified by the removal of the building as a whole and restoration of the relevant parts of the building to their position before the unauthorised development was carried out. There are no lesser steps available to the appellant that would allow this to be achieved."

16. Mr Ahmed was given permission to appeal to the High Court only in relation to ground (f). In his judgment on the appeal, the deputy judge found that the inspector had erred in law in that passage of the decision. Having considered *Tapecrown* and *Moore* (see para 2 above), the deputy judge stated:

> "35. *Moore* thus stands as clear authority for the proposition that where an appellant has advanced a properly articulated fall-back submission under grounds (a) to (e) in section 174(2) it may also be considered under ground (f). I can see no reason in logic or principle why the reverse should not also be true. In the present case the Appellant made his fall-back position clear under ground (f). The Inspector concluded that the Appellant's fall-back position might have remedied the injury to amenity. The Inspector however concluded that it could not be an obvious alternative for the purpose of the present notice, which had been issued for the sole purpose of remedying the breach of planning control, because the prior consent had already lapsed by the time of his decision.
>
> 36. In my judgment the Inspector overlooked an obvious alternative that could have remedied the breach of planning control that was the object of the notice – namely the possibility of varying the [notice], as requested by the appellant under ground (f), and at the same time granting retrospective planning consent under section 177, which provides a power to grant consent in respect of part of the matters that were the subject of the notice (namely that part of the building which could remain standing in accordance with the prior consent had it not lapsed). The Appellant was, at the time, deemed also to have made a planning application under ground (a). For the purposes of that application, and treating the Appellant's submissions as a whole in accordance with the approach in *Moore*, it was in my judgment incumbent on the Inspector at least to consider whether to exercise his power to vary the notice and grant consent in accordance with the proposal made under ground (f). Having concluded that he lacked the power to vary the order under section 176 standing alone, recourse to section 177(1) and section 174(2)(a) was the obvious alternative course which could have overcome the planning

> difficulties, at less cost and disruption than total demolition. In failing to address his mind to this possibility, the Inspector in my judgment erred in law."

17. The deputy judge therefore allowed the appeal and remitted the matter to the inspector for reconsideration.

The case for the Secretary of State

18. On behalf of the Secretary of State, Mr Whale advanced two broad lines of argument: first, that given the way Mr Ahmed's appeal was pursued the inspector did not have the power to grant planning permission for the 2005 scheme; and secondly, that even if the inspector did have that power, he did not err in law in failing to consider the possibility.

19. Mr Whale's first line of argument included the following points:

(1) The enforcement notice was found by the inspector to be for the purpose of remedying the breach of planning control (section 173(4)(a) of the Act), not for the purpose of remedying any injury to amenity caused by the breach (section 173(4)(b)). But Mr Ahmed's case under ground (f) was that the steps required by the notice exceeded what was necessary to *remedy any injury to amenity*, not that the steps required exceeded what was necessary to *remedy the breach*. Thus his case was based on a fundamental error as to the purpose of the notice, and the deputy judge was wrong to state that Mr Ahmed "did clearly and expressly advance the submission under the section 174(2)(f) ground that restoration of the building to conform to the 2005 consent was all that was required to remedy the breach of planning control" (para 8).

(2) The power under section 177(1) to grant planning permission in respect of matters stated in the enforcement notice as constituting a breach of planning control "does not go with" ground (f) but with ground (a).

(3) The decision in *Secretary of State for the Environment, Transport and the Regions v Wyatt Brothers (Oxford) Ltd* [2001] EWCA Civ 1560, [2002] PLCR 18 ("*Wyatt*") is fatal to Mr Ahmed's case. First, the court held that where all the steps required by an enforcement notice are for the purpose of remedying a breach of planning control, it is not permissible, in the absence of an appeal under ground (a), to consider general planning considerations under ground (f): Mr Whale submitted that the same conclusion should be reached even where there is an appeal under ground (a). Secondly, the court held that the power in section 176(1)(b) to vary the terms of an enforcement notice cannot properly be used to attack the substance of an enforcement notice, so that, for example, a notice which requires land to be returned to its condition before the breach cannot, by reliance on section 176(1)(b), be turned into a notice which requires something less. The court added that if the recipient of the notice wishes to achieve that result he can do so by appealing on ground (a) and pursuing the deemed application for planning permission under section 177. Mr Ahmed did that in the present case but his ground (a) appeal failed.

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

20. The alternative argument, that even if the inspector had power to grant permission for the 2005 scheme he did not err in law in failing to consider that possibility, proceeded as follows. Mr Ahmed did not apply for permission for the 2005 scheme under ground (a), nor did he suggest that any planning conditions be attached to permission for the 2005 scheme or offer a section 106 unilateral obligation calculated by reference to the scheme. The 2005 scheme is fundamentally different from the development as built, and there was no consultation in relation to the 2005 scheme as part of the enforcement notice appeal: such consultation could, for example, have raised individual concerns or have drawn attention to any relevant change in planning policies. Mr Ahmed did not argue under ground (f) that modification of the development as built to bring it into line with the 2005 scheme would remedy the breach of planning control, even though that was the purpose of the enforcement notice. The power to vary a notice can be exercised only if the inspector is satisfied that the variation will not cause injustice both to the appellant and to the local planning authority, but Mr Ahmed's appeal statement was silent on the issue of injustice. Mr Ahmed had opted for the written representations procedure and the inspector was entitled under the Procedure Regulations to proceed to a decision on the appeal taking into account only such written representations as were submitted within the relevant time limits. The Procedure Regulations provide no support for a duty to consider obvious alternatives to those advanced. *Tapecrown* and *Moore* are to be approached with caution.

Discussion

21. I think it helpful to start at the point where Mr Whale's submissions ended, by consideration of the authorities directly relevant to the basis on which the deputy judge found in Mr Ahmed's favour.

22. In *Taylor & Sons (Farms) v Secretary of State for the Environment, Transport and the Regions* [2001] EWCA Civ 1254, [2002] PLCR 11, it was said that appellants should contemplate the possibility that their primary contentions might fail, and if there was a fall-back position on which they intended to rely they should make this clear in their submissions. It was not reasonable to come to court and ask for the case to be remitted to the inspector so that he or she might ask for further submissions which could and should have been made in the first place if the landowner wished to advance them.

23. *Taylor* was considered in *Tapecrown*. Carnwath LJ, with whom the other members of the court agreed, observed at para 33 of his judgment that 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. The inspector's primary task, however, is to consider the proposals that have been put before him, and although he is free to suggest

alternatives it is not his duty to search around for solutions. Carnwath LJ came back to this later in his judgment:

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

24. The judgment of the court in *Moore* was given by Sullivan LJ. He referred to *Taylor* and *Tapecrown* as establishing the proposition that an appellant under ground (f) should state his "fall-back" position because the inspector's primary duty is to consider the proposals which have been put before him, and he is not under any duty to search around for solutions. He continued:

> "40. We readily accept that it is not the duty of an Inspector to make an appellant's case for him (see [46] of *Tapecrown* per Carnwath LJ, as he then was), but in the present case the appellant had made her case, albeit that she made it under ground (b) rather than ground (f), that the alleged use in breach of planning control, which the notice required her to cease, was too wide. As Carnwath LJ observed in *Tapecrown* 'the enforcement procedure is intended to be remedial rather than punitive' ([46]). We accept [counsel's] submission that the mere fact that this issue was raised under ground (b) rather than ground (f) is not fatal to this ground of appeal. If there was an 'obvious alternative which would overcome the planning difficulties, at less cost and disruption than total [cessation]' the inspector should have considered it: *Tapecrown*."

The court in that case held on the particular facts that there was no "obvious alternative" on the material before the inspector.

25. Whilst Carnwath LJ's observations in *Tapecrown* were *obiter*, as Mr Whale emphasised in his submissions, the same cannot in my view be said for para 40 of the court's judgment in *Moore*. I note too that in *Tapecrown* the point was expressed in terms of discretion (if there appears to the inspector to be an obvious alternative, he should feel free to consider it), whereas in *Moore* it was expressed in terms of duty (if there is an obvious alternative, the inspector should consider it). In my judgment, the deputy judge was correct to direct himself in accordance with *Moore*. He was also correct that the principle in *Moore* is not limited to consideration under ground (f) of a

point raised under another ground but is equally capable of applying to consideration under ground (a) of a point raised under ground (f).

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

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

28. The decision in *Wyatt* does not provide the Secretary of State with the support that Mr Whale sought to extract from it. The enforcement notices in that case required the restoration of land to its condition before the breach of planning control took place. The statutory purposes for which the notices were issued were those specified in section 173(4)(a), namely remedying the breach by various means, although the reasons for issuing the notices included general planning and amenity considerations. There was no appeal under ground (a). The first issue before the Court of Appeal concerned the inspector's refusal to consider evidence or argument under ground (f), by reference to general planning considerations, to the effect that the steps required by the notices exceeded what was necessary to remedy any injury to amenity caused by any breach of planning control. The judge at first instance had held that "[an] appeal on the ground of exceeding what is necessary to remedy injury to amenity is

available, in the absence of a deemed planning application, only if the steps required by the notice are solely for the purpose of removing or alleviating injury to amenity which has been caused by the development". Kennedy LJ, with whom the other members of the court agreed, criticised the use of the word "solely" as rendering the proposition too restrictive but agreed with the judge's conclusion that the inspector had been right. I do not see how any of this helps the Secretary of State in the present case, for the very reason that in this case, by contrast with *Wyatt*, there *was* an appeal under ground (a); and it is not contended that the result sought by Mr Ahmed could have been achieved under ground (f) alone but that the representations made by him under ground (f) ought to have caused the inspector to consider the obvious alternative of granting permission for the 2005 scheme under ground (a) even though the actual application for permission under ground (a) related to the development as built. What was said on the first issue in *Wyatt* is therefore simply not in point.

29. For similar reasons, I see no force in Mr Whale's argument that Mr Ahmed's submissions under ground (f) were based on a fundamental error as to the statutory purpose of the notice. It may be that, as the inspector found, the notice was issued for the purpose of remedying the breach, not for the purpose of remedying any injury to amenity caused by the breach, even though the reasons in the notice included injury to amenity (as they did in *Wyatt*). On that basis, Mr Ahmed's representations under ground (f) may have been directed at the wrong target in so far as they argued that the steps required by the notice exceeded what was necessary to remedy any injury to amenity. The essential point he was making, however, was that all that was needed to make the development acceptable in planning terms was for it to be modified to comply with the scheme approved in 2005. It was this that ought to have led the inspector to consider the grant of planning permission under ground (a) for the 2005 scheme, with a consequential variation under ground (f) in respect of the steps required to be taken to remedy the breach of planning control.

30. The reference to a consequential variation under ground (f) brings me to the second issue in *Wyatt*, which concerned the power under section 176(1)(b) to vary the terms of an enforcement notice. The question was whether the inspector took too narrow a view of his power to vary the terms of the enforcement notices under that provision by refusing to have regard to general planning considerations in relation to whether the land owner should be required to take the steps specified in the notices. On that issue the Court of Appeal accepted the submissions of counsel for the Secretary of State which were summarised as follows in the judgment of Kennedy LJ:

> "31. … Ever since 1947 it has been possible to vary an enforcement notice to give effect to a decision in favour of an appellant in relation to one of the statutory grounds of appeal …. That power is now to be found in section 176(2A) of the 1990 Act which provides:
>
> > 'The Secretary of State shall give any directions necessary to give effect to his determination on the appeal.'
>
> 32. Quite separate from the power to vary a notice to give effect to a decision on appeal there has, for about 40 years, been a power vested in the Secretary of State to amend an enforcement notice, as [counsel] put it 'to prevent it from

> failing on a technicality because of an error in the formulation of the notice as served …. It is this latter power which, [counsel] submits, is now to be found in section 176(1) of the 1990 Act. It is a wide power of correction, a generously expressed slip rule, it is not a power which can properly be used to attack the substance of an enforcement notice. So, for example, a notice which requires the recipient to return the land to its condition before the breach cannot, by reliance on section 176(1)(b), be turned into a notice which requires something less. If the recipient of the notice wishes to achieve that result he can do so by appealing on the grounds set out in section 174(2)(a) and pursuing the deemed application for planning permission under section 177 ….”

Kennedy LJ concluded at para 34 that counsel was right for the reasons she gave. He said that section 176(1)(b) does not stand alone but is one of a group of sections which set out an appellate structure; and if that structure is not to be undermined, “section 176(1)(b) does have to be read in such a way as not to afford a remedy obtainable by pursuing an appeal under ground (a)”.

31. In my judgment, that aspect of the decision in *Wyatt* takes the Secretary of State nowhere in the present case. The essential point of distinction is the same as in relation to the first aspect of the decision: in this case there *was* an appeal under ground (a), and it is said that the inspector ought to have considered the obvious alternative of granting permission for the 2005 scheme under ground (a) even though the actual application for permission under ground (a) related to the development as built. If the inspector had granted permission for the 2005 scheme under ground (a), it would have been open to him to vary the enforcement notice to give effect to that decision. What was said in *Wyatt* about the power to vary a notice to give effect to a decision on appeal provides clear support for that view. The submission accepted in *Wyatt* suggests that the relevant power would have been the section 176(1A) power to give any directions necessary to give effect to the determination on the appeal, rather than the section 176(1)(b) to vary the terms of the enforcement notice. I am a little puzzled by that, since section 176(1)(b) would appear to be the more natural provision to apply in such a situation. But nothing turns on that question. The important point is that there is a power to vary the notice in these circumstances; and what was said in *Wyatt* about the limits on the exercise of the power in the absence of a ground (a) appeal is again not in point.

32. Mr Whale’s reliance on *Richmond upon Thames Borough Council v Secretary of State for the Environment* is equally misplaced. In that case the enforcement notices required the cessation of the use of land for parking motor coaches. On appeal the Secretary of State granted permission under the predecessor of ground (a) for parking motor vehicles *in general*, i.e. for a category of vehicles going wider than the subject of the enforcement notices. The court held that the grant of permission could not go beyond the terms of the notices. That reasoning, however, has no impact on the present case. I have already made clear that there would have been power to grant permission for the 2005 scheme only if, within the terms of section 177(1), it was judged to be “part” of the matters stated in the enforcement notice as constituting a breach of planning control. The question of a grant of permission going beyond the

terms of the notice does not arise. The application of the *Richmond upon Thames* decision in *Runnymede Borough Council v Secretary of State for the Environment, Transport and the Regions* likewise takes matters no further. Nor, as it seems to me, does the decision in *Ioannou v Secretary of State for Communities and Local Government* [2013] EWHC 3945 (Admin) to which Mr Whale also drew our attention.

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

34. The final question to be considered is whether the inspector erred in law in failing to consider the possibility. In my judgment he did fall into error, in the manner found by the deputy judge. The inspector's reasoning under ground (f) was to the effect that he did not have the power to produce a result whereby Mr Ahmed was required to fall back on the 2005 scheme rather than removing the building as a whole. But as explained above, that power potentially existed through the route of granting planning permission for the 2005 scheme under ground (a). That was a route that he failed to consider. Mr Ahmed had not raised it under ground (a) but Mr Ahmed's submissions under ground (f), albeit addressed in terms to remedying the injury to amenity rather than remedying the breach of planning control, should have alerted the inspector to the possibility as an obvious alternative. Mr Whale said that it was not "an obvious alternative which would overcome the planning difficulties, at less cost and disruption than total removal" (the words of Carnwath LJ in *Tapecrown*). It would have been a matter for the inspector, however, to assess whether the 2005 scheme would overcome the planning difficulties at less cost and disruption than total removal. He made no such assessment because he did not apply his mind to the question. Similarly, it would have been for the inspector to decide whether there had been any material change to the planning considerations that had led to the approval of the 2005 scheme on the conditions then imposed, though the enforcement notice itself did not suggest any such change but relied on the differences between the 2005 scheme and the development as built; and it would have been for him to decide whether a variation of the enforcement notice consequent upon the grant of permission for the 2005 scheme would cause any "injustice" to the local planning authority within section 176(1), though again none had been suggested. The fact that there would have been no fresh consultation on the 2005 scheme does not seem to me to be a fatal objection in the circumstances.

35. The use of the written representations procedure, as chosen by Mr Ahmed, may have limited the inspector's flexibility but did not prevent his giving proper consideration to the possibility of granting permission for the 2005 scheme as an obvious alternative. If he had needed further information he could have requested it, as is implicit in regulation 7(8) of the Procedure Regulations. More generally, the written representations procedure was taken expressly into account in *Tapecrown* and *Moore* and Mr Whale did not point to anything in the Procedure Regulations that is inconsistent with the principles laid down in those cases.

Conclusion on the main appeal

36. In the result, I agree with the deputy judge's finding that the inspector erred in law and I would dismiss the Secretary of State's appeal.

The cross-appeal on costs

37. The deputy judge made no order as to the costs of Mr Ahmed's section 289 appeal to the High Court. He did so without receiving submissions from the parties, between whom it had in fact been agreed that if Mr Ahmed won the appeal the Secretary of State should pay his costs limited to £22,700. In consequence it is common ground between the parties in this court that if the Secretary of State's main appeal is dismissed Mr Ahmed should be given permission to appeal on his cross-appeal and that the cross-appeal should be allowed to the extent of setting aside the deputy judge's costs order and substituting an order that the Secretary of State pay Mr Ahmed's costs in what is the agreed sum of £22,700 in respect of the proceedings in the High Court. Effect should plainly be given to the parties' agreed position on that issue.

38. The costs of the appeal and cross-appeal in this court, together with any other consequential issues, will be a matter for written submissions in the event that the parties are unable to reach agreement on them.

Lord Justice Underhill :

39. I agree

Lord Justice Floyd :

40. I also agree.

41.