Neutral Citation Number: [2020] EWHC 1905 (Admin)

Case No: CO/2615/2019

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

Royal Courts of Justice
Strand, London, WC2A 2

Date: 17 July 2020

Before :

HIS HONOUR JUDGE JARMAN QC

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Between :

BEN KPOGHO	**Claimant**
- and -	
LONDON BOROUGH OF BRENT	**Defendant**

- -
- -

The claimant appeared in person
Dr Ashley Bowes (instructed by **Prospect Law Ltd**) for the **defendant**

Hearing dates: 9 July 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and released to Bailii. The date and time for hand-down is deemed to be 10.30 am Friday 17 July 2020.

HH JUDGE JARMAN QC :

1. The claimant, Ben Kpogho, in a claim filed on 2 July 2019, challenges the decision of the defendant (the council) to refuse to extend the time period for compliance with an enforcement notice (the notice) which the council served on him by letter dated 28 November 2018. The notice relates to a detached dwelling which the claimant and his wife own at 305 Salmon Street London NW9 8YA (the property). The alleged breach of planning control was set out in schedule 2 of the notice as follows:

> "Without planning permission, the erection of a two-storey side extension, two storey rear extension, single storey rear extension, rear dormer roof extension, four flank rooflights, a new roof and alterations to the front, side and rear of the property."

2. The notice, which required the claimant to demolish the unauthorised extensions to his property, came into effect on 7 January 2019 and the date for compliance was given in the notice as six months from that date. The claimant had the right to appeal the notice, including the time for compliance, providing the appeal was received by that date, as was made clear on the face of the notice. He did not exercise that right.

3. On 25 June 2019, with about 12 days of the time to comply remaining, the claimant in an email requested the council to grant an extension of time. The email set out very briefly the reason for the request which was to facilitate the lodging of an appeal against the council's refusal on 21 June 2019 of the claimant's application for retrospective planning permission for extensions to the property, which I refer to in more detail below. That request was refused in an email to him the next day from the council's planning officer. That email also dealt with the refusal very briefly, merely saying that the time set out for compliance in the notice still stood.

4. This challenge is brought with permission of Upper Tribunal Judge Grubb, sitting as a judge of the High Court, which was granted after an oral hearing by order 19 November 2019. Permission had been refused by Swift J on consideration of the papers. Judge Grubb gave permission on only two of the grounds upon which the claimant sought to rely. The permitted grounds were referred to in the order as follows:

> "The Defendant arguably erred in law by failing to have regard to a relevant consideration, namely the relevance of exercising its discretion under s.70C Town and Country Planning Act 1990 [the 1990 Act] to entertain two retrospective planning applications, and/or came to an irrational conclusion on the facts when taking the impugned decision on 26 June 2019."

5. There was no appeal or application in respect of the refusal upon the other grounds. The order also gave permission to the claimant to file an amended statement of grounds to reflect the grounds on which permission had been given and the amendment was filed on 4 December 2019.

6. The background is that the claimant and his wife purchased the property in 2016. He applied for and obtained on 30 October 2017 planning permission for extensions to

the property, but the extensions as then built differed to those permitted. The claimant submitted two applications for retrospective planning permission in respect of the extensions to the property dated 7 September 2018 and 15 April 2019, each of which was refused by the council on 1 March 2019 and on 21 June 2019, respectively. The development referred to in the latter application was a double storey side extension, double storey rear extension, roof alterations with a rear dormer window, four roof lights and front porch. The single storey rear extension referred to in the notice did not form part of that application. The claimant appealed the latter refusal under section 78 of the 1990 Act.

7. In a decision letter dated 12 February 2020 an inspector appointed by the Secretary of State for Housing Communities and Local Government allowed the claimant's appeal against the refusal of retrospective planning permission, subject to amended plans which showed the rear single-storey extension was to be demolished. The inspector was informed of the notice but was not given a copy of it. He referred to the single storey rear extension in paragraphs 11 and 12 of his decision letter as follows:

> "I would not describe the manner in which the single storey flat roofed rear extension would meet that with a pitched roof as being complex. There would be a slightly odd relationship, but this would not cause harm that might justify refusing permission.
>
> Taken individually or cumulatively and subject to a condition requiring the use of matching materials, the proposed extensions and alterations would not appear discordant in the street scene, nor would they have an adverse effect on the host dwelling. They would, therefore, accord with the terms of DMP Policy DMP1 and the guidance in the SPD and National Planning Policy Framework (the Framework)."

8. The decision was that the appeal was allowed, and planning permission was granted for:

> "…double storey side, double storey rear, roof alterations with rear dormer and 4 roof lights and front porch…in accordance with the terms of the application…and the plans submitted with it, subject to the following conditions: 1) the development hereby permitted shall be carried out in accordance with approved plans..02A…save as with regards to compliance with any condition in this decision."

9. Plan 02A shows that the single storey extension was to be demolished. If paragraph 11 of the decision letter suggests that the inspector, not having seen a copy of the notice, misunderstood the position, nevertheless the permission granted by that decision letter clearly provides that the development thereby permitted was to be carried out in accordance with the approved plans including plan 02A. Dr Bowes on behalf of the council accepts that the vast majority of the works required to be demolished by the notice now constitute permitted development in respect of which the notice is now ineffective. However, he submits that the notice remains in effect in relation to the rear single storey extension. If that is right, as it must be having regard

to the clear definition of the development permitted by the decision and the fact that plan 02A shows this extension as removed, then the effect of the notice is since the appeal decision far less significant than when the claim was brought.

10. Of course, the lawfulness of the refusal to extend time for compliance with the notice must be judged in the circumstances which were or should have been known at the time, and the outcome of the appeal could not then be certain. Mr Kpogho submits that the works set out in the notice were so extensive as to render the property uninhabitable during works to comply with it, and to demolish and refurbish (or rebuild in the event of a successful appeal) would be very expensive. He submits that the effect of that on himself and the other occupants needed to be taken into account in the decision whether to extend time for compliance.

11. He refers to guidance entitled "Enforcement and Post Permission Matters" issued by the Ministry of Housing Communities and Local Government dated 6 April 2014 and updated on 22 July 2019. In the overview to the guidance, this is said:

> "The provisions of the European Convention on Human Rights such as Article 1 of the First Protocol, Article 8 and Article 14 are relevant when considering enforcement action. There is a clear public interest in enforcing planning law and planning regulation in a proportionate way. In deciding whether enforcement action is taken, local planning authorities should, where relevant, have regard to the potential impact on the health, housing needs and welfare of those affected by the proposed action, and those who are affected by a breach of planning control."

12. It is to be noted, however, that this challenge is not to the decision whether to take enforcement action. There was no appeal to the notice or challenge to that decision. Rather Mr Kpogho chose (albeit on advice he says) to make two further planning applications and to seek an extension of the time for compliance set out in the notice for the express and simple reason to facilitate an appeal from the latest refusal.

13. The relevant statutory scheme for enforcement notices, extensions of time for compliance, and the grant of planning permission in respect of development referred to in such notices is dealt with in the 1990 Act as amended, as follows.

14. Section 70C was inserted by the Localism Act 2011 and confers power to decline to determine retrospective applications for planning permission as follows:

> "(1) A local planning authority may decline to determine an application for planning permission or permission in principle 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 or permission in principle, a "pre-existing enforcement notice" is an enforcement notice issued before the application was received by the local planning authority."

15. Section 173A was inserted by the Planning and Compensation Act 1991 and deals with the variation and withdrawal of enforcement notices as follows:

> "(1) The local planning authority may—
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> (a) withdraw an enforcement notice issued by them; or
>
> (b) waive or relax any requirement of such a notice and, in particular, may extend any period specified in accordance with section 173(9).
>
> (2) The powers conferred by subsection (1) may be exercised whether or not the notice has taken effect.
>
> (3) The local planning authority shall, immediately after exercising the powers conferred by subsection (1), give notice of the exercise to every person who has been served with a copy of the enforcement notice or would, if the notice were re-issued, be served with a copy of it.
>
> (4) The withdrawal of an enforcement notice does not affect the power of the local planning authority to issue a further enforcement notice."

16. Section 174(2) deals with the grounds on which appeals against enforcement notices may be brought and includes at (2)(a):

> "that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted or, as the case may be, the condition or limitation concerned ought to be discharged;"

17. Another relevant ground is set out in (2)(g), namely that any relevant period specified in the notice in accordance with section 173(9), that is the time specified in the notice for compliance, falls short of what should reasonably be allowed.

18. However, subsection (2A) provides that an appeal may not be brought on that ground if the land to which the 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."

19. The notice in this case was issued after the first application for retrospective planning permission but before the second. However, the first application had not been determined within eight weeks and so could have been appealed in early November before the notice was issued, but it was not.

20. Subsection (2B) provides that 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."

21. Accordingly, an appeal may not be brought under section 174(2)(a) if an application for permission for development related to the notice and the time period for determining that decision has not yet expired, so an enforcement notice may come into effect before the planning merits of the unauthorised development are tested on appeal.

22. Where such an appeal is brought, section 175(4) provides that the enforcement notice is of no effect pending the outcome of the appeal. This provision was set out in the notice.

23. These relatively recent amendments to the statutory scheme have been considered by the courts on several occasions. As Mr Kpogho pointed out, in these cases the challenge was to a decision of a local planning authority to exercise its discretion under section 70C not to determine planning applications, and none involved a case such as the present where the discretion was not exercised under that section.

24. Cranston J in *Wingrove v Stratford on Avon District* Council [2015] EWHC 287 (Admin) examined the purpose of the legislative changes. At paragraphs 20 and 21 he said this:

> "Apart from section 70C, there are parallel tracks if an enforcement notice has been issued. The enforcement notice can be appealed, the appeal covering legality and planning merits: see section 174 of the 1990 Act. The effect of the appeal is to stop the enforcement process in its tracks (section 175(4)), so there can be incentive to appeal. There can also be an application for retrospective planning permission for the unauthorised development, which can also be appealed if refused.
>
> In an illuminating article on the history of the relevant legal provisions, Professor Michael Purdue suggests that although an application for retrospective planning permission might appear unnecessary when the enforcement notice can be appealed, it might still be made for tactical reasons: [2012] JPL 795, at 795. Section 70C, he states, was directed at the problem of delay under the existing provisions. Of the situation where an application for retrospective planning permission is made where enforcement action has already been taken, Professor Purdue writes:

> "The purpose must be to prevent …retrospective applications being made just to delay enforcement. It seems that if the service of an enforcement notice leads to a retrospective application being made, this can cause delay. This is because if there is an appeal against the enforcement notice (which is of course very likely) and the planning application is refused, the two appeals will normally be conjoined… However, the Government spokesman accepted when discussing this new power in s.123 [i.e. 70C], that it should not be used in the case of a genuine mistake when it had not been realised that the development was in breach of planning control or, as the Secretary of State for Communities and Local Government put it, is there to: "protect the gormless but deter the greedy"
>
> Professor Purdue's analysis seems correct since, as Ms. Paul observed in her written grounds, Parliament amended section 174 of the 1990 Act at the same time to provide that, if a retrospective planning application has been made, but an enforcement notice has been issued before the time for making a decision has expired, there cannot be an appeal against the enforcement notice under section 174(2)(a). In other words, the applicant cannot have multiple 'bites at the cherry.'"

25. At paragraph 30 Cranston J observed that section 70C conferred a wide discretionary power and continued:

> "The legislative history of section 70C demonstrates that Parliament's intention was to provide a tool to local planning authorities to prevent retrospective planning applications being used to delay enforcement action being taken against a development. It seems to me that there is a legislative steer in favour of exercising the discretion, especially since an enforcement notice can be appealed and the planning merits thereby canvassed. Since delay is the bugbear against which the section is directed, a claimant's actual motives to use a retrospective planning application to delay matters is clearly a consideration in favour of a decision to invoke section 70C."

26. Cranston J in paragraph 31 gave examples of factors pointing against the use of the discretion conferred by section 70C which if ignored might render the exercise of discretion open to a public law challenge, namely:

> "Examples might be where for legitimate reasons there has been a failure to appeal an enforcement notice and the development is plainly compliant with planning provisions (for example, they have been patently misapplied or have changed) or the development can readily be made acceptable by the correct planning conditions. However, section 70C is far from being a gateway for applicants to canvass the full planning

> merits: it is a discretion to decline to determine those merits, not a discretion to determine them."

27. In *O'Brien v South Cambridgeshire District Council* [2016] EWHC 36 (Admin) Lewis J also considered the purpose of these changes and concluded at paragraph 72:

> "The purpose underlying the legislative provisions is that an applicant for permission for an unauthorised development cannot insist on more than one determination of the underlying planning merits of that development."

28. Ms Nathalie Lieven QC, sitting as a judge of the High Court in *R (Banghard) v Bedford Borough Council* [2017] EWHC 2391 (Admin), also considered a situation where the local planning authority declined to determine an application under section 70C because to grant it would involve granting permission for the matters specified in the enforcement notice. The judge recognised that there may be cases where the opportunity to have the merits of a proposal considered was not taken, or where the application and the matters enforced against were not identical, yet where the power in section 70C would still be available. At paragraph 30 she said this:

> "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."

29. Upper Tribunal Judge Martin Rodger QC sitting as a judge of the High Court in *Chesterton Commercial (Bucks Ltd) -v- Wokingham District Council (2018) EWHC 1795 (Admin),* after reviewing those authorities said at paragraph 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. ”

30. In the present case it should be remembered that the challenge is not to the exercise by a local planning authority of the power under section 70C, but to the decision of the council not to extend the time for compliance in the notice in circumstances where its power under that section had not been exercised and the applications for retrospective planning permission had been determined and refused.

31. It will be apparent that in the scheme set out above there is no express statutory requirement of the decision-maker to take particular matters into account. Such a situation has been the subject of judicial comment in two recent authorities. The first is *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire Council* [2020] PTSR 221. Lord Carnwath at [31]-[32] said:

> “Short of irrationality, the question is one of statutory construction. It is necessary to show that the matter was one which the statute expressly or impliedly (because ‘obviously material’) requires to be taken into account ‘as a matter of legal obligation’.”

32. The second is *R (Client Earth) v Secretary of State for Business, Energy & Industrial Strategy* [2020] EWHC 1303 (Admin). Holgate J said at [99]:

> “It is insufficient for a claimant simply to say that the decision-maker did not take into account a legally relevant consideration. A legally relevant consideration is only something that is not irrelevant or immaterial, and therefore something which the decision-maker is empowered or entitled to take into account. But a decision-maker does not fail to take a relevant consideration into account unless he was under an obligation to do so. Accordingly, for this type of allegation it is necessary for a claimant to show that the decision-maker was expressly or impliedly required by the legislation (or by a policy which had to be applied) to take the particular consideration into account, or whether on the facts of the case, the matter was so “obviously material”, that it was irrational not to have taken it into account.”

33. Even where there is a legal obligation to take a certain matter into account, the question of what weight to attach to it is for the decision-maker to decide. In *Tesco Stores Limited v Secretary of State for the Environment* [1995] 1 WLR 759 Lord Hoffmann at page 780 said:

> “This distinction between whether something is a material consideration and the weight which it should be given is only one aspect of a fundamental principle of British planning law, namely that the courts are concerned only with the legality of the decision-making process and not with the merits of the decision. If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment

> are within the exclusive province of the local planning authority or the Secretary of State."

34. In the present case, Mr Kpogho submits that the relevant consideration which the council failed to take account of when refusing to extend time under section 173A was its decision not to exercise its powers under section 70C. The council submits that it was under no statutory obligation to take this consideration into account and it was not so obviously material to the exercise in hand, but in any event that this consideration was as a matter of fact taken into account.

35. The filed evidence of the council is that the decision to refuse to extend the time for compliance in the notice was taken by the council's planning enforcement manager, Tim Rolt. In his witness statement dated 20 December 2019, Mr Rolt says that in coming to that decision he took the following matters into account:

> "a) That the matter had caused environmental harm, had been the subject of Public Complaint, and the need to uphold public confidence in the planning system.
>
> b) That the Council had not used its powers to decline to determine either of the applications under section 70C of the Town and Country Planning Act1990.
>
> c) That Mr Kpogho had not appealed the enforcement notice or the previous application.
>
> d) The general presumption that it is in the Public Interest that enforcement notices are complied with on time –particularly as the compliance period is a ground of appeal and section 285 of the Town and Country Planning Act prohibits a challenge to the notice on an appeal ground."

36. There was no challenge to that evidence and no request to cross-examine Mr Rolt. Mr Kpogho pointed out that no detail was given as to what sort of consideration was given to these factors. As indicated in the *Tesco* case, however, the weight to be attached to these factors is a matter of planning judgment. However, in the present case, so far as the power under section 70C was concerned, there was not a great deal to consider. The council had not exercised its power under that section in respect of either of the applications for retrospective planning permission but had determined both of them by refusing them.

37. I am satisfied therefore that consideration was given to the relevance of the exercise of discretion (or not to exercise it as in this case) under section 70C. I turn now to the second ground, namely whether the decision not to extend time for compliance under the notice was irrational.

38. That is a high threshold for Mr Kpogho to reach. He submits that the council acted irrationally by failing to extend the time for compliance with the notice to align with the decision in an appeal against his second retrospective application. The council submits that there is no entitlement to having the merits of an application for retrospective planning permission considered on appeal before the time for

compliance with an enforcement notice expires. That is shown by section 174(2A) which restricts the ability to appeal under s.174(2)(a) where there is an undetermined application for planning permission related to the development in an enforcement notice. It follows that the notice will come into effect before a planning appeal, and it was not irrational to refuse to extend time for compliance.

39. Any appeal must be brought before the enforcement notice comes into effect. Mr Kpogho submits that he has legitimate good reasons for not appealing the notice as his architect told him he did not need to. The notice says on its face that it will come into effect unless appealed before 7 January 2019 and if not complied with by the deadline will lead to criminal liability, and was served directly on the claimant.

40. With the benefit of hindsight, there is force in Mr Kpogho's submission that for him to incur the cost and inconvenience of demolishing the extensions and other features referred to in his second application for retrospective planning permission, only to incur further cost and inconvenience in rebuilding them if in the event the appeal was successful, appears to be non-sensical. That possibility could not have been discounted by Mr Rolt when making the decision under challenge.

41. However, in my judgment the council was entitled to take a view on the planning merits of any appeal. The council was entitled to take into account that there had been no appeal against the notice and the council had refused both applications for retrospective planning permission, and the other matters referred to in Mr Rolt's statement. The fact that in the event the inspector took a different view on the planning merits does not detract from these matters.

42. To hold that it was irrational of the council to refuse an extension where there had been no appeal in respect of the notice and where two applications for retrospective planning permission had been refused comes close to frustrating the aim of reducing delay and not allowing two bites of the cherry. In my judgment the council's refusal of the extension was reasoned and reasonable. Accordingly, the irrationality ground also fails.

43. Insofar as Mr Kpogho sought in his skeleton argument to resurrect other grounds upon which permission had been refused on paper and after an oral hearing, and having regard to the overriding objective it is not just or proportionate to allow him to do so. Insofar as he raised in his skeleton argument a new point on legitimate expectation then the same applies for similar reasons. Moreover, he does not identify what representation he alleges there was on the part of the council that the time for compliance with the notice would be extended.

44. Accordingly, the claim fails. I will hand down judgment remotely. Any consequential matters which cannot be agreed should be dealt with in written submissions to be filed and served within 14 days of handing down and will be determined on the basis of those submissions.