Neutral Citation Number: [2018] EWHC 1795 (Admin)

Case No: CO/5156/2017

IN THE HIGH COURT OF JUSTICE

**QUEEN'S BENCH DIVISION**

**PLANNING COURT**

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 13 July 2018

**Before**:

UPPER TRIBUNAL JUDGE MARTIN RODGER QC,

(Sitting as a Judge of the High Court)

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**Between :**

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| --- | --- | --- |
|  | **CHESTERTON COMMERCIAL (BUCKS) LIMITED** | Claimant |
|  | **- and -** |  |
|  | **WOKINGHAM DISTRICT COUNCIL** | Defendant |
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**Sasha White QC** and **Anjoli Foster** (instructed by **Richard Max & Co LLP**) for the **Claimant**

**Saira Kabir Sheikh QC** (instructed by Select Business Services: Legal Solutions) for the **Defendant**

Hearing date: 12 June 2018

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**Introduction**

1. Section 70C(1), Town and Country Planning Act 1990 provides that:

“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.”

A “pre-existing enforcement notice” is one issued before the related application for planning permission was received by the local planning authority (section 70C(2)).

1. The issues in this application for judicial review are whether the discretion in section 70C is engaged on the facts and, if it is, whether the defendant‘s refusal to consider an application for planning permission made by the claimant was a lawful exercise of that discretion.
2. Permission to bring the application was granted on the papers by Mr David Elvin QC on 20 December 2017.
3. The claimant is a company, Chesterton Commercial (Bucks) Ltd. It is represented in the application by Mr Sasha White QC and Miss Anjoli Foster.
4. The claimant is the owner of land and a house on the banks of the River Thames in Henley which I will describe shortly. The land has been the subject of unauthorised development by the claimant, followed by a number of applications for retrospective planning permission, which have been met by refusals and enforcement action. The application for planning permission which is of particular relevance to these proceedings was made on 7 August 2017. As described in the application itself, it was for the creation of a balcony to link a garage and a boathouse at first floor level on the claimant’s land.
5. By a decision made on 27 September 2017 the defendant, Wokingham Borough Council, declined to determine the claimant’s application, relying on section 70C of the 1990 Act. It is that decision which is challenged in this application. The defendant is represented by Ms Saira Kabir Sheikh QC and resists the application.
6. At the commencement of the hearing I gave permission for the claimant to rely on a witness statement of its planning consultant, Mr Neil Boddington, explaining some features of the application of 7 August 2017 and the plans which had accompanied it which had already been commented on in evidence by the defendant’s planning officer, Mr Jason Varley.

**Factual background**

1. I take the facts largely from the claimant’s statement of facts and grounds, supplemented by a decision given on 13 February 2017 by Mr Chris Preston, an inspector appointed by the Secretary of State to consider a number of appeals by the claimant and associates in relation to development on the site.
2. The claimant is the freehold owner of a Grade II listed cottage known as Bird Place Cottage (or sometimes Stonebridge Cottage) and its surrounding gardens and outbuildings which adjoins Henley Bridge, at Henley on Thames in Berkshire. The land is roughly rectangular, directly adjacent to the River Thames on its eastern bank, and is part of the green belt. It is clearly visible from the western bank of the river and from the bridge itself, and occupies a prominent position in the Remenham and Henley Bridge Conservation Area. It immediately adjoins the Henley Royal Regatta building to the north, and lies a few lengths from the Leander Club boathouse.
3. Bird Place Cottage is said to be the claimant’s family home, but as the claimant is a limited company, I assume it is the home of its principal director Mr Grahame Bryant. The Cottage itself is in the centre of the site, with gardens to the south.
4. Along the northern side of the site stands a large building comprising three connected sections. At the western end of this building, fronting directly onto the river, is a large boathouse on two floors, with living accommodation at the upper level. At the eastern end of the building is an attached garage, also on two floors, with office and storage accommodation over. The boathouse and garage are of traditional appearance, fitting to their riverside location, with timber facades and tiled roofs. A third, smaller section completes the range and links the boathouse and the garage. This is a single-storey, flat roofed, storage building, of timber, glass and brick, the roof of which also provides a terrace or viewing platform and an outdoor seating area, and the whole of which is structurally connected to, and links, the boathouse and the garage at both ground and first floor level.
5. Before the construction of the current range by the claimant in 2015-16, a smaller boathouse and a separate detached garage were present in the same general location. These were demolished to make way for the new building. In aggregate volume and floor area, they were substantially smaller than the new building.
6. The claimant’s case is that the boathouse and garage elements of the new building were built in accordance with planning permissions, but it acknowledges that the link building was not. The defendant disputes the first part of that assertion and says that the whole of the new range was built without planning permission.
7. The planning inspector found that there had been three planning permissions for outbuildings on the claimant’s land, which remained extant. Two of these related to the construction of a separate garage with living accommodation above and were granted in 2014. The third related to the demolition of the original boathouse and the construction of a self contained replacement boathouse. The external dimensions of the boathouse and garage elements of the building which the claimant has actually constructed were found by the inspector to be in line with the dimensions of the approved boathouse and garage scheme.
8. Principally because of the presence of the link building, for which no permission has ever been granted, the new building is larger in terms of volume and footprint than the approved garage and boathouse. The link building has a floor area of 33.6 m2 and increased the permitted volume of development represented by the boathouse and the garage by 12.8%. Moreover the completed structure is a single building or range of attached buildings, as opposed to two detached buildings with space in between. The link element projects outwards into the garden and is not set back behind the side elevations of the garage and boathouse.
9. The detached garage and boathouse in their approved form each provided for access to accommodation on the upper floor by means of separate external staircases (one for each building) situated in the space between the two buildings which subsequently came to be occupied by the link building. When the single new building was constructed, access to the upper floors over the garage and boathouse elements was by a single, more prominent, external staircase flanking the building and leading to the terrace or balcony on the flat roof of the linking section, from which doors open into the first floor accommodation at each end of the structure.
10. On 23 May 2016 the claimant applied for retrospective planning permission described as being for “erection of boathouse, garage and store”. It may be that the application was made in response to a threat of enforcement proceedings by the defendant, but in any event, on 22 June 2016, the defendant issued an enforcement notice. On 25 July 2016 it refused the application for retrospective planning permission.
11. The terms of the enforcement notice are important. The breach of planning control alleged was “without planning permission the erection of an outbuilding, brick wall, gates and gate posts (“the Building”) in the approximate position shown” on an attached plan. The plan showed that the “outbuilding” against which the notice was directed was the whole of the new range comprising the boathouse, the garage and the structure linking the two. The brick wall, gate and gatepost also mentioned in the notice had been erected by the claimant at the same time as the Building.
12. A number of reasons were given by the defendant for issuing the notice but only one was upheld by the inspector, namely that the Building was an unsustainable form of development which by virtue of its size, scale and massing was inappropriate in the green belt and had a detrimental impact on openness.
13. The remedial action required by the notice was that the claimant must demolish the Building, excavate the slab and remove all resultant materials from the land within 3 months of 25 August 2016.
14. The notice was one of three enforcement notices served on the claimant on the same day. The others required the removal of an extended wet dock and the removal of two single-storey extensions to Bird Place Cottage itself, which did not conform to permissions granted by the defendant.
15. The claimant’ director, Mr Bryant, appealed against all three enforcement notices and against the refusal of the application for retrospective planning permission for the retention of the Building. The appeals were considered together at a hearing and the Inspector gave his decision on 13 February 2017.
16. In the relevant part of his decision, the inspector pointed out that the appeal against the refusal of planning permission for the Building, and the appeal against the enforcement notice on ground (a) in section 174(2) of the 1990 Act raised the same issues. In considering those issues he found first that the Building represented a substantial and disproportionate increase in the scale of built development at the site and comprised inappropriate development within the Green Belt. The substantial bulk and mass of the structure represented a significant expansion on the site with a consequential loss of openness and significant visual impact. Having drawn attention to the differences between the development as built, and the separate buildings which had been permitted, the inspector then went on:

“58. It is not for me to question the merits of the previous decisions but the extant planning permissions would permit a substantial increase in the scale of buildings at the site and, to my mind, any additional development above that already approved could not be justified, having regard to the effect on the openness of the Green Belt.”

As there were no very special circumstances justifying inappropriate development in the Green Belt, the appeal against the refusal of planning permission for the new Building and the appeal against the enforcement notice under ground (a) were therefore dismissed. Planning permission was also refused on the application deemed to have been made under section 177(5) of the 1990 Act.

1. The inspector then considered the claimant’s appeal under ground (f) in section 174(2) of the 1990 Act, which raised the question whether the remedial steps required by the enforcement notice exceeded what was necessary to remedy any breach of planning control. He noted that permissions for the construction of the boathouse and the garage as separate structures were still extant and capable of being implemented. All relevant conditions had been discharged in relation to those buildings and the parties were agreed that the external dimensions of the boathouse and garage elements of the larger structure were in compliance with the approved details. The inspector was therefore satisfied that the development could be modified without complete demolition to ensure that it complied with the extant permissions. He considered that varying the enforcement notice to permit this modification would cause no injustice to the defendant since the breach would be remedied whether the building was demolished, or altered to accord with the extant planning permissions.
2. To give effect to this conclusion the inspector varied the enforcement notice by providing an alternative to demolition and wholesale removal of the Building, namely that the appellant must:

“Demolish the storeroom that links the garage to the boathouse and modify the outbuilding so as to comply with the terms of the planning permission … granted on 9 October 2015 (relating to the boathouse), including its conditions and limitations, and planning permission … granted on 21 October 2015 (with regard to the garage …) including its conditions and limitations.”

It seems likely that, if the link building is removed, the modifications to the boathouse and garage required to comply with the terms of the planning permissions would comprise installing the two external staircases in the space previously occupied by the link, and other relatively minor adjustments. The inspector also extended the period for compliance with the notice to 6 months to 13 August 2017. Subject to those variations the appeal against the enforcement notice was dismissed and the notice itself was upheld.

1. The claimant did not comply with the enforcement notice relating to the boathouse, garage and link building, nor, incidentally, with the enforcement notices requiring removal of the unauthorised extensions to Bird Place Cottage itself (although it did subsequently obtain retrospective planning permission for the extended wet dock). Instead, on 7 August 2017 the claimant made a further application for planning permission for development described as the “creation of a balcony to link garage and boathouse at first floor level”. It was this application which, on 27 September 2017, the defendant declined to consider, relying on the power conferred by section 70C.
2. The decision letter informing the claimant of the defendant’s refusal to consider the application recited the text of section 70C, and continued:

“The purpose of s70C is to prevent retrospective applications being used to delay enforcement action. In this instance an enforcement notice was issued on 25th June 2016. Whilst your client appealed against the enforcement notice, this was dismissed by the Planning Inspectorate on 13th February 2017 and the enforcement notice upheld. The Council expects full compliance with the enforcement notice and, in light of this, the Council has declined to determine the application as it relates to matters specified in the enforcement notice as constituting a breach of planning control.”

1. The “balcony” linking the boathouse and the garage for which the claimant sought planning permission was described in a design statement which accompanied the application. It was said that a way had been found so “that the existing staircase can be recycled and a small part of the store roof retained to serve as a balcony link between the two buildings at first floor level, retaining some of the existing roof and railings.” It was said that the ground floor element would be “entirely open” and would not create floor space or volume, so there would be no impact on the openness of the Green Belt.

1. In fact, the plans of the proposed balcony show that the ground floor area will not be “entirely open” as suggested in the design statement. Part of the ground floor of the link section is to be retained, that being a lavatory cubicle attached to the rear wall of the boathouse which extends across about a third of the gap between the boathouse and the garage. The existing floor slab is also to be retained. The flat roof is to be reduced to about a third of its former size, and to be shaped to form a walkway or gallery along the rear wall of the boathouse and the rear wall of the garage, with a wider section spanning the gap between the two. A balustrade with glass panelling below is to be relocated around the edges of the flat roof, in the same manner as under the existing arrangement. The current structure is thus to be substantially modified, either by removing it in its entirety before reinstalling certain parts of it, or by removing only those parts which are no longer required.
2. Access to the balcony is to be by means of a single staircase placed against the rear wall of the boathouse, in the gap between the two buildings. For about half of its length the staircase will project beyond the flank wall of the boathouse into the area formerly comprised in the garden of Bird Place Cottage, although it will be screened to some extent by a planter which is already present. Apart from the presence of the lavatory cubicle the area beneath the proposed balcony will be unenclosed at the front and rear. Glass doors along the front of the former link building and a glazing panel forming the flank wall of the projecting section are to be removed, as are about two thirds of the rear wall leaving only the part of the wall enclosing the lavatory (from which an existing window is also to be removed). The net effect will be that the ground floor area between the garage and the boathouse will no longer be occupied by a room or building, but will instead contain the lavatory cubicle and the staircase giving access to the balcony at first floor level.
3. There is some dispute between the parties over the proper interpretation of the drawings which accompanied the application for planning permission for the balcony. In particular there has been debate about the significance of a double line shown on the plan at ground floor level, spanning the gap between the lavatory cubicle and the garage wall, in the location currently occupied by the rear wall of the link section. The evidence of Mr Varley on behalf of the defendant is that, despite the description in the design statement, the defendant understood this to be a solid wall with a window. The defendant also understood the drawing to show a larger surface area for the balcony than the 12.06m2 claimed and measured that area as about 17 m2. The claimant provided an explanation of these features in the witness statement of Mr Boddington, long after the defendant’s decision to refuse consideration of the application. Mr Boddington said that, as to the rear wall, Mr Varley was mistaken and the feature shown by the double line was a low retaining wall which accommodated a change in ground levels, rather than a full height wall, while as to the extent of the balcony, the drawing was mistaken and showed a larger area than had been intended.

**The statutory provisions**

1. The power to decline to determine a retrospective application for planning permission conferred by section 70C of the 1990 Act is of relatively recent origin, having been introduced by section 123(2) of the Localism Act 2011 with effect from 6 April 2012.
2. Section 70C is contained in Part III of the 1990 Act, concerning control over development, and is one of a group of sections dealing with the determination of applications. The power was first considered by Cranston J in Wingrove v Stratford on Avon District Council [2015] EWHC 287 (Admin), where he pointed out (at para. 19) that the new provision had been introduced alongside other amendments relating to appeals against enforcement notices contained in section 174(2A) and (2B) of the 1990 Act. Section 174(2A) and (2B) are found in Part VII of the Act, which contains provisions relating to enforcement. It is a criminal offence for the owner of land to fail to take the steps specified in an enforcement notice, but the making of an appeal against an enforcement notice suspends its effect until the appeal is determined or withdrawn (sections 179 and 175(4) of the 1990 Act). Sections 70C, and 174(2A)-(2B) are both concerned with curbing opportunities for delay in enforcement by abuse of the appeals procedure in circumstances where a retrospective application for planning permission and an enforcement notice concern related matters.
3. By section 70C(1) a local planning authority may decline to determine an application 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.”
4. Section 174(2A) and (2B) prohibit the bringing of an appeal against an enforcement notice under section 174(2)(a) (i.e. on the grounds that planning permission ought to be granted in respect of any breach of planning control constituted by the matters stated in the notice) where the enforcement notice was issued after the making of a “related application for planning permission”, but before the time for making a decision has expired under section 78(2). A “related application” has the meaning explained in section 174(2B):

“(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."

1. As Cranston J explained in Wingrove (at para 21) section 70C and 174(2A) and (2B) were both directed at the problem of delay under the existing provisions, and specifically at the situation where an application for planning permission is made where enforcement action has already been taken. Their object was said to be to deter appeals made for tactical reasons:

“ … 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. In other words, the applicant cannot have multiple ‘bites at the cherry’.”

1. That section 70C and section 174(2A) and (2B) are aimed at the same abuse is apparent both from the manner of their introduction and from their language. Both are concerned with situations where granting planning permission for a development (either on an application for permission or on a deemed application arising from an appeal against an enforcement notice) would involve granting permission in respect of “the matters” (or in the case of section 70C, “the whole or part of the matters”) “specified in the enforcement notice as constituting a breach of planning control”.
2. 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.
3. As section 70C is designed to complement the provisions of the 1990 Act relating to enforcement it is relevant to refer to two of the grounds contained in section 174(2) on which an appeal may be brought against an enforcement notice, ground (a) and ground (f), which provide:

“(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;”

and

“(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;”

1. The logic of the discretion conferred on the local planning authority by section 70C is clear. Where an enforcement notice has already been served there is 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 a proposal is already available, or was available, in the form of an appeal under section 174(2)(a) against the pre-existing enforcement notice.
2. The object of the provision is not to prevent the merits of an unauthorised development from being considered at all, but to avoid delay in enforcement by ensuring that they need be considered only once. As Lewis J said in O’Brien v South Cambridgeshire District Council [2016] EWHC 36 (Admin) at para 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.”

1. Where section 70C is engaged, Cranston J explained in Wingrove (at para 30) that it conferred “a wide discretionary power”, but added:

“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.”

1. Cranston J recognised that in some cases there may be factors pointing against the use of the discretion conferred by section 70C, such as “where for legitimate reasons there has been a failure to appeal an enforcement notice and the development is plainly compliant with planning provisions”; if such considerations were ignored an authority’s decision would be open to a public law challenge (Wingrove, para. 31). Other examples of circumstances in which a proper exercise of the discretion might require that the application for planning permission be determined were suggested by Hickinbottom J in R (Seventeen de Vere Gardens Management Ltd ) v London Borough of Kensington v Chelsea [2016] EWHC 2869 (Admin), at paragraph 44: “where the development plan has changed, or some other material planning considerations have changed, so that the underlying planning merits may be different”.
2. The most recent consideration of section 70C to which I was referred was in the decision of Ms Nathalie Lieven QC, sitting as a Deputy High Court Judge, in R (Banghard) v Bedford Borough Council [2017] EWHC 2391 (Admin). In R (Smith) v Basildon Borough Council [2017] EWHC 2696 (Admin) in refusing a renewed application for permission to seek judicial review Gilbart J said that he regarded Banghard as a decision on its own facts, but it forms an important part of the argument advanced on behalf of the claimant in this application.

1. The application for planning permission in Banghard was for the alteration of a building and a change of use from residential to storage. Permission had originally been given for the erection of a storage building, but the claimant had built a dwelling-house; the local planning authority subsequently issued an enforcement notice requiring its demolition. An appeal against the enforcement notice failed, in part on grounds advanced by the authority that it was not open to the inspector to consider granting permission for storage use, since the enforcement notice was solely against residential use and section 174(2)(a) of the 1990 Act did not allow permission to be granted other than for the matters stated in the enforcement notice as constituting the breach of planning control. The claimant then sought planning permission for the alterations required to enable the building to be used for storage and for a change of use. The local planning authority declined to determine the application under section 70C because to grant it would involve granting permission for the matters specified in the enforcement notice (i.e. the retention of the building, albeit in an altered form, which the notice required should be demolished).
2. Having considered the authorities to which I have also been referred identifying the purpose of section 70C, Ms Lieven QC considered that section 70C was not engaged where the applicant had, as yet, had no opportunity to have the planning merits of his proposed change of use determined, because the terms of the enforcement notice itself had precluded it. Although the planning authority had a wide discretion and there was necessarily an element of planning judgment in whether the development for which permission was being sought involved "any part of the matters specified..." in the enforcement notice as constituting the breach of planning control alleged, on the facts of that case the learned judge did not see how it could properly be said that the permission sought for a storage building was part of the breach of planning control in the enforcement notice, 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.”
3. The judge also recognised, at paragraph 30, 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:

“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.”

**Submissions**

1. On behalf of the claimant Mr White QC and Ms Foster submitted that the defendant’s decision to decline to determine the claimant’s planning application for the new balcony was plainly unlawful, because of the substantive and real differences between the balcony proposal and the breach of planning control specified in the enforcement notice (the erection of the Building comprising the garage, boathouse and store). Mr White enumerated those differences including the reduction of the surface area of the roof by about two-thirds, the removal of the glass screens at grounds floor level on the front and side of the store room and the greater part of the wall at the rear, leaving the ground floor entirely open with the exception of the lavatory cubicle, and the relocation of the staircase from the side of the garage to the space between the two buildings. These were not, he suggested, “very minor” changes to the built form, such as had been contemplated by the Judge in Banghard, but rather were substantive changes. The proposal was now for a balcony, not a store room, but the merits of that proposal had not been considered by the inspector on the appeal against the enforcement notice.
2. When addressing the question whether the balcony for which planning permission was sought was part of the matters specified in the enforcement notice as constituting a breach of planning control, Mr White acknowledged that the planning inspector had not modified those matters, although he had modified the remedial action required to be taken. Nevertheless, even as described in the enforcement notice the relevant part of the breach for the purpose of section 70C was the presence of the storeroom alone. The focus ought, Mr White submitted, to be on the extent to which the storeroom and the balcony raised distinct planning considerations which required separate consideration. That involved an element of planning judgment, and was not as simple as assessing the extent to which the two structures coincided. It was apparent from the inspector’s report that the primary planning consideration was the impact which the structures would make on the openness of the green belt, and it was not credible to suggest that there was not a material difference between the two structures on that account. Reliance by the defendant on section 70C in those circumstances was unlawful and contrary to the purpose for which the provision had been introduced.
3. Although Mr White initially criticised Mr Varley, the defendant’s planning officer, for misunderstanding some of the details of the application (in particular whether it was intended that there should be a rear wall between the garage and the boathouse) he did not suggest that any misunderstanding of the proposal was relevant to the lawfulness of the defendant’s decision to decline to determine the application. In view of the acknowledgement by Mr Boddington that the plans submitted in support of the application were inaccurate in at least one important respect (the floor area of the balcony), and the impossibility of reconciling his explanation of another feature (the double lines which Mr Varley took to be a rear wall) with the photographs of the existing structure, Mr White’s restrain was fully justified.

1. Miss Kabir Sheikh QC began her submissions on behalf of the defendant by drawing attention to the breadth of the discretion vested in the authority by section 70C. If an application for planning permission included any part of the matters comprised in an enforcement notice the local planning authority was entitled to decline to determine it. Before the introduction of section 70C a local planning authority had had only limited power to decline to determine an application for planning permission which was similar to, or overlapped with, another application (under sections 70A and 70B), but these provisions gave rise to costly and lengthy disputes. Section 70 C was much simpler in its operation and it was important that it should not be neutered by too restricted an approach being taken to its application.
2. It was necessary, Miss Kabir Sheikh submitted, to focus on the breach specified in the enforcement notice, which in this case included the whole of the new Building, not merely the portion linking the garage and the boathouse. The tactic adopted by the claimant was exactly the sort of abuse the provision was intended to curb. It had first had the planning merits of the Building as a whole considered by an inspector on its appeal against the enforcement notice, and now sought to secure a reconsideration of what she said were substantially the same issues by making its application for planning permission which, if granted, would result in the retention of by far the greater part of the same structure.
3. To the extent that it may be appropriate to focus on the link building alone, Miss Kabir Sheikh pointed out that it would have been possible for the claimant to have had the merits of the balcony itself considered fully by the inspector in the course of the appeal, by mounting a case under section 174(2)(f) that the modifications of the existing structure which are now proposed would be a sufficient remedy for the breach of planning control against which the enforcement notice was directed.
4. It was clear, Miss Kabir Sheikh suggested, that the application was in respect of part of the matters which formed the subject of the enforcement notice. It was not necessary that the application be for substantially the same matters as had already been the subject of an appeal (in which case further consideration could be refused under section 70A). Both functionally and physically there was a sufficient coincidence between the subject of the enforcement notice and the subject of the application to engage section 70C. In each case the structure formed a link between the garage and the boathouse, the balcony comprised a significant portion of the roof of the storeroom, the lavatory cubicle remained at ground floor level, the staircase would be relocated and the balustrade and railings would largely be retained. The question whether the application and the enforcement notice concerned some of the same matters was an exercise in planning judgment which could not be impugned.
5. In the claimant’s statement of facts and grounds of application it had been asserted that, as in Banghard, the claimant had been prevented from having any consideration of the planning merits of the balcony proposal; it was said that the inspector did not consider it, and could not have done, because he could only consider the planning merits of the store room, garage and boat house. In his oral submissions in reply to those of Ms Kabir Sheikh for the defendant, Mr White acknowledged for the first time that it would have been open to the claimant, as part of its successful appeal under section 174(2)(f) to have put forward the balcony proposal and to have argued that the breach of planning control and injury to amenity caused by the construction of the link building would be sufficiently remedied by a requirement to modify the structure so as to leave only the balcony. Nevertheless, Mr White argued that, while that “presumptuous and tactically dangerous” approach was available in theory, no applicant would adopt it in reality as it would undermine the appeal on ground (a) which sought the retention of the whole structure.

**Discussion**

1. The opportunity to decline to determine an application is available only where granting planning permission would have the effect specified in section 70C(1), that is that it would involve granting permission in respect of the whole or any part of the matters specified in the enforcement notice, whether it would do so in relation to the whole of the land to which the enforcement notice relates, or only to part of it.
2. The most convenient starting point is the relevant part of the enforcement notice itself. The relevant part of the notice is that part which specifies the matters which constitute the breach of planning control. By section 173(1)(a) an enforcement notice is required to state “the matters which appear to the local planning authority to constitute the breach of planning control.” It is this statement on which the comparison required by section 70C(1) must focus.
3. In this case the matters stated in the enforcement notice as constituting a breach of planning control were “without planning permission the erection of an outbuilding, brick wall, gates and gate posts (“the Building”) in the approximate position shown hatched and outlined in pink and annotated” on the plan attached to the notice. The plan identified the whole of the new building comprising the garage, boathouse and link building. The matters specified are therefore the erection of a particular structure in a specific location.
4. Bearing in mind the purpose of section 70C, there is an obvious logic in its focussing attention on the matters specified in the enforcement notice as constituting the breach. Those same matters, stated in the notice, define the scope of the planning permission which an inspector will be required to consider on any appeal under section 174(2)(a). The recipient of an enforcement notice has the opportunity, by making such an appeal, to obtain a determination of the planning merits of the matters against which enforcement action has been taken. The limits of the power to decline to determine another application are therefore best defined by the same description.
5. Section 70C(1) is not concerned with the steps which the enforcement notice requires to be taken, or the activities which must cease, in order to remedy the breach or any injury to amenity which has been caused by the breach. In this case the inspector modified the enforcement notice (which required the removal of the whole Building) by permitting an alternative course of remedial action (the removal of only the link section). That modification had no effect on the matters specified in the notice as constituting a breach of planning control. I therefore approach with some caution the submission of Mr White that, because of the modifications to the notice allowed by the inspector, the focus ought to be on the extent to which the original storeroom and the new balcony raised distinct planning considerations which required separate consideration. In practice it may not make much difference (because section 70C(1) allows consideration of any part of the land to which the enforcement notice relates) but in principle the inspector’s modification of the remedy is irrelevant, and what is important is the breach specified in the enforcement notice.
6. Having identified the matters specified as constituting the breach, section 70C(1) then invites a comparison between those matters and the development to which the retrospective application for planning permission relates. The purpose of the comparison is to identify any overlap between the matters enforced against and the subject of the retrospective application. It is clear that something very much less than a complete coincidence between the matters enforced against and the matters for which permission is sought will be sufficient to engage section 70C(1). It is enough that the retrospective application relates to “the whole or any part of the land” to which the enforcement notice relates, and that granting it would involve granting permission for “the whole or any part of” the matters specified in the enforcement notice.
7. In the course of argument both counsel agreed that the question whether section 70C was capable of being relied on involves an element of planning judgment. I accept that submission, which is consistent with the decision in Banghard, but I would qualify it in two respects. The first is that the matters to be considered are of objective matters requiring a comparison between two documents, the enforcement notice and the application for planning permission. Making that comparison necessarily involves a judgment, possibly on a number of factors, but it remains a relatively limited exercise which is likely in most cases to be capable of only a single outcome. Secondly, and as a result, it seems to me to be important not to approach the application of section 70C as if it involves simply a single exercise of the authority’s discretion. Where reliance on the provision is challenged it is necessary to consider first whether the circumstances described in section 70C(1) exist, so that the discretion to decline to determine an application is available, before considering any complaint about the manner in which the discretion has been exercised. In their submissions, both parties tended to elide these stages.
8. The case for the defendant is that the right of the local planning authority to rely on section 70C(1) is triggered by the existence of any overlap which is not *de minimis*.
9. The claimant has approached the matter from a different standpoint, and has argued that if there are sufficient differences between the two matters, so that different planning considerations may arise on the application for planning permission from those which were relevant to the appeal against the enforcement notice, those differences will be enough to prevent a local planning authority from relying on section 70C.
10. In support of that submission Mr White relied on the statements concerning the purpose of the provision to which I have already referred. He also relied on the observations of the learned judge in Banghard (at paragraph 32) that “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;” and earlier (at paragraph 30) that reliance on section 70C would be an option “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.” Mr White also relied on observations of Mr David Elvin when granting permission for this application, in which he had said:

“This does not appear (at least arguably) to be a case of asking for the reconsideration of the merits of substantially the same development. The case is distinct from the type of situation considered in Banghard (which is accepted in the AOS) and, arguably, as in O’Brien this is a case where the merits of the application development have not previously been considered.”

1. I do not accept Mr White’s submissions, for the following reasons.
2. First, section 70C is not concerned with the existence of differences between two developments, but with the existence of similarities. The statutory language requires an assessment of whether granting the planning permission sought would involve granting permission for *any part* of the matters specified in the enforcement notice. The fact that granting the application would also involve granting permission for matters which were not specified in the enforcement notice, or that it would not involve granting permission for other matters which were specified in the notice, are nothing to the point when considering whether the power to decline to determine the application is engaged. The extent of any differences may be very relevant to the exercise of the local planning authority’s discretion, but that is a later stage of the exercise.
3. In this case there can be no doubt that granting planning permission for the balcony would involve granting permission for part of the matters specified in the enforcement notice. Those parts would include parts of the Building comprising the ground floor slab, the lavatory cubicle, a further portion of the rear wall of the link section spanning from the garage to the boat house at least up to Environment Agency predicted flood level, and at least one third of the first floor terrace forming the roof of the link building (more if the plans are taken at face value), as well as parts of the structure supporting it. Other components such as the stairs and balustrades would be relocated.
4. Secondly, the statutory objective of stopping applicants who have undertaken development in breach of planning control from gaming the system by tactical appeals and retrospective applications is not achieved by asking only whether the planning merits of a proposal have already been determined. The applicant cannot have multiple ‘bites at the cherry’, but nor can he decline the cherry when it is available to be bitten, and insist on biting it on a later occasion. As was recognised in Banghard, the statutory purpose requires that the unexploited opportunity to have the planning merits considered should also count against the applicant, because “in such cases the developer had a full opportunity to a fair process and did not avail himself of it.” In Smith Gilbart J considered that it was sufficient that the opportunity to pursue an appeal against an enforcement notice had been available to the applicant’s predecessor in title, even though it had not been taken and was no longer available to the applicant himself.
5. 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.
6. Thirdly, Banghard was a very different case on its facts, and the observations on which Mr White relied must be read in the context of those facts. The application was for a storage use of the building (for which use permission had been granted in 2010) and for modifications to the structure. The planning inspector had been prevented from considering the proposed storage use as part of the enforcement notice appeal, which was taken by the learned judge to be “a very clear indication that the storage use was not part of the matters being enforced against” (paragraph 33). The different use of the two structures was critical to the judge’s decision: “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” (paragraph 32).
7. In any event, I find it difficult to reconcile the dicta in Banghard on which Mr White relies with the statutory language. In particular the suggestion that section 70C is restricted to case where the application for planning permission involves only “a very minor change” from the development described in the enforcement notice, is at odds with the reference in section 70C(1) to “planning permission for … any part of the matters specified in the enforcement notice.”

1. I am therefore satisfied that it was open to the defendant to rely on section 70C(1) because granting the application for the balcony would have involved granting permission for part of the matters specified in the enforcement notice.
2. Although Mr White argued separately that, if the defendant had a discretion under section 70C, the manner in which it exercised that discretion was unlawful, that contention cannot succeed either. The inspector expressed a very clear conclusion that “any additional development above that already approved could not be justified” and given the extent to which the unlawful development was sought to be retained by the balcony application (see paragraph 67 above), with other elements to be reused in different locations, it cannot be suggested that the defendant’s decision was not properly open to it. In particular, given the claimant’s desire to retain parts of the structure between the garage and the boathouse, and to relocate the staircase so that it projects beyond the front of the building, the potential for an adverse impact on openness in the green belt (the factor on which Mr White relied most strongly) is clear. The assessment of that impact was a matter for the defendant and cannot be challenged on the very broad grounds advanced on behalf of the claimant in this application.
3. For these reasons I dismiss the application for judicial review.