C1/2012/2668

Neutral Citation Number: [2014] EWCA Civ 1723
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(MR JUSTICE WALKER)

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 3 December 2014

B e f o r e:

LORD JUSTICE SULLIVAN

LORD JUSTICE SALES

MR JUSTICE NEWEY

Between:
KOUMIS

Appellant

v

SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT
Respondent

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Mr D Elvin QC (instructed by Kingsley Smith Solicitors LLP) appeared on behalf of the **Appellant**
Mr R Honey (instructed by Treasury Solicitors) appeared on behalf of the **First Respondent**
Mr S Hockman QC (instructed by London Borough of Enfield) appeared on behalf of the **Second Respondent**

J U D G M E N T
(Approved)

LORD JUSTICE SULLIVAN:

Introduction

1. This is an appeal against an order dated 9 October 2012 of Walker J dismissing (1) the Appellant's application under section 288 of the Town and Country Planning Act 1990 ("the Act") to quash the decision dated 8 April 2011 of an Inspector appointed by the First Respondent to dismiss the Appellant's appeal under section 78 of the Act against the Second Respondent's refusal on 14 January 2008 to grant planning permission for the redevelopment of a site at 16-18 Hazelwood Lane, London, N13 5EX ("the site") for 11 flats and (2) the Appellant's appeal under section 289 of the Act against the Inspector's decision contained in the same decision letter to dismiss the Appellant's appeal against an enforcement notice issued by the Second Respondent on 17 June 2008 in respect of the site and to uphold the notice with a correction and variations.

2. It is most regrettable to say the least that these proceedings have taken so long. In December 2014 we are considering lawfulness of decisions made in respect of a refusal of planning permission in January 2008, nearly 7 years ago, and an enforcement notice which was issued some 6 and a half years ago.

3. Part of this delay was caused by the fact that the Appellant's appeals to the First Respondent were initially dismissed under the written representations procedure in a decision dated 19 February 2009, but this decision was quashed by consent and the appeals were redetermined in the Inspector's decision dated 8 April 2011 after an inquiry which she held on 22 and 23 March 2011.

4. The delays since then show just how overdue were the procedural reforms which had resulted in the creation of the Planning Court. It is to be hoped that such delays in an appeal process are now a thing of the past.

Factual background

5. The factual background is described in some detail in Walker J's judgment [2012] EWHC 2686 (Admin).

6. In summary, the Second Respondent granted planning permission on 31 August 2005 to develop the site for 9 flats. The development as built contains 11 flats rather than 9. Although the 11 flats were therefore built without planning permission, the Second Respondent did not require the demolition of the whole of the unauthorised development. In its requirement in the enforcement notice, the Second Respondent was seeking to reduce the scale of the development on the site and in particular to reduce its ridge height to that of the development which it had approved in 2005.

7. Before the Inspector, it was the Second Respondent's contention that the ridge height of the development which had been granted planning permission in 2005 was 9.5 metres. It was the Appellant's contention that the ridge height of the development approved in 2005 was 10.5 metres.

8. The Appellant's case before the Inspector was that the 11 flats development as built was similar in scale and height to the 10.5 metre high development which had been

approved in 2005. This was a material consideration which the Appellant argued should lead the Inspector to grant planning permission for the development as constructed and to allow the appeal on ground A in section 174(2) of the Act against the enforcement notice and to quash the enforcement notice accordingly.

9. It was the Second Respondent's case before the Inspector that the 9.5 metre ridge height of the development which had been permitted in 2005 was the maximum height which was acceptable in planning terms for any development on the site and the requirements in the enforcement notice were justified on planning grounds because they sought to reduce the height of the existing development to that height.

10. It is clear therefore that the ridge height of the development which had been permitted in 2005 was a, if not the, principle issue at the inquiry.

11. The planning permission granted in 2005 was a detailed planning permission. It referred to a drawing number PR/16-18/LAYOUT/A which showed inter alia the ridge height of the approved development. The problem which confronted the Inspector at the inquiry was that there were drawings both numbered PR/16-18/LAYOUT/A which showed the ridge height of the 2005 development as 9.5 metres and 10.5 metres respectively.

The Inspector's decision

12. The Inspector dealt with this issue in paragraphs 9 to 14 of her decision. Having referred to the background of the dispute, she said at paragraph 9 of the decision that:

> "A significant amount of the inquiry time was taken up with whether the Council's plan or the Appellant's plan was the correct one. I will not go into every detail raised by the parties, but will set out below what I consider to be the most salient points."

13. The Inspector then set out what she considered to be the salient points in paragraphs 10 to 13 of her decision as follows:

> "10. The grant of permission refers to Drawing No.PR/16-18/LAYOUT/A. There are a number of drawings on the Council's files: one dated October 2004 has a ridge height of 11.2m but this drawing is marked as superseded; one dated March 2005, where the 'A' has been changed in handwriting to 'B' but with no accompanying description for 'B', has a ridge height of 10.5m and this drawing is also marked as superseded; one dated June 2005 where the 'B' revision has been described and the drawing superseded; and one dated March 2005 with a ridge height of 9.5m which the Council says is the plan of the scheme that was approved. The Council did not have a copy of this plan on its file but obtained an un-numbered copy from a neighbour and the numbered plan from Mr Bennett.
>
> 11. Mr Bennett is the developer of an adjacent site and he therefore had a keen interest in what was proposed for the appeal site. He objected to

the scheme. He received a letter from the Council dated 17 August 2005 advising him that the Planning Committee would be considering the Appellant's scheme on 31 August 2005. Mr Bennett went to the Council Offices, asked for the file, took a copy of the drawing and obtained a copy of the Committee Report. The report refers to the scheme having an overall height of 9.5m and it being 0.5m higher than the previous two storey 9m high scheme. I appreciate that there may be some unanswered questions including which file Mr Bennett saw and whether the plan Mr Bennett copied was the plan that the Committee would be considering but Mr Bennett thought it was unlikely that he did not have the correct plan.

12. The Appellant has a plan dated May 2005 which has been stamped 'permission granted subject to conditions 31 Aug 2005' which shows a development with a ridge height of 10.5m. The 'A' revision is dated 20/5/2005 and described 'As discussed with Local Authority Planning Officer'. Ms Allenden, the case officer, who unfortunately did not attend the Inquiry, says in her statutory declaration that she did not see this drawing until May 2009 during the course of these appeals and Mr Higham, the Planning Decisions Manager, only recalls seeing it in May 2007 during the enforcement investigation.

13. Mr Koumis said that this was his first venture into development and he left everything in the hands of his then agent. He said that he had never had an original of the drawing; he found the stamped plan in his file; he went to the Committee meeting but did not read the report; and he did not recall the height of the scheme. Mr Koumis also found, about six-seven weeks ago, a letter from his agent to the Council dated 10 May 2005 in which the agent alleges that the building cannot be constructed with a height of 9.5m and that 10.5m would be more viable. An adjusted drawing is promised and given the description on the stamped plan it could be the drawing promised in the letter. The letter is not on the Council's file. Beyond producing these documents Mr Koumis was unable to help with the provenance of the stamped drawing. It is very unfortunate that Mr Bardy, who was acting for Mr Koumis at the time, was unobtainable and so did not attend the Inquiry."

In paragraph 14, the Inspector concluded:

"14. Given the evidence I have set out above, and taking all the other matters that were raised into account, on the balance of probability and with regard to, among other things, the Committee report and Mr Bennett's evidence, I consider that the scheme approved by the Council in 2005 had a ridge height of 9.5m."

14. The Inspector dealt with the time for compliance with the notice in paragraph 7 of her decision as follows:

"7. The notice sets out a compliance period of three months. The

> Council conceded at the Inquiry that six months would be more reasonable. The Appellant sought a period of 20 months. The Appellant first raised the ground (g) appeal in his statement of case in January 2011 where a period of 12 months was sought. This period was extended to 20 months in Mr Koumis' proof. There was no ground (g) appeal in the original appeal and the matter was not raised in the court proceedings; I consider that it is too late for the Appellant to raise a ground (g) appeal in the context of this Inquiry. I will vary the notice to accord with the Council's concession and I also draw the Parties' attention to the Council's powers in s. 173A of the Act to extend any period specified in the notice whether or not the notice has taken effect should there be any need to do so."

15. Having concluded in paragraph 28 that the planning appeal and ground (a) appeal should be dismissed, the Inspector directed in paragraph 29 of the decision that the notice should be corrected in one immaterial respect and then directed in paragraph 30 that it should be varied in four respects. Unfortunately, the Inspector did not include the variation of the period for compliance from three to six months in the four variations listed in paragraph 30.

16. In paragraph 31 of the decision, the Inspector said:

> "Subject to this correction and variations, I dismiss the appeal and uphold the enforcement notice. I refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended."

It is to be noted that paragraphs 29 to 31 in the decision letter are contained within that part of the letter of the decision which is headed "decision."

The challenge to the Inspector's decision

17. The Inspector's decisions were challenged by the Appellant under sections 288 and 289 of the Act on a number of grounds.

18. One of the grounds in the section 289 appeal was the Inspector's failure to direct in paragraph 30 of her decision that the enforcement notice be varied so as to extend the period for compliance from three months to six months in accordance with the Second Respondent's concession at the inquiry when she had said in paragraph 7 of her decision that she would vary the notice to accord with the Second Respondent's concession.

19. In response to that ground of appeal, the Second Respondent attempted to narrow the issues in the forthcoming hearing on 8 and 9 May 2012 in the High Court by exercising its powers under section 173A of the Act to extend the period for compliance with the notice to six months.

20. Unfortunately, the Second Respondent only succeeded in broadening rather than narrowing the issues before Walker J because it made an error in its section 173A

notice dated 4 May 2012. As issued, the enforcement notice had stated in paragraphs 6 and 7:

> "6. TIME FOR COMPLIANCE
>
> Three (3) calendar months after this Notice takes effect
>
> 7. WHEN THIS NOTICE TAKES EFFECT
>
> This Notice takes effect on 22 July 2008, unless an appeal is made against it beforehand."

The notice dated 4 May 2012 stated:

> "The Council directs that the requirements of the Enforcement Notice are hereby relaxed by the following variations:
>
> (i) the TIME FOR COMPLIANCE in Part 6 of the notice is varied by the deletion of 'Three (3) calendar month after this Notice takes effect' and the substitution of the words "Six (6) calendar months after 4 May 2012"."

There is another immaterial variation.

21. Paragraph 7 of the enforcement notice was not varied. Unfortunately, the draftsman of the 4 May 2012 notice had overlooked the fact that because an appeal had been made against the enforcement notice and had not been finally determined, the enforcement notice had not taken effect. See section 175(4) of the Act.

22. On receipt of the notice of 4 May 2012, the Appellant contended that the effect of that notice had been to vary the enforcement notice so that the enforcement notice became a nullity. The reasons for that submission are set out in paragraph 22 of Walker J's judgment.

23. In response to this contention, the Second Respondent served another notice under section 173A on 8 May 2012 which said that the 4 May notice was of no effect and which amended paragraph 6 of the enforcement notice as follows:

> "The Council directs that the requirements of the Enforcement Notice are hereby relaxed by the following variations:
>
> (i) the TIME FOR COMPLIANCE in Part 6 of the Enforcement Notice is varied by the deletion of "Three (3) calendar month" before the words "after this Notice takes effect" and the substitution of the words "Six (6) calendar months"."

Walker J's judgment

24. Before Walker J, it was submitted by Mr Turney on behalf of the Appellant that the 4 May 2012 variation notice had rendered the enforcement notice a nullity.

25. In support of that submission, he referred to a number of authorities, but in particular he relied upon the judgment of Harrison J in R (Lynes) v West Berkshire District Council [2003] JPL 1137 ("Lynes"). In Lynes, the enforcement notices in question had the following, paragraphs 6 and 7:

> "6. TIME FOR COMPLIANCE
>
> Immediately this notice takes effect
>
> 7. WHEN THIS NOTICE TAKES EFFECT
>
> This notice takes effect on February the 22nd 2002 unless an appeal is made against it beforehand."

26. Having set out the statutory framework and reviewed the relevant authorities, Harrison J said in paragraph 28 of his judgment:

> "Section 173(9) makes it mandatory for the notice to specify "the period" at the end of which there has to be compliance with its requirements. In my view, the notices in this case did not specify the period at all. As Mr Lewsley said, the word "period" implies a start point and an end point with a period of time in between. The notices stated "time for compliance" not "period for compliance". They then stated "immediately this notice takes effect". The notices did not purport to specify a period for compliance, they simply required compliance immediately the notice took effect."

He then continued in paragraphs 30 and 31:

> "Second, I do not think that the statutory framework envisages a period for compliance starting before the notice takes effect. I appreciate that section 87(6) of the 1971 Act expressly referred to the period for compliance beginning with the date upon which the notice was to take effect, whereas none of the subsequent amendments, including the present section 173(9), have included such an express provision, but, equally, none of the subsequent amendments have contained any language that envisaged that the period for compliance would start before the notice were to take effect. Mr Fookes agreed that the effect of his submission was that, since the amendment introduced by the Local Government and Planning (Amendment) Act 1981, the law has been that the compliance period can run from before the notice takes effect, yet there has been no case law establishing that that is so, and I notice that para P173.22 of vol 2 of the Planning Encyclopedia states:
>
> "By virtue of subs (9) the notice must specify a compliance period, which commences on the date the notice takes effect, for the carrying out of any

required steps or the cessation of any specified activities."

In my view, that correctly states the position."

27. In paragraphs 32 and 33, Harrison J gave other reasons for concluding that the period for compliance should start from the date upon which the notice is stated to take effect. He concluded in paragraph 34:

> "For all those reasons, I have concluded that the enforcement notices in this case failed to specify a period for compliance, as required by section 173(9). Such a period should start from the date upon which the notice is stated to take effect..."

28. Harrison J then considered what the result of the failure to specify a period for compliance as required by section 173(9) should be.

29. Was the enforcement notice a nullity or could it be corrected without injustice? He answered that question in paragraphs 48 and 49 of his judgment as follows:

> "I have reached the conclusion that an enforcement notice that, on the face of it and without having to refer to evidence elsewhere, fails to specify a period for compliance, as required by section 173(9), is a nullity and it is therefore without legal effect. That being so, it cannot be the subject of amendment by the Secretary of State under section 176. The power of amendment under section 176 cannot relate to an enforcement notice that is a nullity. The test of whether an amendment to an enforcement notice can be made without injustice can apply only to a notice that is not a nullity. Furthermore, an enforcement notice that is a nullity cannot be made the subject of an appeal under section 174(2)(g). It is relevant to note that section 174(2)(g) is predicated upon the basis that a period for compliance has been specified in the notice, whereas no such period has been specified in these enforcement notices.
>
> I am very conscious of the need to avoid technicalities and artificial distinctions when dealing with enforcement notices, but the failure to comply with a basic statutory provision for a valid enforcement notice, such as specification of a period for compliance, cannot be said to be a technicality. An enforcement notice that, on its face, does not comply with such a requirement, is a nullity and therefore incapable of amendment. As it cannot be the subject of an appeal under section 174, the preclusive provisions of section 285 do not apply, and the claimants are entitled to apply for judicial review for the declaration that they seek."

30. Mr Turney submitted to Walker J that it followed the enforcement notice in the present case as varied by the 4 May 2012 notice was a nullity. The six month period of compliance began on 4 May 2012 before the enforcement notice had taken effect. If that was correct, he submitted that the Second Respondent's attempt to rectify the position in the 8 May 2012 variation notice was of no effect.

31. The power conferred by section 173A was a power to relax a requirement in an extant enforcement notice. It was not a power to resuscitate a nullity.

32. Walker J answered this submission in paragraph 26 of his judgment:

> "In my view the argument advanced by Mr Turney does not get to first base. For the purposes of analysing the argument, I am prepared to assume the correctness of the decision in Lynes. I am also prepared to assume that Mr Turney is right in his submission that, once the enforcement notice is varied so that it contains the wording in the variation notice of 4 May 2012, it falls foul of Lynes, as it fails to specify a compliance period which commences on the date when the enforcement notice takes effect. If that were so, however, then it seems to me that what Mr Turney submits would be the case for the enforcement notice when varied must apply to the variation notice itself. There was nothing wrong with the enforcement notice prior to the issue of the variation notice. The crucial element in Mr Turney's argument is that on 4 May 2012 the Council did something which it had no power to do. In those circumstances, the necessary consequence would appear to me to be that it is the action which it had no power to do that is a nullity."

33. Having considered submissions as to the effect of the decision in Smith v East Elloe District Council [1956] AC 736, Walker J concluded in paragraph 30:

> "For those reasons, which are essentially similar to those advanced by Mr Honey and Ms Lambert, it seems to me that when taken on its own terms the nullity argument fails. I would add that, for my part, I can see attractions in an argument that, at least during the period when the enforcement notice has no effect pursuant to section 175(4), nothing done by way of variation notice has the effect of rendering an enforcement notice a nullity. It is unnecessary, however, to explore the merits of such an argument. It is equally unnecessary to explore an argument by Mr Honey and Ms Lambert that the variation of 4 May 2012 failed to comply with section 173A."

34. In ground 1 of his appeal to this court, the Appellant contends that Walker J erred in not concluding that the 4 May 2012 notice had varied the enforcement notice so as to render the latter a nullity.

35. In the remaining paragraphs of his judgment, Walker J dealt with three other grounds on which the Inspector's decision was challenged. For present purposes, it is sufficient to note that he rejected the Appellant's submission that the Inspector had, for a variety of reasons, erred in law in concluding that the drawing number PR/16-18/LAYOUT/A referred to in the 2005 planning permission was the Council's version of that drawing, showing a 9.5 metre ridge height rather than the Appellant's version of that drawing showing a 10.5 metre ridge height.

36. In his second and third grounds of appeal, the Appellant submits that in this respect the judge erred (1) in concluding that there was ambiguity in the 2005 planning permission which enabled the Inspector to have recourse to extrinsic evidence when deciding whether the 2005 planning permission authorised a building with a ridge height of 9.5 metres rather than 10.5 metres (see paragraphs 58 and 59 of the judgment) (ground 2).

37. Alternatively, in concluding that, the Inspector had given adequate reasons for interpreting the 2005 planning permission as permitting a building with a ridge height of 9.5 metres rather than 10.5 metres. (See paragraph 60 of the judgment) (ground 3).

Discussion

38. At the outset of the appeal, we expressed our concern that both parties in their skeleton arguments in respect of ground 1 of this appeal and Walker J in his judgment below appeared to have overlooked the fact that an appeal under section 289 of the Act is an appeal on a point of law against the decision of the First Respondent by his appointed Inspector. The same applies to an application under section 288 of the Act, although ground 1 is relevant only to the section 289 appeal.

39. Whatever might be the legal implications of the Second Respondent's admittedly erroneous exercise of its powers under section 173A to extend the time for compliance with the enforcement notice, those powers were exercised or purported to be exercised by the Second Respondent after the Inspector had made her decision on 8 April 2011 and they could not therefore effect the lawfulness of the Inspector's decision.

40. While grounds 2 and 3 of the appeal do challenge the lawfulness of the Inspector's decision, ground 1, the nullity point, does not. It seemed to us that at most the nullity point would be relevant to the exercise of the court's discretion to remit the matter under section 289(5) to the First Respondent for reconsideration in accordance with its opinion as to the law if we were to conclude that the Inspector had erred in law in not giving directions to vary the enforcement notice to accord with the Second Respondent's concession that the period for compliance should be six months when she had said in paragraph 7 of her decision that she would so vary the enforcement notice.

41. In those circumstances, the validity of the Second Respondent's exercise or purported exercise of its power under section 173A to extend the period for compliance with the enforcement notice would be relevant to the exercise of discretion.

42. Mr Elvin QC on behalf of the Appellant accepted that if the 8 May 2012 notice under section 173A extending the period for compliance with the enforcement notice to six months after the notice took effect had been effective, then it would have rendered any error of law on the part of the Inspector in not directing the variation of the notice to the same effect of academic interest only. He rightly accepted that in those circumstances the court would not permit the enforcement notice appeal to the First Respondent for redetermination on that academic issue. To do so would be pointless.

43. We were considered that although this was an appeal against the Inspector's decision, the nullity point raised in ground 1 appeared to have developed a life of its own. In

these circumstances, it is sensible to begin with a consideration of grounds 2 and 3 of the appeal which do challenge the lawfulness of the Inspector's conclusion that the drawing number PR/16-18/LAYOUT/A referred to in the 2005 planning permission was the Council's version of that drawing showing a ridge height of 9.5 metres.

44. Notwithstanding Mr Elvin's valiant attempts to persuade us to the contrary, I have no doubt that the Inspector was entitled to look at extrinsic evidence on this point.

45. There was no dispute before the Inspector that a drawing number PR/16-18/LAYOUT/A had been incorporated into the grant of detailed planning permission in 2005. Two different versions of a drawing with that number had been produced by the Appellant and by the Local Planning Authority respectively at the inquiry. In those circumstances, the Inspector had to resolve the factual issue: which of the two drawings so numbered was the drawing number PR/16-18/LAYOUT/A referred to in the planning permission?

46. Extrinsic evidence was plainly admissible to resolve this factual issue. There was no question of the Inspector using extrinsic evidence to interpret the planning permission. She was simply ascertaining which drawing was the drawing that was referred to in the planning permission.

47. Mr Elvin accepted that extrinsic evidence was admissible to identify the plans approved by a detailed planning permission if that permission did not identify the plans that had been approved. See Barnett v Secretary of State for Communities and Local Government [2008] EWHC 1601 (Admin), [2009] 1 P & CR 24 at paragraph 30.

48. For my part, I can see no difference in principle between admitting extrinsic evidence to identify the approved plans in such a case and admitting extrinsic evidence to identify which of two different plans with the same number was the approved plan with that number in the present case.

49. In reality, Mr Elvin's submissions on this issue boil down to a single point. The Inspector should have concluded that the correct drawing was the drawing produced by the Appellant because the Appellant's drawing was stamped "permission granted subject to conditions, 31st August 2005" and the revision A was dated 20 May 2005 and described "as discussed with the Local Authority Planning Officer," which was consistent with a letter dated 10 May 2005 from the Appellant's then agent to the Second Respondent in which the agent had said that if the building could not be constructed to a height of 9.5 metres, then the height of 10.5 metres would be "a more viable solution."

50. However, the planning permission simply referred to a drawing with a particular number. It did not refer to a drawing with an approval stamp or any particular kind of revision described upon it. The approval stamp, the description of revision A and the letter dated 10 May were all factual matters which were supportive of the Appellant's claim that his version of drawing PR/16-18/LAYOUT/A was the approved drawing, but they were not conclusive. They were all considered by the Inspector in paragraphs 10 to 14 of her decision.

51. The Appellant told the Inspector that he left everything in the hands of his then agent, Mr Bardy. Unfortunately, Mr Bardy was unobtainable, so he did not give any evidence to the inquiry. Miss Allenden, the Second Respondent's case officer who dealt with the 2005 application, did give evidence by way of a written statement, but she did not attend the inquiry.

52. However, there was some contemporaneous evidence in the form of the committee report which had recommended the grant of planning permission in 2005 and which had referred to the scheme as having an overall height of 9.5 metres. The overall height of the proposed development in 2005 as an important consideration in the report. It was noted that the height of 9.5 metres was .5 of a metre higher than a previously approved scheme, but the report said that this difference was not sufficient to justify a refusal of planning permission for the 2005 scheme.

53. Contemporaneous evidence was also supplied by the developer of an adjacent site, Mr Bennett, who had gone to the Council offices and had taken a copy of drawing number PR/16-18/LAYOUT/A which was on the Council's file.

54. Having carefully considered all of the evidence, the Inspector was entitled to prefer the version of the drawing which Mr Bennett produced which corresponded with the dimensions referred to in the committee report.

55. Mr Elvin submitted that given the importance of this issue, the Inspector's reasoning was inadequate. She had failed to give any reasons for rejecting the version of the drawing which had the Local Planning Authority's approval stamp on it.

56. I do not accept that submission. Having carefully set out all of the evidence on this point, including the evidence referred to by Mr Elvin, the Inspector explained in paragraph 14 of her decision that she had concluded on the balance of probability that the drawing which was approved was the drawing which accorded with the contemporaneous evidence, that is to say the officer's report and Mr Bennett's evidence. That reasoning was brief, but it is perfectly intelligible.

57. For these reasons, I would dismiss the appeal on grounds 2 and 3. Since these were the only grounds on which the Inspector's decision to dismiss the appeal against the Second Respondent's refusal to grant planning permission was challenged, it follows that I would dismiss the Appellant's appeal against Walker J's order insofar as it dismissed the Appellant's application to quash the Inspector's decision on the planning appeal under section 288 of the Act.

58. That leaves ground 1 of the appeal insofar as it relates to the Inspector's decision to uphold the enforcement notice. The starting point for considering the issues raised by this ground must be sub-section 176(2A) of the Act which provides that:

> "The Secretary of State shall give any directions necessary to give effect to his determination on the appeal."

59. On behalf of the First Respondent, Mr Honey submitted that notwithstanding the provisions of that sub-section, the Inspector had not erred in law. Her decision had to

be read as a whole. It was clear from paragraph 7 of the decision that she had decided to vary the time for compliance with the notice and the omission of this variation from the list of variations in paragraph 30 of the decision was a matter of no consequence. The Inspector did not give any directions necessary to give effect to that determination, but sub-section 176(2A) did not proscribe any particular formality or procedure for doing so. What the Inspector said in paragraph 7 of her decision was sufficient to effect the variation of the period for compliance of the enforcement notice. Paragraphs 29 to 31 of the decision should not be read in isolation.

60. For my part, I would readily accept Mr Honey's submission that the Inspector's decision must be read as a whole and that paragraphs 29 to 31 of the decision should not be read in isolation. If that is done, I do not accept Mr Honey's submission that what was said in paragraph 7 of the decision was sufficient to effect a variation of the notice.

61. Reading the decision as a whole and in a common sense way, it is clear that while the Inspector had decided that she would vary the notice to accord with the Second Respondent's concession, she then failed to give effect to her intention when setting out her direction as to respect in which the notice was to be varied. Her failure to do so amounted to an error of law.

62. However, it is common ground that this error of law on the part of the Inspector had become academic by the time the section 289 appeal came before Walker J if, but only if, the 8 May 2012 section 173A notice was effective to extend the period for compliance to six months from the date when the enforcement notice took effect.

63. It is in this context that we have to consider the legal implications of the 4 May 2012 notice. In response to our procedural concerns, Mr Elvin formally applied for permission to apply for judicial review and sought a declaration that the enforcement notice as varied on 4 May 2012 was a nullity. His statement of facts and grounds in support of that application set out in substance the argument that the Appellant had advanced before Walker J and in ground 1 of his appeal to this court.

64. Both Mr Honey on behalf of the First Respondent and Mr Hockman QC on behalf of the Second Respondent adopted a neutral attitude in response to Mr Elvin's application. Given the particular procedural history of this case and the fact that ground 1 was argued before Walker J without any objection from either of the Respondents, this was an entirely sensible and pragmatic response on the part of the Respondents.

65. Given the somewhat unusual way in which this case has been conducted hitherto, I have no doubt that we should consider Mr Elvin's application for permission to apply for judicial review, notwithstanding that it is well out of time.

66. It is plain from the submissions before Walker J and from ground 1 of the appeal before us that the point is at least arguable. For my part, therefore, I would grant Mr Elvin permission to apply for judicial review in respect of this issue and I would resolve the substantive issue that is raised by ground 1.

67. In his submissions in support of the proposition that the 4 May 2012 variation notice had rendered the enforcement notice a nullity, Mr Elvin relied upon a number of authorities in addition to the decision in Lynes. In particular, he relied on Burgess v Sevenoaks Rural District Council [1952] 2 QB 41 ("Burgess") and the well-known authority of Miller-Mead v Minister of Housing and Local Government [1963] 2 QB 196 ("Miller-Mead").

68. In Burgess, Somervell LJ said that the provisions of section 23 of the Town and Country Planning Act 1947 required that an enforcement notice must specify two periods, the first being the period at the expiration of which the enforcement notice takes effect and the second being the period within which the specified steps requiring the land to be restored had to be taken.

He also thought that it was:

> "plain that the second of those periods at the point in time does not start until the first has expired and the notice has taken effect. That seems to be the plain meaning of the words and if one considers them in their context the reason for what I have called the first period is obvious. The first period is the period during which the notice can be challenged. Permission can be asked for and any person can appeal..."

In Burgess, the enforcement notice had said:

> "Now, therefore, the Rural District Council of Sevenoaks do hereby give you notice in the pursuance of their powers as Local Planning Authority under section 23, 24 and 75 of the Town and Country Planning Act 1947 to demolish the aforementioned 16 houses and restore the land to its condition before the aforementioned operations took place within 5 years after the date of the service of this notice."

Somervell LJ said:

> "It will be seen that only one period is specified. In my view, as I have said, the section of the Act requires two periods to be specified. (Pages 44 to 45)."

At the foot of page 45, Somervell LJ returned to this point, saying:

> "I think section 23 requires two periods. In particular, it requires a period to be specified at the expiration of which the notice is to take effect and it is, in my view, at the end of that period, which is an uncertain date because of the possible appeal, that the period which Mr Thetherdue referred to conveniently as the period of the kind should be given. As this notice does not comply with those two provisions, I think it is invalid and inoperative under the section."

Denning J and Rothborough J agreed.

69. In Miller-Mead, the court had to consider what would be the effect of non-compliance with the statutory requirements in what is now section 173 of the Act. In a well-known passage, Upjohn LJ said:

> "Now, what happens if a notice does not comply exactly with those sections? As a matter of common sense, if it does not specify the steps to be taken to remedy the alleged breach of planning permission or the alleged failure to comply with the conditions in proper and sufficient particularity, the notice will not be operative. Step 2 of sub-section (3) is not complied with. Now, I think is to draw the distinction between invalidity and nullity. For example, supposing development without permission is alleged and it is found no permission is required or that contrary to the allegation of the notice, it is established that in fact the conditions in the planning permission have been complied with, then the notice may be quashed under section 234A. The notice is invalid: it is not a nullity because on the face of it appears to be good and it is only on proof of facts aliunde that the notice is shown to be bad: the notice is invalid and, therefore, it may be quashed. But supposing that the notice on the face of it fails to specify some period required by sub-sections (2) or (3). On the face of it the notice does not comply with the section: it is a nullity and is so much waste paper. No power was given to the justices to quash in such circumstances for it was quite unnecessary. The notice on its face is bad."

70. It was this passage in Miller-Mead which Harrison J applied in Lynes. See paragraph 48 of his judgment above.

71. Mr Hockman QC, whose submissions were adopted in this respect by Mr Honey, did not take issue with the principle expressed in Miller-Mead, nor with the application of that principle by Harrison J in Lynes. However, he submitted that those authorities can be distinguished from the present case on the basis that the enforcement notices in those cases did not on their face comply with the statutory requirements.

72. The relevant statutory requirements are now contained in sub-sections (8) and (9) of section 173 of the Act and are as follows:

> "(8) An enforcement notice shall specify the date on which it is to take effect and, subject to sections 175(4) and 289(4A), shall take effect on that date.
>
> (9) An enforcement notice shall specify the period at the end of which any steps are required to have been taken or any activities are required to have ceased and may specify different periods for different steps or activities..."

73. In Burgess, the enforcement notice was defective on its face because it specified only one period, not two. In Miller-Mead, Upjohn LJ referred to the enforcement notice which on its face failed to specify some period that will now be required by

sub-sections (8) or (9) as an example of an enforcement notice that was so much waste paper, a nullity. In Lynes, the enforcement notice did not specify any period at all. Thus, all of those cases are examples of enforcement notices that were defective on their face.

74. Mr Hockman submitted that those examples were to be contrasted with the enforcement notice in the present case, assuming that it had been varied by the 4 May 2012 notice. As so varied, the notice specifies two periods, one for compliance in paragraph 6 "six calendar months after the 4th May 2012", the second in paragraph 7 which states that the notice, which was issued on 17 June 2008, takes effect on 22 July 2008 unless an appeal is made against it beforehand.

75. Thus on the face of the notice, the period for compliance as varied starts on 4 May 2012, well after the date when the notice took effect on 22 July 2008 unless there had been an appeal. It is only if one has regard to extrinsic evidence that there has been an appeal and that the appeal has not been finally determined that one can identify the error in the enforcement notice as varied, namely that the period for compliance began before the notice had taken effect.

76. Mr Elvin submitted that since the section 173A notice was served in the context of a section 289 appeal which was ongoing and since the notice was served for the purpose of correcting an error that the Inspector had made in her decision, it was permissible to take notice of the fact that the appeal had been made and that it had not been finally determined.

77. It is true that the notice of 4 May 2012 does refer to the fact that the enforcement notice had been varied by the Inspector in the decision of 8 April 2011. The first paragraph of the 4 May 2012 notice said:

> "Notice is hereby given that the London Borough of Enfield in accordance with its powers contained in section 173A(1)(b) of the Town and Country Planning Act 1990 (as amended by the Planning and Compensation Act 1991) (and without prejudice to it powers to issue another enforcement notice) hereby relax the requirements of the enforcement notice issued on the 17th June 2008 and subsequently varied by the Inspector appointed by the Secretary of State for Communities and Local Government by a decision dated the 8th April 2011 relating to unauthorised erection of a part two storey, a part three storey, a part four storey block of 11 self-contained residential flats at 16-18 Hazelwood Lane, London, N13 5EX ("the premises")."

78. In my judgment, assuming that it is permissible to look at both the enforcement notice and the 4 May 2012 variation notice in order to ascertain whether there is an error on the face of the enforcement notice as varied, it remains the fact that on the face of those documents the legal flaw introduced by the variation notice is not apparent, namely that the six month period for compliance would begin before the enforcement notice had taken effect because the appeal to the High Court was still ongoing.

79. A power in the Act to correct errors on an appeal under section 174 against the enforcement notice is very broad. Section 176(1) provides that:

> "(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..."

80. This statutory power to correct error is somewhat broader than the power which was contained in the earlier legislation which was considered in Miller-Mead. Given the breadth of the current statutory power to correct error on appeal to the Secretary of State, it seems to me that the Miller-Mead approach to nullity should be confined to those cases where the failure to comply with the statutory requirements in section 173 is apparent on the face of the enforcement notice itself (as varied under section 173A).

81. This notice (as varied on 4 May 2012) did not fail to comply with the statutory requirements on its face. The fact that it was defective could only be ascertained by reference to the extrinsic evidence as to the progress of the appeal proceedings.

82. It is true that 4 May 2012 was a date which was well after the date when the notice took effect on 22 July 2008, but that could only be of benefit to the recipient of the enforcement notice.

83. What is critical, as is plain from the judgment of Harrison J in Lynes, is that the period for compliance of the notice must not begin before the notice has taken effect. The reasons for that are set out in Harrison J's judgment and they are not challenged in this appeal.

84. For these reasons, I do not consider that the notice of 4 May 2012, assuming that it was effective notice to vary the enforcement notice, rendered the enforcement notice a nullity.

85. There is a further reason why I would not allow the Appellant's judicial review claim in respect of ground 1. It is not in dispute that the Second Respondent's purpose in serving the 4 May notice was to correct the Inspector's failure to extend the period of compliance with the enforcement notice from three months to six months from when the notice took effect. The Second Respondent failed to achieve that purpose in the 4 May notice.

86. As a matter of first impression, a Local Planning Authority that erroneously issues a notice which fails to achieve its desired statutory purpose ought, unless there is very good reason to the contrary, to be able to withdraw that defective notice and to replace it with a notice which does achieve its statutory purpose as soon as it recognises its error without having to wait for judicial review proceedings to be commenced to quash its admittedly erroneous first decision.

87. If anything, it seems to me that the decision in Smith v East Elloe, which was referred to by Walker J in paragraph 27 of his judgment, would appear to assist the Second Respondent rather than the Appellant in this respect. Applying the analysis in Smith v East Elloe, if the 4 May 2012 variation notice, although legally detective, remained valid unless and until it was quashed, it seems to me that it was open to the Second Respondent while the 12 May 2012 notice enjoyed that "legal half life" to replace it with a fresh notice.

88. It is plain that there may be a number of variation notices pursued under section 173A(2). Power to vary may be exercised whether or not the notice has taken effect. If a defective variation notice has been issued, there seems to be no sensible reason why the Local Planning Authority should not be entitled to withdraw the defective notice and replace it with a valid variation notice without having to wait for the first defective notice to be quashed by way of judicial review.

89. Another way of considering this issue is to look at the end product of the section 173A process. The statutory power is a power to withdraw or to waive or vary an existing enforcement notice.

90. The Second Respondent did not purport to either withdraw the enforcement notice or to waive any of its provisions. It purported to relax one of the requirements of the notice. It simply had no power under section 173A to render the existing valid enforcement notice a nullity. The judge in effect accepted this argument in paragraphs 26 and 30 of his judgment. Rendering a valid enforcement notice a nullity could not sensibly be described as a relaxation of one of its requirements. A notice that does that is simply out with the scope of the Local Planning Authority's powers under section 173A.

91. Thus it seems to me that however this matter is approached, whether by reference to the statutory purposes of the Second Respondent or the end product of its actions, the end result is that there was a legally defective variation notice under section 173A which the Second Respondent had power to and did withdraw and correct before the section 298 appeal was decided by Walker J.

92. For these reasons, I would reject the Appellant's submission that the 8 May notice was not effective to overcome the consequences of the only error in the Inspector's decision.

For these reasons, I would dismiss the section 289 appeal.

93. LORD JUSTICE SALES: I agree. I have nothing to add.

94. MR JUSTICE NEWEY: I also agree.