The Planning Inspectorate

Costs Decision

Inquiry Held on 19 – 21 January 2021
Site visit made on 21 January 2021

by L Perkins BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 12th March 2021

Costs application in relation to Appeal Ref: APP/B5480/C/18/3215807
Land at 53 Ernest Road, Hornchurch RM11 3JN

- The application is made under the Town and Country Planning Act 1990, sections 174, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The application is made by the Council of the London Borough of Havering for a full award of costs against Mr Stewart Roberts.
- The inquiry was in connection with an appeal against an enforcement notice alleging: Without planning permission, the material change of use of outbuildings to a separate dwelling unit (C3).

Decision

1. The application for an award of costs is allowed in part in the terms set out below.

The submissions for the Council of the London Borough of Havering

2. The costs application was submitted in writing at the Inquiry. A summary of their comments on the appellant's response to their costs application is in Annex B at the end of this decision.

The response on behalf of Mr Stewart Roberts

3. The response was made orally at the Inquiry and is summarised in Annex A at the end of this decision.

Reasons

4. The Planning Practice Guidance (PPG)[1] advises that costs may be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process. Unreasonable behaviour may be based on procedural or substantive grounds. In this case the Council's application is based on both.

5. In respect of substantive grounds, the PPG[2] states that an appellant is at risk of an award of costs being made against them if the appeal or ground of appeal had no reasonable prospect of succeeding. It also makes clear that in enforcement appeals the onus of proof on matters of fact is on the appellant.

[1] Appeals, Paragraph: 030 Reference ID: 16-030-20140306
[2] Appeals, Paragraph: 053 Reference ID: 16-053-20140306

6. The PPG[3] lists examples of unreasonable behaviour which may result in an award of costs on procedural grounds. The list is not exhaustive. It includes resistance to or delay in providing information; providing information that is shown to be manifestly inaccurate or untrue; and deliberately concealing relevant evidence at planning application stage or at a subsequent appeal.

7. It is clear that the Council has been requesting information to support the appellant's assertion that the outbuildings have been used as a separate dwelling for 4 or more years, since at least 22 March 2018, long before the notice was issued. This is the date of email correspondence from the enforcement officer to the appellant, provided with the Council's statement of evidence. It is also clear, from the appellant's proof of evidence, where he describes his conversation with the Council's enforcement officer, that he knew tenancy agreements by themselves would not be enough to satisfy the Council.

8. In terms of evidence, expectations of the Council have been set out since before the appeal was lodged (in the enforcement correspondence noted above, its lawful development certificate report dated 12 October 2018 and its enforcement report dated 19 October 2018); as well as after the appeal was lodged (in the Council's Statement of Evidence of June 2020, its proof of evidence of December 2020 and its rebuttal proof of 11 January 2021).

9. So the Council has repeatedly pointed out that additional evidence, for example bank statements, should be provided to support the appellant's case. Yet such additional evidence has not been provided at any stage, despite both of the appellant's witnesses saying, for example, that rent was paid by BACS[4] (Mr Roberts) or standing order (Miss Crowe), meaning bank records would certainly exist.

10. After the exchange of evidence on 22 December 2020, the Council prepared a rebuttal proof containing a detailed critique of the evidence the appellant had submitted and would rely on at the Inquiry. The specific shortcomings of the evidence provided by the appellant were made clear by the Council in this rebuttal proof, which was sent by email to the appellant on 12 January 2021. I have found this rebuttal proof compelling. I agree with the Council that the identified shortcomings in the appellant's case were such that the appellant should have known that their appeal would have no prospect of success.

11. Under cross-examination, repeated references were made by the appellant's witnesses to other evidence said to exist, including tax returns, photographs, receipts and other documents. But, despite being professionally represented, none of these have been submitted and the appellant was therefore told they could not be taken into account. In my judgement, this is akin to a resistance to or delay in providing information or deliberately concealing relevant evidence at appeal, ie unreasonable behaviour by the appellant, as set out in the PPG.

12. I have no reason not to believe that if the evidence withheld would have supported the appellant's case, then it would have been forthcoming. This strongly indicates information which was provided was likely to be inaccurate. As set out in the PPG, this is unreasonable behaviour.

[3] Appeals, Paragraph: 052 Reference ID: 16-052-20140306
[4] Bankers Automated Clearing Services

13. The appellant has been represented variously by a solicitor, planning consultant and barrister. So in my judgement, it is inconceivable that he has not been professionally advised on the prospects of success for the appeal in light of the Council's case and the evidence provided, including the National Anti-Fraud Network data submitted by the Council in its rebuttal proof prior to the Inquiry. But yet the appellant still proceeded with the Inquiry, based on the evidence he had submitted.

14. Considering all of the above points, it is my view that based on the evidence provided, the appeal had no reasonable prospect of succeeding and that this was clear from the point when the appellant received the Council's rebuttal proof. From the critique contained in the Council's rebuttal proof, the appellant should have been alive to the fact that the evidence they had provided was not sufficient.

15. In addition to the above, both witnesses for the appellant appeared at the Inquiry without copies of appeal documents. I do not accept this was a consequence of my Pre-Inquiry Note as such notes are entirely discretionary. Whilst I can appreciate the virtual format of the Inquiry may explain what occurred to some extent, the problem was obvious on day 1 of the Inquiry and yet the same issue occurred on day 2. This wasted hours of Inquiry time and indicates a lack of preparation on the part of the appellant. Given the appellant has been professionally advised, this was unreasonable behaviour. Even if I am wrong in this regard, it makes no difference as in my view a partial award of costs is due for the other reasons set out above, covering this period, in any event.

16. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has been demonstrated and that a partial award of costs is justified.

Costs Order

17. In exercise of the powers under section 250(5) of the Local Government Act 1972 and Schedule 6 of the Town and Country Planning Act 1990 as amended, and all other enabling powers in that behalf, IT IS HEREBY ORDERED that Mr Stewart Roberts shall pay to the Council of the London Borough of Havering, the costs of the appeal proceedings described in the heading of this decision, limited to those costs incurred after the appellant received the Council's rebuttal proof; such costs to be assessed in the Senior Courts Costs Office if not agreed.

18. The applicant is now invited to submit to Mr Stewart Roberts, to whose agents a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

L Perkins

INSPECTOR

Annex A: The response on behalf of Mr Stewart Roberts

The numbered responses below relate to the numbered points in the Council's written application for costs.

1. There has not been unreasonableness on either a procedural or a substantive basis.

2. Not accepted. The appellant is entitled to succeed. Evidence was put forward with exhibits and the authority knew what the appellant intended to put before the Inquiry.

3. Do not accept delay caused by document difficulties can be attributed to unreasonableness by appellant.

4. Premises were occupied by tenants. Ordinary landlord and tenant principles apply. A landlord is not allowed to go in without consent of the tenants. The authority should have written or hand delivered a request to tenants direct to see the interior. When an appointment was made with the tenants, access was given. Regarding the Council's email of 28 December 2020, there is no proof of evidence from the appellant's agent as this case is entirely about matters of fact. Facts had to be put forward by appellant. We submit that in a pure ground (d) appeal it would not be appropriate or necessary for a planning agent to give evidence, a view or commentary. What is relevant is what is put forward in matters of fact for ground (d) and section 171B(2).

5. Do not accept the appeal had no reasonable prospect of succeeding. You can have as much documentation as you choose. But it has to be put in a testamentary context. It has to be shown how the documents relate to 4 years' continuous occupation, hence the point of the witnesses' evidence. Clear evidence was given. The level of evidence and its quality and quantity is a matter for the Inspector. There was sensible evidence called. There was no failure to comply with process, eg deadlines. There was no failure to respond, eg to a Planning Contravention Notice. There were no delays in providing information. Providing information only at "application stage" does not apply. That only applies to planning applications. "Untrue" information is a judgement. Nothing has been put forward which is manifestly inaccurate or untrue. Concealing evidence at "planning application stage" is not relevant.

6. Not accepted. The appellant's evidence is what was adjudged to be appropriate.

7. The evidence is quite sufficient on the balance of probabilities. There is not anything to indicate the material provided is anything other than authentic. Oath/affirmation is hugely important on a case of this kind. Their evidence was thoroughly tested and what is left is a credible case. It is very common to have no records of contact between the appellant and the authority. How is the fraud record linkage so conflicting? Submit that it is consistent. Do not accept evidence is weak or contradictory. The position on residents is addressed in closings.

8. It is right that a solicitor was involved.

9. Do not accept there has been a delay in providing information or that it has only been provided when requested. The position is different to if you are dealing with a planning application or ground (a) appeal. This is only relevant

to a planning application. The authority was indicating a range of material it would expect to see. It is a matter for the appellant to decide what information is put forward. There has not been any failure to provide material in response to requests.

10. Do not accept it is reasonable to put this in a costs application. Documentary difficulties were a result of this being a Virtual Inquiry. Submit this was just an unfortunate aspect, a consequence of the remote process. A couple of lines was needed in the inspectorate guidance (ie the notes sent out by the Inspector prior to the Inquiry) where you are dealing with witnesses of fact. Mr Roberts was aware of the documentation and was able to respond. This can be avoided by clear guidance being given. It is regrettable but this does not equal unreasonableness. It is a consequence of the nature of the Inquiry. It is something we can learn from.

Annex B: The Council's response to the response by the appellant

- Section 2.4.1 of the tenancy agreement gives relevant notice to gain access and section 4.3.10 states the tenant is required to permit access after 24 hours' written notice. Access is normally achieved by arrangement.
- References to "planning application stage" means lawful development certificate applications too by analogy.
- The lawful development certificate application is material to this appeal which immediately followed a lawful development certificate application.
- Evidence not produced and then put forward now is unreasonable.
- There were deadlines missed earlier.
- There was simply no engagement with what evidence was said by the Council to be lacking.
- A planning contravention notice was not necessary. A lawful development certificate process is sitting alongside the appeal.
- Regarding reasonable prospect of success, if it is positively asserted that something exists and it is not submitted, evidence submitted becomes manifestly untrue and concealment.
- The National Anti-Fraud Network data indicates inauthenticity of the evidence.
- There is not a 'lack' of any record, it is all records missing, not just those of the Council.