



Costs Decision

Inquiry held on 16 August 2016

Site visit made on 16 August 2016

by Pete Drew BSc (Hons), DipTP (Dist) MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 23 September 2016

Costs application in relation to Appeal Ref: APP/A5270/C/15/3140939 Premises known as 46 Birkbeck Road, Acton, London W3 6BQ

- The application is made under the Town and Country Planning Act 1990 [hereinafter "the Act"], sections 174, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The application is made by the Council of the London Borough of Ealing for a full award of costs against Mr David Robold.
- The appeal was made against the Council's decision to issue an enforcement notice that alleged *Without planning permission, the material change of use of the outbuilding at the rear of 46 Birkbeck Road, Acton, London W3 6BQ ("the Land") to use as primary living accommodation not ancillary to the use of the main building at 46 Birkbeck Road.*

Formal Decision and Costs Order

1. In exercise of my powers under section 250(5) of the Local Government Act 1972 and Schedule 6 of the Town and Country Planning Act 1990, and all other powers enabling me in that behalf, IT IS HEREBY ORDERED that Mr David Robold shall pay to the Council of the London Borough of Ealing, the costs of the appeal proceedings described in the heading of this decision; such costs to be assessed in the Senior Courts Costs Office if not agreed. The proceedings concerned an appeal more particularly described in the heading of this decision.
2. The Applicant is now invited to submit to Mr David Robold, to whom a copy of this decision has been sent, the details of those costs with a view to reaching agreement as to the amount. In the event that the parties cannot agree on the amount, a copy of the guidance note on how to apply for a detailed assessment by the Senior Court Costs Office is attached.

The case for the Council of the London Borough of Ealing

3. The Council's case was made in writing and since there is a public record of that submission [Appendix 1] no purpose would be served by reciting it here.
4. However that written submission was supplemented by a further submission at the Inquiry. It was pointed out that at the Inquiry yet another version of events had been given by the Appellant and his witnesses as to the use of the outbuilding prior to it becoming what is alleged to be a dwellinghouse. This has caused the Council to raise new points of law and principle that it did not have a full chance to prepare for.

The response on behalf of David Robold

5. It was said that the Council has singularly failed to identify any extra costs other than to say that the PCN response somehow wasted resources. The Appellant is unclear what this means. Paragraph 3.1 of the costs submission says that it might not have been necessary for the Inquiry at all, but the basis for this suggestion is not elaborated upon. The only conclusion that has been

reached on behalf of the Appellant is that this has only given rise to an extra 5 to 10 minutes of cross-examination.

Final response on behalf of the Council of the London Borough of Ealing

6. The Council says that it put its case together before receipt of the Appellant's proof of evidence. However the case looked very different after taking account of the proof and this had resulted in at least 2 days of extra work. The Council had to prepare at short notice on the night before the Inquiry because notice was given that Mr Robold would attend the Inquiry.

Final submission on behalf of David Robold

7. It was observed that it was not understood why 2 days would be necessary once the proof of evidence had been put in [*Note: the Council were given the chance to, but did not, respond to this observation*].

Reasons

8. The Planning Practice Guidance ['the Guidance'] advises that, irrespective of the outcome of the appeal, costs may only 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.
9. In order to examine the underlying basis for this application it is necessary to go back to first principles because PINS' own guidance merely puts a gloss on the Statutory Instrument. The procedures relating to this Inquiry are set out in the Town and Country Planning (Enforcement) (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2002 ['the 2002 Rules']. The 2002 Rules set out the procedure and timetable for the Inquiry, including the production of a statement of case, which is defined in the following terms: "*means, and is comprised of, a written statement which contains full particulars of the case which a person proposes to put forward at an inquiry, and a list of any documents which that person intends to refer to or put in evidence*".
10. Rule 6 (3) of the 2002 Rules says: "*The appellant shall, within 6 weeks of the starting date, serve 2 copies of his statement of case on the Secretary of State and, in the case of an enforcement appeal, a copy on any person on whom a copy of the enforcement notice has been served*". Rule 6 (4) continues: "*The Secretary of State shall, as soon as practicable after receipt, send a copy of the local planning authority's statement of case to the appellant and a copy of the appellant's statement of case to the local planning authority*". In that way the statements are exchanged via the Secretary of State or, in practice, PINS.
11. Rule 15 of the 2002 Rules sets out the provisions for submission of proofs of evidence which, amongst other things, requires that they be submitted no later than 4 weeks before the Inquiry. However the term proofs of evidence is not defined in the 2002 Rules and so to understand the term one has to go to PINS' published guidance. The updated version was published in March 2016¹ and applies at the date at which the Inquiry was convened but, for the record, the point at issue did not change from the earlier published version. Section D.12 says: "*The term "proofs of evidence" is used in the Enforcement Inquiries Procedure Rules and refers to the document containing the written evidence about which a person appearing at a public inquiry will speak*". In the bullet-points that follow it says they should: "*...cover only areas which remain at issue and should not include new areas of evidence or arguments*" [*my emphasis*].

¹https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/509810/Procedural_Guide_Enf_appeals_v3_23_03_16_MASTER.pdf

12. In this case PINS' letter dated 23 December 2015 translated the 2002 Rules into the 'real time' timetable for the Inquiry. Amongst other things it required that by 3 February 2016 each party provide 2 copies of its statement of case and that by 24 February 2016 each party provide any final comments. The letter also defines a proof of evidence to be "*...a written statement that you, the LPA or a witness wishes the Inspector to take into account at the inquiry*".
13. In lodging the appeal on ground (d), I hope it is fair to say that the Appellant essentially relied on the documents that he had submitted with the first appeal. In my view it is significant that the Appellant did not provide a statement of case by 3 February 2016. The Appellant did provide comments on the Council's statement of case which comprises of a letter to PINS dated 23 February 2016. There is no dispute that Mr Nam submitted his proof of evidence in accordance with the timetable set out in PINS' letter dated 23 December 2015.
14. I appreciate that the Appellant was initially unrepresented but in my view PINS' letter dated 23 December 2015 is jargon free and clear about what is required when. However even if a statement of case had been provided by the deadline I rhetorically ask whether it would have set out the case that was subsequently advanced for the Appellant at the Inquiry?
15. In that context Mr Nam's proof of evidence can fairly be characterised as "*a complete 180 degree shift*". I make clear that I make no criticism of Mr Nam who appears to have put together a highly professional case on behalf of the Appellant at short notice. However in the face of PINS' published guidance his proof of evidence plainly did include new areas of evidence and arguments: it starkly contrasts with the Appellant's earlier position and it was almost all new.
16. The problem lies not with Mr Nam, who put forward the best case on behalf of his client, but with the Appellant himself. Until receipt of the proof he had told the Council that the outbuilding was used as part of the HMO, that only he slept in the outbuilding, that rent was not received, that the outbuilding shared a kitchen, dining room and entrance with No 46, that it had no separate cooking facilities and that there was no separate access. The position he took in the PCN was broadly maintained in other correspondence, including a telephone call and, crucially, in the initial correspondence in this appeal. Thus to the extent that the Council had any indication, in the absence of a statement of case, of the full particulars of the case which the Appellant proposed to put forward at the Inquiry, it was that: "*...the outbuilding has been there and used for over 10 years now*"² but, in any event it had: "*no cooking facilities inside*"³.
17. It is significant to note that the argument based on 10-years use was destined to fail. It was conceded on behalf of the Appellant at the Inquiry that if I found that the allegation was correct, such that a 10-year period applied, that no case could be made. To be clear on that analysis the material date would have been 10-years before the date of issue of the withdrawn enforcement notice, namely 6 January 2005. Mr Robold did not even acquire the property until May 2005 and so his appeal on ground (d) was hopeless. In that context it is worth underlining that if the property did not have cooking facilities, as stated in the PCN reply, but was used for primary living accommodation, including sleeping, then a 10-year period would have applied. No ground (c) was lodged and so there was no dispute that it was a breach of planning control as it would have been a form a residential use that was not use as a single dwellinghouse. To

² Source of quote: section E of the appeal form.

³ Source of quote: attached document from the last appeal, as referred to in section E of the appeal form.

the extent that the cost submission says that the Appellant had no reasonable prospect of success, I agree in this scenario.

18. The Guidance sets out examples of unreasonable behaviour which may result in an award of costs against an Appellant⁴. The fourth bullet-point is: introducing fresh and substantial evidence at a late stage necessitating an adjournment, or extra expense for preparatory work that would not otherwise have arisen. In my view the Appellant's behaviour falls squarely within the fourth bullet-point and whilst the Council did not seek an adjournment it has referred to extra expense for preparatory work. This would not have been necessary if the arguments that were relied on in the Inquiry had been openly presented earlier in the appeal process, let alone in advance thereof. For these reasons the tests for an award of costs⁵ are met. Quantum is a matter for the parties, but there is no reason to doubt that preparation for the Inquiry would have been significantly extended in order to prepare the entirely fresh and substantial evidence that was contained in, and appended to, Mr Nam's proof of evidence.
19. The extra expense incurred by the Council for preparatory work would have been compounded by the late decision to call other witnesses. In advance of the Inquiry Mr Nam had provided a completed "*Enforcement/LDC Inquiry Timetable Form*", dated 25 July 2016, which said that only Mr Nam was going to be called as a witness for the Appellant. The form indicated that the total time that he would take to give evidence would be half an hour. At the Inquiry I was given a revised version, dated 15 August 2016, which indicated that 3 other witnesses would be called and that the total time the Appellant's witnesses would take to give evidence would be 2 hours. It would appear this was communicated to the Appellant on the Monday before the Inquiry opened.
20. Continuing to focus at this stage on preparation time, the decision to call other witnesses would have resulted in the need for more preparation time. Since there has been reference to my note to the parties, which was circulated in advance of the Inquiry, the salient sentence reads: "*...it might be considered to be necessary to take evidence on oath from the Appellant himself, not his Agent, in order to understand what happened when and to enable an explanation to be given for the written answers to the PCN*". The Appellant was professionally represented by this stage and "*might*" places the decision firmly with those who advise the Appellant. Moreover there is no suggestion that other witnesses would need to be called to deal with the reply to the PCN. In the circumstances there is no reason to doubt the Council incurred extra expense for preparatory work of which it was not notified until the day before.
21. In the context of finding that a partial award should be made for additional preparation time I turn to consider the case for a full award and, as necessary, the case for an award in relation to an extension to Inquiry sitting time. The key point here arises from paragraph 3.1 of the costs submission, namely if the response to the PCN had: "*been correct, there may well not have been a need for the public inquiry at all*". In the particular, indeed unique, circumstances of this case that argument is very hard to contest and, with respect, the response on behalf of Mr Robold does not give me a good reason to do so.
22. Nevertheless, to be fair to both main parties, I will rehearse the respective arguments as I see them. As I have suggested in my main decision, if the PCN response had disclosed the information that is now set out in, and/or appended to, Mr Nam's proof of evidence, the planning process could have had a different

⁴ Paragraph ID 16-052-20140306.

⁵ Paragraph ID 16-030-20140306.

- outcome. The Council could have invited a lawful development certificate [LDC] as it did in 2011 and it might have been in prospect that an LDC made in 2014 would have been permitted without recourse to the appeal system at all.
23. I anticipate that the retort to that might be that the Council could have followed up its correspondence in 2011. However, whilst I have attached some weight to that argument in my main decision, I do not find it to be valid in the context of this application. The reality is that if the Council had diligently followed up its letter dated 24 November 2011 that, adopting the balance of probability, either: (i) the unauthorised use would have ceased; or (ii) an LDC could have been made but would probably not have succeeded in 2011 such that the matter would have gone to appeal; and/or (iii) the Council could have issued an enforcement notice in 2011 but that too would have gone to appeal. In that sense the planning process could have had a very different outcome, but one that would probably have been much worse for Mr Robold.
24. In any event the Council would doubtless say that the position could have materially changed between 2011 and 2014 and it was entitled to rely on the response to the PCN and other correspondence from Mr Robold. Again it might be said that the Council should have conducted a site inspection to test what was being said in the PCN response, but I have dealt with that argument in my main decision. In short I consider the Council was entitled to rely on the PCN given the consistent picture that Mr Robold presented to the Council.
25. In this context it is again appropriate to test this scenario against the examples in the Guidance, noting that it says: "*This list is not exhaustive*"⁶. The eighth bullet-point says: providing information that is shown to be manifestly inaccurate or untrue. Whilst I have given reasons in my main decision for accepting what the Appellant said on oath, the information provided in the written response to the PCN has, at a minimum, been shown to be manifestly inaccurate and so the behaviour falls within the eighth example. In my view this whole sequence of events was entirely avoidable, although I make very clear that the costs regime is limited to costs for the statutory process⁷.
26. For these reasons, since the tests for an award of costs are met, I consider that the case for a full award of costs has been made out and so no purpose would be gained by looking separately at whether the Inquiry sitting time has been unreasonably extended. The notice was underpinned by the terms of the reply to the PCN and because that reply was manifestly inaccurate the whole appeal process has given rise to a complete waste of public time and money ab initio.

Conclusion

27. For the reasons identified above, I conclude that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Guidance, has been demonstrated. The application for an award costs is therefore allowed, as set out in the formal decision and costs order.

Pete Drew

INSPECTOR

Appendix 1: Written application for costs submitted by the Council at the Inquiry.

⁶ Paragraph ID 16-052-20140306.

⁷ Paragraph ID 16-040-20140306.