

Costs Decision

Inquiry held on 10 November 2016

Site visit made on 10 November 2016

by Paul Freer BA (Hons) LLM MRTPI

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

Decision date: 03 January 2017

**Costs application in relation to Appeal Ref: APP/T5150/C/16/3142994
Land at Flats 1-7 and Garden Flat, 664 North Circular Road, Neasden,
London NW2 7QJ**

- 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 Brent for a full award of costs against Mr Mordechai Aksler.
 - The Inquiry was in connection with an appeal against an enforcement notice alleging, without planning permission, the material change of use of the premises to eight flats.
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Decision: The application is granted in the terms set out below.

The submissions for the Council of the London Borough of Brent

1. The Council's case is made on substantive grounds rather than procedural grounds. The Council considers that the appellant has failed to understand the various grounds of appeal open to him, with the result that the appeals on grounds (b) and (c) were conflated in the evidence submitted to the Inquiry. Moreover, the Council considers that none of the grounds of appeal were supported by adequate evidence and that the evidence submitted was factually incorrect. The Council point out that no documentary evidence was submitted in relation to the appeal on ground (d), and that on the appellant's own case this ground of appeal could not have succeeded. The Council says that the same applies to the appeal on ground (c). The Council considers that no evidence was submitted by the appellant to support the claim made under the appeal on ground (f) that two kitchens were required, and that no evidence was submitted to support the claim on the ground (g) appeal that the period of compliance of six months was not adequate. The Council takes the view that this degree of unreasonable behaviour is highly unusual, and therefore seeks a full award of costs against the appellant.

The response by Mr Mordechai Aksler

2. The appellant responds by explaining that Mr Aksler had been present with his planning consultant at both the re-scheduled date on which the Inquiry sat and the earlier date when it had to be postponed. By contrast, the Council had produced a Proof of evidence but the author of that Proof was not present on either occasion to give evidence in person. The appellant's evidence, given on oath, was clear and compelling, and discharged the onus of proof that was upon him.
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3. The appellant disputes that there was a failure to understand the grounds of appeal. The additional ground of appeal was on ground (c) only, and this would have been clear from the evidence anyway. In terms of ground (g), the appellant produced the only clear and compelling evidence of how long the Section 21 procedure takes. The appellant therefore submits that this is not a case where the appellant has failed to turn up to present evidence and that, in substantive terms, the evidence was backed-up.

Reasons

4. The Planning Practice 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. The Planning Practice Guidance indicates that one of the aims of the costs regime is to encourage all those involved in the appeal process to behave in a reasonable way and to follow good practice. The Planning Practice Guidance provides examples of unreasonable behaviour which may result in an award of costs against an appellant. These include pursuing a ground of appeal that had no reasonable prospect of succeeding.
5. The appellant's written evidence on ground (d) related more to an appeal on ground (c). Consequently, whilst there was no appeal on ground (b), the appellant's written evidence did not to any meaningful extent address a ground on which the appeal was originally lodged. Moreover, in oral evidence, Mr Aksler himself confirmed on oath that the conversion of the property only occurred some two years before the enforcement notice was issued. The appeal on ground (d) therefore had no reasonable prospect of succeeding, and the appellant ought to have been aware of that at the time the appeal was initially lodged. In my view, pursuing that ground of appeal was unreasonable behaviour.
6. The appellant's appeal on ground (c) was predicated on a situation whereby the change of use comprised a self-contained dwelling on the ground floor with the remainder of the property in use as a House in Multiple Occupation (HMO). The appellant's argument was therefore, in summary, that the conversion to eight flats did not result in a change in the character of the use and therefore did not constitute a material change of use. A similar line of argument had been successful in other appeals to which the appellant referred. Had the lawful use of the property been that described by the appellant at the time the enforcement notice was issued, and without expressing any views on the merits of it, I can understand that this could potentially have constituted a legitimate ground of appeal in those circumstances.
7. However, on the balance of probability, the evidence before me pointed to the lawful planning use of the property being that of a single dwellinghouse. The appellant's ground of appeal could therefore not succeed on the basis on which it was put me. Moreover, the description of the use on which the appellant relied was based entirely on the appellant's recollection of the situation at the time he purchased the property. There was no documentary evidence to support the notion that the use described by the appellant was the lawful planning use, and the appellant does not appear to have undertaken any due diligence in that respect before purchasing the property. Consequently, the entire premise on which the appellant's appeal on ground (c) was predicated

lacked foundation in matters of fact, without which it had no reasonable prospect of succeeding. Pursuing that ground of appeal was therefore also unreasonable behaviour.

8. In the absence of an appeal on ground (a), the scope of an appeal on ground (f) is limited. The appellant appeared to accept this, conceding in evidence that it was correct to restore the property to its lawful planning use. It is clear that simply removing all the kitchens save 2 would not achieve the purpose of the notice, such that the appeal on ground (f) could not succeed. I also note that the appellant did not specifically contest the Council's claim for an award of costs in relation to this ground of appeal.
9. I acknowledge that the appellant did give written and oral evidence in support of the appeal on ground (g), much of which appeared in principle to provide a reasonable basis for extending the period of compliance. However, this evidence was not supported by documents to confirm the terms of the tenancy agreements held by the occupiers of the appeal premises. In the absence of that documentary evidence, the appellant's appeal on ground (g) was not made out and could not succeed.
10. In summary, the appellant's case on each of the grounds of appeal may be defined as being not supported by documentary evidence. In the absence of that underpinning documentary evidence, the planning principles upon which the appellant sought to rely could not have formed the basis of a successful appeal. Pursuing the appeal without this supporting evidence constitutes unreasonable behaviour on the part of the appellant across the piece. Attendance at the Inquiry with a planning consultant and other representatives is not, in itself, sufficient to offset that unreasonable behaviour.
11. The Planning Practice Guidance clearly states that the right of appeal must be exercised reasonably. Having regard to the above, I have no hesitation in finding that the appellant did not exercise his right of appeal in a reasonable manner. The appellant's unreasonable behaviour has caused the Council to incur unnecessary and the wasted expense in defending this appeal. I therefore consider that the full award of costs sought by the Council is justified.

Costs Order

12. In exercise of the powers under sections 174, 320 and Schedule 6 of the Town and Country Planning Act 1990, and section 250(5) of the Local Government Act 1972, and all other enabling powers in that behalf, IT IS HEREBY ORDERED that Mr Mordechai Aksler shall pay to the Council of the London Borough of Brent, the full costs of the appeal proceedings described in the heading of this decision.
13. The applicant is now invited to submit to Mr Mordechai Aksler, to whom a copy of this decision has been sent, 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 Courts Costs Office is enclosed.

Paul Freer

INSPECTOR