

Costs Decision

Inquiry held on 21 and 22 December 2016 and 3 and 10 February 2017

Site visit made on 2 February 2017

by Gloria McFarlane LLB(Hons) BA(Hons) Solicitor (Non-practising)

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

Decision date: 19 April 2017

**Costs application in relation to Appeal Ref: APP/A5270/C/16/3145183
144 Avenue Road, Acton , London, W3 8QG**

- 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 Ealing for a full award of costs against Mr P Benmax.
 - The inquiry was in connection with an appeal against an enforcement notice alleging the material change of use of the premises at 144 Avenue Road to use as 11 self-contained residential dwellings.
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Decision

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

The submissions for the Council – Main Points

2. The Council provided a written copy of its application. The Council's application was in two parts – substantive and procedural – for a full award of wasted expenses.
 3. The Council submits that Mr Benmax's evidence in itself was insufficient to make out his ground (d) appeal because: the submitted evidence was in the form of unsigned licences and on the second day of the Inquiry signed ones were produced; there is little if any supporting evidence for the licence agreements; the agreements are inconsistent with the Council's housing benefit records; exclusive occupancy is expressly refused and therefore the units are not separate dwellinghouses and a case based on the agreements is bound to fail; apart from Mr Peppiatt no evidence was offered about when the facilities were installed in each unit; and there is no evidence of capability of use as a dwellinghouse. The ground (d) appeal had no chance of success on the evidence available and it was unreasonable to bring it.
 4. The other grounds of appeal were similarly without merit. The ground (c) appeal disclosed no discernible case in planning law and immunity for two flats cannot result in quashing a notice for 11 flats. The ground (f) appeal was not clarified until closing submissions. The ground (g) appeal was nonsense in the context of licence agreements that are terminable on notice.
 5. With regard to the procedural case the Appellant failed to meet the requirements of the procedure rule in a number of key aspects. He failed to agree a statement of common ground; new evidence was submitted on day
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one which caused a delay in proceedings for the Council to consider it; he failed to engage with the Inquiry on the first and second days; he refused to confirm after the adjournment in December whether he would give evidence resulting in the Council having to re-prepare for cross examination and draft closing submissions on separate bases depending on whether he gave evidence or not; new evidence was brought to the December sittings; and he sought to introduce more evidence after his presentation of his case had, arguably, closed. The Appellant's behaviour is unreasonable.

The response by Mr Benmax – Main Points

6. Where a costs application is to be made the Party making the application should give an indication at the earliest opportunity that the application is to be made. The Council's written costs application is dated 3 February 2017 but the Appellant was not aware of the application until today (10 February 2017).
7. The substantive point that the Appellant's ground (d) appeal was bound to fail is obviously wrong. There were a number of witnesses in support of the Appellant who gave evidence of their honest recollection. The Appellant provided what documentary evidence there was to support his case. There was corroborative evidence of residential occupation in the form of the Council's housing benefit records. It was not unreasonable of the Appellant to have made the appeal on ground (d).
8. With regard to the procedural point, there were no wasted costs arising from the lack of a statement of common ground; it is not a statement that would have saved any Inquiry time and it is difficult to see what wasted costs arise from a failure to sign it at an earlier stage. The most substantial new evidence submitted on the first day was that of the Council in Mr Whittaker's supplementary proof with the housing benefit records attached. This necessitated the attendance of the Housing Benefit Officer and his evidence was that the records were not reliable in respect of two entries.
9. Mr Benmax's failure to engage arose from his medical condition and the medical evidence was accepted. Cross-examination was required in the event and there were no wasted costs in this respect.
10. The Appellant made an application for an adjournment which was refused. The adjournment of the Inquiry to February was for a number of reasons – it was not possible to deal with all the evidence in the allotted two days, Mr Benmax was not able to attend on the original two days and the Council had produced additional evidence.

Reasons

11. The Planning Practice Guidance 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 process¹.
12. The appeal was made on 24 February 2016 and at that time Mr Benmax had instructed an agent to act on his behalf. An Inquiry of one day was requested and the agent advised that four witnesses would be called; in the Appellant's Inquiry timetable this was reduced to three – the agent, Mr Benmax and Mr Hoffman. All matters relating to the appeal were dealt with by the agent

¹ Paragraph 030

and on 9 November 2016 he advised the Inspectorate by email that he was preparing the proof of evidence on behalf of the Appellant. On 14 November the agent informed the Inspectorate that the Appellant would be dealing with the appeal personally and that he (the agent) had no further involvement. The proofs of evidence, the Appellant's and the Council's, were exchanged on 23 November 2016.

13. When the Inquiry opened on Wednesday 21 December 2016 the Appellant was represented by Counsel and another agent had been instructed. These gentlemen had been instructed on the previous Thursday/Friday but no notice had been given to either the Inspectorate or the Council.
14. The Appellant's application for an adjournment was refused for a number of reasons but as both Parties were in receipt of new evidence the Inquiry was adjourned for 20 minutes for Counsel to look at the Council's supplementary statement and after hearing further representations the Inquiry was adjourned for a further hour and twenty minutes before hearing the Parties' opening remarks. These adjournments were for the benefit of both the Appellant and the Council and no wasted costs arise from them.
15. The Rules² permit the calling of evidence without a proof and although it is not good practice I do not consider that it was unreasonable for Mr Solomon and Mr Christie to be called to give evidence given the circumstances of Mr Benmax's ill-health and the late instruction of the agent and Counsel.
16. There was an adjournment of over a month (22 December 2016 until 3 February 2017) between the second and third days of the Inquiry and I consider that the attendance of Mr Peppiatt and Mr Turvey to give evidence on the third day without any prior indication that they would be attending was unreasonable behaviour by the Appellant. There was ample time for notice to have been given and for written proofs to be sent to the Council and in this respect I note that Mr Peppiatt's statement was dated 19 January 2016. Their attendance extended the length of the Inquiry and the Council had to bear unnecessary costs because of this.
17. Mr Benmax was not well on the first and second days and one of the reasons why the Inquiry was adjourned was in order to ascertain whether he would be able to give evidence at a later date. I had directed that the Inspectorate and the Council should be informed prior to the resumed Inquiry whether Mr Benmax would be giving evidence or not but no such information was provided. I consider that this behaviour was unreasonable but as Mr Benmax gave evidence any preparation by the Council's advocate for cross-examination was not wasted and therefore this unreasonable behaviour did not give rise to wasted costs.
18. The Rules require a statement of common ground to be prepared and agreed between the Council and the Appellant and sent to the Inspectorate four weeks before the Inquiry. In this appeal the statement of common ground was signed on the third day of the Inquiry. Whilst it was unreasonable of the Appellant not to have engaged in this process earlier no costs were wasted by the Council in its production given the Appellant's eventual agreement.

² The Town and Country Planning (Enforcement)(Determination by Inspectors)(Inquiries Procedure)(England) Rules 2002 2002 No 2685

19. With regard to the grounds of appeal, I found in my decision that the evidence presented by and on behalf of the Appellant was unreliable and in addition it was not sufficiently precise and unambiguous to prove to the required standard the appeals on grounds (b) and (d). However, evidence was called and documents were produced which were fully tested by the Council and I do not consider that the Appellant acted unreasonably in bringing those appeals.
20. The ground (c) appeal, as a matter of law, was unsustainable and I consider that the Appellant acted unreasonably in making it, particularly as it was virtually conceded by Counsel that it was a ground (f) point not a ground (c) one. The Council wasted costs in responding to this meritless appeal. As a result of submissions made by Counsel the Council varied the requirements of the notice and ground (f) appeal was successful on a point of law; the Appellant did not act unreasonably in bringing this ground of appeal. So far as the ground (g) appeal is concerned even if the Appellant had acted unreasonably in making it, which I consider he did not, any wasted costs by the Council in responding to it would have been minimal.

Conclusions

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

Costs Order

22. 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 P Benmax shall pay to the Council of the London Borough of Ealing the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in respect of the time spent at the Inquiry arising from the attendance of Mr Peppiatt and Mr Turvey to give evidence on the third and fourth days of the Inquiry and in respect of responding to the ground (c) appeal; such costs to be assessed in the Senior Courts Costs Office if not agreed.
23. The Council of the London Borough of Ealing is now invited to submit to Mr P Benmax to whom and to whose agent a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Gloria McFarlane

Inspector

DOCUMENTS

Document 1 – The Council’s Costs application