
Costs Decisions

Site visit made on 13 January 2020

by Laura Renaudon LLM LARTPI Solicitor

an Inspector appointed by the Secretary of State

Decision date: 16 April 2020

Costs Application A: in relation to Appeal Ref: APP/X5990/C/19/3232401 117 - 119 Edgware Road, London W2 2HX

- The application is made under the Town and Country Planning Act 1990, sections 174, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by City of Westminster Council for a full award of costs against Daejan Investments Limited ('the landlord').
 - The appeal was against an enforcement notice alleging the unauthorised use of the property as a café/restaurant (A3 use class).
-

Costs Application B: in relation to Appeal Ref: APP/X5990/C/19/3232401 117 - 119 Edgware Road, London W2 2HX

- The application is made under the Town and Country Planning Act 1990, sections 174, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made Daejan Investments Limited ('the landlord') by for a full award of costs against City of Westminster Council.
 - The appeal was against an enforcement notice alleging the unauthorised use of the property as a café/restaurant (A3 use class).
-

Costs Application C: in relation to Appeal Ref: APP/X5990/C/19/3232435 117 - 119 Edgware Road, London W2 2HX

- The application is made under the Town and Country Planning Act 1990, sections 174, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by City of Westminster Council for a full award of costs against Mr Jihad Issa ('the tenant').
 - The appeal was against an enforcement notice alleging the unauthorised use of the property as a café/restaurant (A3 use class).
-

Application A: the Council's application against the Landlord

Decision

1. The application for an award of costs is refused.

Reasons

2. Paragraph 030 of the Planning Practice Guidance advises that costs may be awarded where a party has behaved unreasonably and the unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process. Unreasonable behaviour in this context may be either procedural or substantive. The Council's costs application results from their assertion that the landlord's reasoning in support of their appeal is unreasonable and unsubstantiated.

3. The related enforcement appeal was made on ground (g), seeking more time to comply with the requirements of the notice. The landlord explained that they, as the freeholder, were not in possession of the property and would require extra time to take steps to secure possession in order to secure the cessation of the restaurant use, as required by the notice. Following the issue of the notice, an extension of time for compliance was sought from the Council, which was refused. Additionally, the landlord sought an assurance as regards prosecution from the Council, pursuant to section 172A of the 1990 Act. This was also refused by the Council. The Council say that the lease was assigned by the landlord in the knowledge that the property would be used in breach of planning control and that ample time has elapsed for the landlord to take steps to bring the unauthorised use to an end.
4. The Council say that the landlord's position should not outweigh development plan policies, and point out that section 179(3) of the 1990 Act provides a landlord with a defence to prosecution where he can show that he did everything he could be expected to do to secure compliance with the notice. However in the face of such uncertainty, with no reassurances about prosecution action notwithstanding that the landlord is not in possession of the property, I do not find the landlord's decision to appeal in order to seek extra time to be unreasonable.
5. The Council refused to give the landlord an assurance against prosecution whilst the tenant remained in possession of the property. If the Council thinks that the landlord is responsible for complying with the notice in these circumstances, and should be susceptible to a prosecution under s. 179, then the landlord's request for an extension of time, for the reasons given, does not appear unreasonable.
6. The Council's reasons for refusing to give an assurance against prosecution included the 'circumstances' in which the lease was assigned, where the Council say the landlord assigned the lease in full knowledge of the proposed unauthorised use. However, the lease appears to have been assigned when a temporary flexible use permission was available. There is no information before me to suggest that the landlord has actively encouraged the unauthorised use. Nor do I consider, as the Council indicates, that it is incumbent on the landlord to take steps to bring the lease to an end prior to the notice taking effect.
7. The landlord has requested an extension of time, both in this appeal and previously from the Council, in the misapprehension that such an extension can be 'party-specific'. It cannot: an extension of time is to the notice, or particular elements of it, to the world at large. However I do not think that this ultimately affects the landlord's position, seeking extra time in order to secure possession of the property and thus compliance with the notice, in circumstances where the Council declined to say that they were not at risk of prosecution.
8. In these circumstances I do not find that the landlord's appeal was unreasonably made, and has not put the Council to unreasonable expense. The application for an award of costs is refused.

Application B: the Landlord's application against the Council

Decision

9. The application for an award of costs is refused.

Reasons

10. Late in the appeal proceedings, the landlord made a costs application against the Council. This arose as a result of my questioning whether the alleged breach of planning control was properly described as a material change of use without planning permission, or if the breach actually amounted to a breach of planning conditions. In the event I have concluded that it was the latter, and have corrected the notice accordingly.
11. The landlord says that their position is prejudiced as a result, because they have commenced forfeiture proceedings against the tenant citing breaches of the lease, in which they say they have relied on the Council's description of the breach of planning control rather than the breach which I have found to have taken place. It is said that the correction of the allegation in the Enforcement Notice has the effect of rendering the forfeiture notice to the tenant 'invalid' because the lease breach complained of, and as originally described by the Council, is 'substantially different' from that now described in the corrected notice.
12. I am not informed whether the forfeiture proceedings will in fact be stymied as a result of my correcting the notice. However I am unable to find that the Council's original description of the breach has caused the landlord appellant to incur wasted costs in these appeal proceedings.
13. The landlord seeks costs against the Council resulting from what it describes as the Council's unreasonable conduct of the appeal and in view of the procedural irregularities with the notice. The landlord says that the Council's refusal to extend time for compliance by the appellant, or to issue a letter of assurance against prosecution, were substantively unreasonable and resulted in the need for the landlord's appeal.
14. As explained elsewhere, the Council could not extend time only for the landlord, and the landlord does not dispute that 3 months is an adequate time for compliance by the tenant. Therefore the Council were not unreasonable in that respect.
15. As to the lack of a letter of assurance, the Council's case is that the landlord could establish a defence to a prosecution by showing that all reasonable steps were being taken. This approach is within the range of reasonable responses that the Council could take. Whilst I do not consider that the landlord's appeal on ground (g) was an unreasonable step to take, nor do I consider that the Council's refusal to give assurances, thus prompting the landlord's appeal, was unreasonable.
16. As to the 'procedural irregularities', all parties are professionally represented and a number of different views as to characterising the breach have been put forward. Ultimately I have disagreed with the Council's analysis. However, in the light of the commencement of the use before the date stated in the 'Class D prior notification' and the uncertain consequences of that, I do not consider that the Council's notice as originally framed was an unreasonable approach to take.
17. In any event the landlord is professionally advised and the responsibility for ensuring the correctness of the section 146 notice is a matter for the landlord. It would not be reasonable to penalise the Council for any reliance placed by

the landlord on the Council's actions before the enforcement notice has taken effect.

18. Therefore the landlord's application for costs against the Council is also refused.

Application C: the Council's application against the Tenant

Decision

19. The application for an award of costs is refused.

Reasons

20. The Council considers that the tenant's claims under its appeal on grounds (f) and (g) are unreasonable and intended to cause delay rather than a resolution. In the light of my findings on the appeal on ground (f), by which I have found the requirements of the notice to exceed what is needed to remedy the corrected breach of planning control, together with my findings on ground (g) by which I have extended the period for compliance, it follows that I do not agree that the tenant's case was unreasonable. No wasted costs have been incurred by the Council, and I refuse their application for costs against the tenant.

Laura Renaudon

INSPECTOR