

Costs Decisions

Hearing held on 17 December 2019

Site visit made on 17 December 2019

by Grahame Kean B.A. (Hons), PgCert CIPFA, Solicitor HCA

an Inspector appointed by the Secretary of State

Decision date: 08 July 2020

Costs applications in relation to:

Appeal A: APP/N5090/C/18/3209042

Appeal B: APP/N5090/C/18/3209072

Appeal C: APP/N5090/W/18/3218172

155 Chanctonbury Way, London NW12 7AE

- The applications are 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 applications are made by Mr and Mrs Rusta for a full award of costs against the Council of the London Borough of Barnet (the Council).
 - Appeals A and B were against an enforcement notice alleging building works not to the approved plans of planning permission reference 18/0129/FUL dated 29 February 2018
 - Appeal C was against refusal of an application for planning permission for: demolition of no 155 and erection of 1 no dwelling. Part single-part two-storey side and rear extension following demolition of existing side/rear extension and garage. Association [sic] changes to windows and door including relocation of front entrance to 157 Chanctonbury Way, without complying with conditions attached to planning permission Ref 18/0129/FUL.
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Decisions

1. The applications for awards of costs against the Council are refused.

The applications

2. The applications were for a full award of costs, firstly in respect of Appeals A and B, and then in respect of Appeal C. They were made in writing before the hearing and orally. The Council responded at the hearing in writing and orally.

Submissions of the Applicants

3. The appeals were entirely avoidable and unnecessary. The enforcement notice was unjustified, there being no harm caused by the unauthorised development. Refusal of application Ref 19/1514 to retain the works to No 155 Chanctonbury Way, made these appeals necessary as it also made a hearing necessary.
 4. In particular the reasons for issuing the notice were unjustified and unsupported by any material evidence. The notice was furthermore a nullity in its lack of clarity and full detail as to the breach of planning control. Service of the notice was inexpedient and disproportionate in requiring complete demolition and removal of two houses where permission had been given on four occasions for very similar proposals and minor amendments.
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5. The notice was issued with the aim of not allowing the applicants time to submit a minor amendments s73 application, time which they had originally been given by the Council.
6. Reason No 3 for issuing the notice should not have been included, given an appeal had been lodged in April 2018 against planning condition 15(a) of permission Ref 18/0129/FUL (the outcome of which related to reason No 3).
7. There was no evidence that justified demolition of the houses. To retain the notice without seeking its replacement or variation imposing lesser remedies, caused stress and anxiety to the appellants over the 18 months since its issue.
8. Given the changes approved regarding No 157, the Council failed to consider issuing a split decision, granting permission for No 157 and refusing permission for the three alleged design issues highlighted.
9. Also in relation to Appeal C, there was no substantial evidence to justify refusal of permission given the minor nature of the amendments sought to a lawful fall-back position. The Council refused permission in relation to both houses but had inconsistently approved the same changes to No 157. The refusal was based on an entirely subjective view of the changes which were unjustified when the changes to the two houses were viewed together, and not on any objective evidence.
10. Its unreasonable behaviour was compounded at the hearing in that the Council accepted after all that lesser steps, other than the draconian option of demolition, "would be an option as well". Those lesser steps were obvious and the Council had been given opportunities to withdraw the notice after the changes to No 157 were approved. The Council's position on the compliance period gave the impression that it was vindictive towards the appellants.
11. Thus the Council's behaviour was unreasonable and forced the appellants to make unnecessary and costly appeals.

Submissions of the Council

12. The Council's decisions in these appeals were based on material considerations supported by planning policy. There were delegated reports for both the enforcement notice and the refused application which stated the Council's concerns. Both parties agreed that what had been built on site was not in accordance with the approved plans. It was therefore appropriate to serve the enforcement notice. Since the approved scheme was not completed in accordance with those plans the requirement for demolition was a proportionate approach to the breach of planning control.
13. The Council had discretion to take enforcement action where it deemed it expedient to do so. The guidance on enforcement was that action is taken in the public interest and to maintain integrity in decision making. The Council's appeal statement showed that proper consideration was given to expediency.
14. For these reasons the decision to issue the notice was reasonable as was the Council's behaviour in all other respects.

Reasons

15. Planning Practice Guidance advises that costs may be awarded where a party has behaved unreasonably, and the unreasonable behaviour directly caused another party to incur unnecessary or wasted expense in the appeal process. Unreasonable behaviour can be procedural or substantive, relating to the issues arising from the merits of the appeal. Although costs can only be awarded in relation to unnecessary or wasted expense at the appeal, behaviours and actions at the time of the application can be taken into account.
16. Substantive examples of unreasonable behaviour, potentially relevant here, include: preventing or delaying development which should clearly be permitted, having regard to its accordance with the development plan, national policy and other material considerations; and vague, generalised or inaccurate assertions about a proposal's impact, which are unsupported by any objective analysis.
17. In the Appeal Decisions I quashed the enforcement notice relating to No 155 Chanctonbury Way and granted planning permission on the deemed planning application contained in Appeal A, as well as granting permission in the s78 appeal, Appeal C. Consideration of Appeal B was not therefore reached and in any event the relevant material for that appeal was the same as for Appeal A. Further, the enforcement notice relating to No 157 had been withdrawn and was not before me.
18. Issues around what is good or bad design are frequently not straightforward. The Council made an arguable case against the planning merits of the unauthorised changes to No 155. I came to a different view on the merits.
19. In relation to refusal reason No 3, the Council recognised that in the previous appeal decision the Inspector was not convinced that the hard and soft landscaping scheme would impact on existing trees. However it pointed to its Trees Officer's advice under application 19/1514/RCU as to potential root and tree damage in the implementation of the hard and soft landscaping scheme. Whilst the trees were not protected by a TPO the Council considered they added to the verdant feel to the rear of dwellings. In the event I considered that with a landscaping condition there was no need for specific tree protection but do not consider the Council acted unreasonably in making its case.
20. As to nullity I found against the applicants. On the question of whether it was expedient to issue the notice related to No 155, this would have been a matter on which to challenge the Council directly through a court process. It is not an issue that is appealable under any of the grounds in s174 of the 1990 Act.
21. It would be incorrect to characterise the differences between authorised development and what had been built out as similar or consisting of minor amendments. This was particularly so as regards the rear dormer works but also, for example the openings in the side elevation, which were quite impactful, albeit a design which I found caused no unacceptable harm.
22. Whether it was disproportionate to require demolition of No 155 was not reached given permission was granted. It is very likely in my opinion that had the notice merely required conformity to an earlier permission or an earlier combination of permissions, the applicants would still have appealed to allow the unauthorised development to stand.

23. Ms Olokodana, the Council's planning officer accepted that lesser steps than demolition might be another option. I say "might" because although it is said the lesser steps were obvious, in my view they were not, and some discussion was had around this issue. However she did not resile from the Council's position that demolition was a reasonable step to remedy the breach of planning control. The breach itself was not contested since the applicants had withdrawn their appeal on ground (c) before the hearing.
24. The applicants took it upon themselves to demolish 155 in its entirety before obtaining planning permission. On its face, the later permission for demolition was an integral part of the permitted development that was conditioned to ensure that the rebuild was carried out fully in accordance with the plans. The applicants chose not to comply with those plans. It must have occurred to them or their professionally qualified agents that the Council might consider the resulting development as a whole to be without the benefit of planning permission. I was not requested to change the description of the breach of planning control to allege a breach of condition. Had permission not been granted ground (f) would have come into play, but it is by no means certain I would have concluded that the Council was wrong, or that if it were, it was unreasonable to require demolition of an unauthorised development as a result.
25. The issue of the notice was short of the promised period of grace but brought matters to a head: there was no evidence that the applicants were at all minded to alter the development as requested by the Council. Had the Council delayed it is unlikely in my view that resolution of the disputed matters would have occurred without an appeal. The applicants had been given ample time between the discovery of the breach and subsequent enforcement action to set out their position.
26. Turning to the alleged wrongful failure to consider issuing a split decision that would have included granting permission for No 157, the failure, however it is characterised did not occasion an appeal that would not otherwise have been made, as it was, against the changes to No 155. The Council made no case on alterations to No 157 which was proper given the approvals granted thereto before, and the withdrawal of the notice relating to No 157. Indeed I asked the applicants whether they wished to amend the appealed application to exclude reference to No 157 but they declined. In the circumstances the Council did not act unreasonably in dealing with the s73 appealed application. In any event the consequences for the applicants for the award, who own No 155, of what may or may not have been granted permission at No 157 are unclear.
27. I should say finally that there is no evidence whatsoever that any Council officer was vindictive toward the applicants, in relation to the compliance period or any other matter. The correspondence and numerous planning applications show that the applicants went to considerable lengths to persuade the Council to let them have their additions built the way they wished them to be built and had in fact built them. There is nothing wrong in that. Equally however, I have no reason to doubt that Ms Olokodana's calm, professional and even conduct at the hearing toward all parties, would have been reflected in her prior dealings with the applicants.

28. I conclude that there was no unreasonable behaviour by the Council that caused the applicants to incur wasted expenditure. The applications are refused.

Grahame Kean

INSPECTOR