



Costs Decision

by Anthony J Wharton BArch RIBA RIAS MRTPI

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

Decision date: 11 February 2021

Costs application in relation to Appeal Ref: APP/R5510/X/19/3238487 84 Cowley Mill Road, Uxbridge UB8 2QD

- The application is made under the Town and Country Planning Act 1990, sections 195, 322 and Schedule 6 and the Local Government Act 1972, section 250(5).
 - The application is made by Emdadur Rahman for a full award of costs against the Council of the London Borough of Hillingdon.
 - The appeal was against the refusal of the Council on an application for a certificate of lawful use or development for the C3 use of 3 converted studio flats: new First Floor Flat 84A (front); First Floor Flat 84A (rear) and Ground Floor Flat 84B (rear)
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Decision

1. The application for costs is allowed in part. See formal decision below.
This decision should be read in conjunction with the appeal decision.

Introduction

2. Planning Practice Guidance (PPG) advises that, irrespective of the outcome of an appeal, costs may only be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary expense in the appeal process. (my underlining).

Reasons

The gist of the Appellant's application for costs

3. It is contended that the LPA was under a statutory duty to consider the LDC application following payment of the requisite fee and the submission of the application documents. It is considered that the LPA failed to properly appoint staff or allocate resources and failed to comprehend the evidence lodged.
4. It is argued that the evidence submitted in support of the application was essentially the same as that provided in the two 'appeal affidavits'. This was particularly the case for the Council Tax evidence which had been submitted at the application stage. Further application evidence had shown the breakdown for the various periods and that the same named tenants matched the names in the tenancy agreements and bank statements.
5. In summary there are considered to be 5 reasons why the LPA is considered to have acted unreasonably in the appeal process. These are as follows:
 1. Failure to produce evidence to substantiate the reason for refusal. It is contended that the LPA knew that it would be unable to substantiate its reason for refusal and tried to save face by relying on the 'appeal affidavits'. It is considered that the LPA either acted by rote or was too lazy to consider the appeal documents.

2. Acting contrary to or not following established case-law. As a consequence the appellant had to instruct a legal representative to prepare 45 page affidavit. Nowhere is it shown that an appellant intending to show 4 years continued usage is required to evidence documents by way of an affidavit.
3. Not reviewing the case properly. The appeal was made on 4 October 2019 and the initial appeal documents included the 'appeal affidavits'. The choice of procedure chosen was written representations but the Planning Inspectorate considered that an Inquiry was necessary.
4. The LPA then submitted details of planning policies which are irrelevant in LDC cases causing the appellant's representatives to peruse this 'fresh evidence'. This was unreasonable and led to further unnecessary loss and expense for the appellant.
5. Finally it was unreasonable to withdraw their reason for refusal which was not done in a timely manner. It was unreasonable to delay conceding the case and this led to further loss and expense.

The gist of the case for the Council

6. In response the Council indicates that, if the 'appeal affidavits' had been submitted with the application details, then a LDC would have been issued. In addition, it also indicated that, if that information had been available in 2015 and 2017, refusals and subsequent appeals against the previous applications could have been avoided. It is contended, therefore, that their decision based upon the initial application documents only, was well-founded.
7. It is stressed that prior to the submission deadline for statements relating to the Inquiry, the LPA had informed the Planning Inspectorate (21 August 2020) that their case was conceded. The concession was made on the basis that the two 'appeal affidavits' in conjunction with the already submitted application details, were considered to provide conclusive evidence that the use was lawful on the date of the application.
8. The Council indicated that the combined evidence now provided a full chronological list of events which clearly demonstrated that the use of the 3 Studio Flats had been continuous for a period of not less than 4 years from the date of the application on 21 January 2019.
9. The Council stressed that its e-mail of 21 August 2020, conceding the case, had not been immediately forwarded by the Planning Inspectorate to the appellant and that it was not until 4 September 2020 that the Council again e-mailed the Inspectorate to confirm the concession. The appellant had then been invited to withdraw the appeal but chose for it to continue.
10. Despite the delay in the appellant being made aware of the concession, the Council considers that its position had been made clear in a timely manner to ensure that the appellant did not incur unnecessary costs. It is considered that the lapse in time of just 10 working days (between 21 August 2020 and 4 September 2020) did not result in any further additional work being carried out on behalf of the appellant at that stage.
11. Furthermore it is stressed that the appellant had not submitted any further evidence during that period (in addition to what had already been provided); that at that stage no Inquiry date had been set and that no evidence had been

prepared by the Council, other than the concession. It is contended, therefore, that there is nothing to indicate that as a result of the delay, the appellant's representatives carried out any unnecessary work in the appeal process.

My assessment

12. Before, considering the parties' cases in this costs application, I consider it necessary to set out the timetable.
 - The LDC application was made on 21 January 2019.
 - The Council refused the application on 18 March 2019.
 - The appeal affidavits are dated 16 and 23 September 2019.
 - The appeal was submitted on 4 October 2019.
 - The appeal was not started until 15 July 2020.
 - The LPA Questionnaire was submitted on 29 July 2020.
 - The LPA wrote to PINS conceding on 21 August 2020
 - The appellant's statement was submitted on 26 August 2020.
 - The appellant was made aware of the concession on 4 September 2020.
 - The Council did not submit a statement.
 - No Inquiry date had been set.
13. Turning to the appellant's first reason as set out above, in a LDC application a LPA does not need to provide evidence to substantiate its reason for refusing to issue a certificate. The onus is upon an applicant to provide precise and unambiguous evidence to demonstrate that what was applied for was lawful on the date of the application.
14. As for the previous 5 applications and having taken advice from its legal department, the LPA concluded that, on the balance of probability, insufficient precise and unambiguous evidence had been submitted to demonstrate a continuous 4 year use of the 3 Studio Flats as separate dwellinghouses. Following the refusal the appellant appointed a legal advisor and the 'appeal affidavits' were prepared and submitted with the appeal form on 4 October 2019. The appeal was formally validated and started on 15 July 2020.
15. I return later to the question of whether or not the LPA might have been unreasonable in not conceding its case earlier, but there is no evidence that it *'either acted by rote or was too lazy to consider the appeal documents'*. The fact is that, having seen the 'appeal affidavits' and considering them in conjunction with the application submissions, the LPA was of the view that the issue of a LDC was justified.
16. As indicated in my appeal decision and on the basis of the application information alone, I consider that the LPA was entitled to reach a conclusion that the appellant had not precisely and unambiguously demonstrated that the use applied for was lawful at that time. I have noted gaps in the application submissions which cast doubt, not on the actual use of the 3 flats over the years, but on the continuity of their use as three separate dwellinghouses for the relevant 4 year period. The previous Inspectors had specifically questioned the continuity of the uses of the 3 studio flats.
17. The LPA had refused the application on 18 March 2019 and once the appeal had been made it was inevitable that the appellant would need to submit a convincing case in order to demonstrate this continuity of use and for the appeal to be successful. It was the submission of the detailed 'appeal affidavits' that tipped the balance and, in effect, resulted in precise and

- unambiguous evidence being submitted. If these had been submitted with the application then the appeal would not have been necessary.
18. Thus, in relation to their initial decision I do not consider that the Council acted unreasonably and their actions up until the date when the appeal was started had not led to unnecessary loss and expense for the appellant. The appellant had decided to appeal the decision; had decided to appoint a legal advisor; had prepared additional evidence in the form of the 'appeal affidavits' and was clearly responsible for his own costs up until the time the appeal was finally validated and started.
 19. This brings me to the second of the reasons as to why the LPA's behaviour was considered to be unreasonable. I find the contention that the LPA acted contrary to or did not follow established case-law unconvincing. Whilst acknowledging that there is nothing in PPG or any other guidance which requires '*4 years continued usage is required to be evidenced by way of an affidavit*', it is a matter for an applicant to decide how best to provide precise and unambiguous evidence.
 20. Again it must be stressed that in LDC appeals, as for legal grounds in enforcement appeals, the onus is on an applicant/appellant to submit precise and unambiguous evidence. The appellant eventually did so by preparing and submitting the two 'appeal affidavits'. It was the appellant's decision to appoint a legal representative at that stage and clearly that was a sound decision which, if taken in relation to the previous cases and at the application stage, might have resulted in a much earlier issue of a certificate of lawfulness for the 3 Studio Flats.
 21. The use of affidavits and statutory declarations are common in LDC and Enforcement applications and appeals. In fact the appellant submitted a short affidavit at the time of the application. However, this was not sufficiently detailed to corroborate the rest of the application evidence and it was only when the 'appeal affidavits' were provided that a full picture of the continued use of the 3 studio flats became obvious. In conclusion on this second point, therefore, I do not consider that the Council's behaviour was unreasonable or that it caused unnecessary loss and expense in the appeal process.
 22. I now turn to the question of whether or not the Council reviewed the case properly and whether or not they should have conceded earlier. The appeal documents, including the two 'appeal affidavits' were submitted on 4 October 2019. There followed communications between the main parties and the Planning Inspectorate including clarification of who was the actual appellant and the procedure to be followed. As referred to above, it was not until 15 July 2020 that the appeal was formally validated and started.
 23. The letters sent to the parties at the start of the appeal, on 15 July 2020, set out the various dates that the Council and the appellant needed to comply with in relation to the appeal process. By 29 July 2020 the Council was required to submit its Questionnaire and a list of documents upon which it was going to rely in relation to its case. The Questionnaire was submitted on the due date along with an officer's delegated report and other information. At question 10a of the Questionnaire the box 'yes' was ticked in relation to Development Plan Policies relevant and related to the appeal.
 24. As indicated on behalf of the appellant, planning policies and the merits of a case are irrelevant in LDC cases. This is made clear in the Planning Inspectorate guidance relating to LDC appeals. It is indicated that all parties

- should follow the general principles set out which should be read in conjunction with PPG. It is made clear that there is no provision under section 195 of the Act for the planning merits of what is being applied for in relation to LDC applications. Furthermore it is stated that national and local plan policies can have no bearing on whether or not what is applied for is lawful.
25. It is difficult to understand, therefore, why the Council referred specifically to the various development plan policies in the Questionnaire when they are clearly irrelevant in consideration of the question of lawfulness. However, it is even more difficult to understand why the Council had seemingly not seen, nor acted upon, the evidence set out in the 'appeal affidavits' by that time.
 26. Having said that, it is equally unclear as to why the appellant, who was legally represented, found it necessary to consider the policies as 'fresh evidence'. I have referred above to the guidance relating to LDC appeals and in my view the LPA and the appellant should have been fully aware of the guidance. The LPA should not have relied on the policies but the appellant's position could have been defended simply by indicating, as indeed it has done, by stating that the policies were irrelevant. A mere 'perusal of the policies' can hardly have resulted in any significant cost.
 27. Nevertheless, I consider that the Council acted unreasonably in not reviewing the case properly or in a timely manner. Even if they had not fully studied the appeal documents until the appeal was formally started, it should at least have noted the content of the two 'appeal affidavits' between 15 July 2020 (when the appeal was formally started) before submitting the Questionnaire on 29 July 2020. Instead it was nearly a month later that it wrote to the Inspectorate to concede its case on 21 August 2020. There then followed another 10 working days before the appellant was made aware of the concession on 4 September 2020.
 28. On the question of whether the Council properly reviewed the case (and on the fifth point), therefore, I consider that the Council was unreasonable in not conceding the case earlier than 21 August 2020. From 15 July 2020 and during the preparation and submission of the Questionnaire, the Council should have been aware of the 'appeal affidavits'. In my view it should have conceded before submitting the Questionnaire, which inexplicably had referred to 2 Witnesses being called for the Inquiry. Instead of conceding at that point, the LPA referred to the irrelevant policies. It was another 6 weeks or so before they formally conceded.
 29. I acknowledge that the pandemic and lockdown measures have disrupted many local authority services. However, I find it difficult to comprehend why the Council had not noted the 'appeal affidavits' earlier and had not acted upon the evidence and conceded soon after 15 July 2020. I find, therefore, that in relation to these last two points (reviewing the case and the late concession), the Council acted unreasonably and that their behaviour led to unnecessary loss and expense for the appellant in the appeal process.
 30. However, I do not consider that a full award of costs is justified. From all of the appeal and costs application submissions, I have concluded that the only unreasonable behaviour by the Council, which could have resulted in unnecessary loss and expense for the appellant, was the failure to review the evidence and to concede the case in a timely manner.
 31. The costs award, therefore, can only be made on the basis that the unnecessary expenses is restricted to those incurred between the formal start

of the appeal on 15 July 2020 and the date that the appellant's legal team were made aware of the Council's decision to conceded on 4 September 2020. Any costs in the appeal process incurred outside of these dates must remain the responsibility of the appellant.

Formal Decision

32. The application for costs is allowed in part and a Costs Order is set out below.

Costs Order

I allow the application for an award of partial costs only and, in exercise of the powers in section 250(5) of the Local Government Act 1972 and Schedule 6 to The Town and Country Planning Act 1990 and all other powers enabling me in this behalf, I order the Council of the London Borough of Hillingdon to pay Emdadur Rahman partial costs of the appeal proceedings. The costs to be restricted to any expenses incurred in the appeal process between the dates of 15 July 2020 and 4 September 2020. The costs are to be assessed in the Supreme Court Costs Office if not agreed. The proceedings concerned the appeal described above.

Emdadur Rahman is now invited to submit to the Council of the London Borough of Hillingdon, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount. The enclosed guidance note describes how to apply for a detailed assessment by the Supreme Court Costs Office if the parties cannot agree the amounts.

Anthony J Wharton
Inspector