The Planning Inspectorate

Costs Decision

Inquiry Held on 3,4 &12 August 2021

Site visit made on 5 August 2021

by Mrs H M Higenbottam BA (Hons) MRTPI

An Inspector appointed by the Secretary of State

Decision date: 17 February 2022.

Costs application in relation to Appeal Ref: APP/Y5420/X/21 3266719 & 3266720
Maid of Muswell, 121 Alexandra Park Road, London N10 2DP

- The application is made under the Town and Country Planning Act 1990 (the Act), sections 195, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The application is made by Mitchells & Butlers Retail Ltd for a full award of costs against the Council of the London Borough of Haringey.
- The inquiry was in connection with two appeals against the refusal of certificates of lawful use or development for the use of the land identified with red hatching on drwg no MC718-201 for refuse/bin storage, staff breakout area and as a customer garden/terrace up to 10pm, ancillary to the lawful use as a licensed premises

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Decision

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

The submissions for Mitchells & Butlers Retail Ltd

2. The costs application was submitted in writing and delivered orally at the inquiry. The following additional points were made orally:

    - The Council never applied the law correctly and the Inspector will be the first decision maker to address the time periods correctly.

    - The appellant sent the Ocado judgement to the Council on 17 June prior to the submission of proofs.

The response by the Council of the London Borough of Haringey

3. The costs response was submitted in writing and delivered orally at the inquiry.

Reasons

4. The Planning Practice Guidance (PPG) 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 process.

5. The appellant considers a full costs award should be made on the following grounds:

    - The Council failed to determine the applications in accordance with the Law;

- The Council has produced no evidence to rebut the Appellant's case;
- The Council's handling of the application demonstrated a lack of engagement and/or co-operation.

6. In relation to the first point the Council considered the relevant period to be 5 December 2009 to 5 December 2019. This was the ten year period immediately preceding the first application. This was evidenced in the officer's report on the application paragraph 7.3; the Council's Statement of Case (paragraph 4.4) and within the proof of evidence for the appeals.

7. The Council continued with this interpretation up until the start of the Inquiry when they wrote on the final business day before the Inquiry in relation to Appeal B that the applicable period straddled the lockdown periods for the pandemic and that the Council would rely on the appellant's inability to demonstrate a continuous breach of planning control during those periods as well as other features of the evidence.

8. Early in the Inquiry the Council accepted that the correct test of whether the use was lawful was any continuous period of use prior to the first application having been submitted for Appeal A. At no time did the Council engage fully in assessing the evidence of a period other than the period 5 December 2009 to 5 December 2019.

9. In my view, it was not unreasonable for the Council to place weight on the findings in Nicholson[1]. However, in the light of Ocado any doubt the Council had about the periods that should be considered was extinguished and the Council accepted at the start of the Inquiry that the relevant period was any ten year period prior to the submission of the application in Appeal A.

10. The appellant is of the view that the Council never properly assessed the totality of the evidence before them, as they excluded any evidence of the use prior to 5 December 2009. The appellant pointed out that the Council also failed to consider the report for application HGY/2006/1165 which refers to the use of the relevant land at the time of that application for customers.

11. Section 191(2) of the Act states that operations are lawful at any time if no enforcement action may be taken in respect of them.

12. Section 171(B) of the Act lays down the time limits for the taking of enforcement action against a breach of planning control, after which no such action may be taken in respect of that breach:-

    "(1) Where there has been a breach of planning control consisting in the carrying out without planning permission of building engineering mining or other operations in on over or under land no enforcement action may be taken after the end of the period of four years beginning with the date on which the operations were substantially completed.

    (2) Where there has been a breach of planning control consisting in the change of use of any building to use as a single dwelling house no enforcement action may be taken after the end of the period of four years beginning with the date of the breach. (

[1] Nicholson v Secretary of State of the Environment (1998)

3) In the case of any other breach of planning control no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.

(4)……………………………………………."

13. In the Ocado judgement[2] the following summary of the Nicholson judgement was given:

"141…………………."Nicholson was concerned with a refusal of a CLEUD relating to non-compliance with an agricultural occupancy condition in a permission for a dwelling. For 15 years the property was occupied in compliance with the condition. Then it was unoccupied for 7 years before being occupied in breach of the condition for the next 7 years. For the following 4 years leading up to the date of the application for the CLEUD the house was unoccupied while extensive works were carried out. Mr. Robin Purchas QC (sitting as a Deputy High Court Judge) rejected the claimant's argument that it sufficed for her merely to show that the breach had occurred more than 10 years before the date of the application. It is highly pertinent that because the breach of condition had ceased after 7 years, the 10-year time limit had never been satisfied. That in itself was fatal to the claim. The breach had not continued for at least 10 years (p197). The judge accepted that straightforward point at p.200 (see Sullivan J in *North Devon* at [16]).

142. The judge also held that the concept of whether a planning use is or is not abandoned was irrelevant to deciding whether a breach of condition had continued for the requisite period (p. 198). No doubt that point had arisen in relation to the 4-year refurbishment period (seep.193). The judge's observation is consistent with the subsequent decisions in *Thurrock* and *Swale* that it is irrelevant to whether a use has continued throughout the appropriate immunity period to say that it was not abandoned during that time (see [54]-[55] above). It was unnecessary for the Court to go any further in *Nicholson*.

143. However, the judge did go on to hold that the relevant breach of condition had to subsist not only during the 10-year immunity period but also at the date of the application for a CLEUD. He equated the issue under s.191(1)(c) as to whether any matter relating to a failure to comply with a condition is lawful to the provisions in s.191(a) and (b) which are also expressed in the present tense. But s.191(1) does not define lawfulness. That is left to s.191(2) and (3) where it is crucial to note that a use, operation or breach is declared to be lawful "at any time" and not simply by reference to the date when an application for a CLEUD happens to be made. The problem is that the judgment in *Nicolson* did not consider the nature of the rights which accrue and continue once a time limit in s.171B has expired. That issue did not arise in *Nicholson* and so it was not argued before the judge, as it has been very fully in the present case.

144. This difficulty can also be seen at p.199 where the judge said that the effect of s.191(1)(a) is that "the *use* must exist at the time of the application" (emphasis added). In my judgment that statement is only accurate if the word "use" is understood as referring to a "use right", whether or not any physical use pursuant to that right is taking place at the time. In this context it is preferable to use the term "use right" rather than the shorthand "use" to avoid confusion. As Keene LJ said in *Swale* at [7], where the necessary period of user can be shown under s.171B the land in question enjoys "lawful use rights". It is those rights, in other words "lawfulness", which must presently subsist at the date of the application, not a breach of planning control. The two concepts should not be elided. On this important point the legislation does not distinguish between a use, an operation or a breach of condition.

145. The judge then suggested that s.191(2)(b) and s.191(3)(b) pre-suppose that there must continue to be something capable of amounting to a breach of planning control at the date when lawfulness is being considered if there was in fact a relevant enforcement notice then in force.

146. With respect, I am unable to agree with this analysis of the legislation. First, the approach taken in *Nicholson* to s.191(2)(b) is inconsistent with the established principle that an accrued lawful use right subsists during periods when the land is not being actively used unless it is abandoned. Second, section 191(2)(b) and s.191(3)(b) apply equally to uses, operations and breaches of conditions without drawing any material distinction between them. Third, they operate by making it clear that a lawful right does *not accrue* upon the expiration of a time limit in s.171B for taking enforcement action if the use, operation, or breach of condition in question contravenes *the requirements* of an enforcement notice then *in force*. In other words, Parliament did not wish an *extant* enforcement notice (or breach of condition notice) to be negated by the subsequent application of a time limit in s.171B to something which contravened the requirements of that notice. The position would be different if at the time the relevant period in s.171B expired the notice had ceased to be in force, e.g. because it had been withdrawn (s.173A of TCPA 1990) or quashed. Fourth, if both limbs (a) and (b) in s.191(3) are satisfied, then the "matter constituting a

[2] R(on the application of Ocado Retail Ltd) v Islington Borough Council.

failure to comply" with a condition is declared to be lawful "at any time". That matter is not lawful simply at the point when the time limit in s171B expires. Accordingly, contrary to the suggestion in *Nicholson*, these provisions do not imply that there must be a continuing breach of planning control *after* the expiry of the time limit in s.171B for taking further enforcement action.

147. For these reasons, I do not consider *Nicholson* to be an authority which assists on the issue to be decided under ground 3."

14. While I consider the law has been clear even before the Ocado judgement, in that it is a well-established principle that an accrued lawful use right subsists during periods when the land is not being actively used unless it is abandoned, s.191(2) and (3) declare that a use, operation or breach is lawful "at any time" and not simply by reference to the date when an application for a CLEUD happens to be made. In the light of the Ocado judgement, which was sent to the Council prior to the submission of proofs, the Council should have reviewed their case and considered the implications to their case in the light of it.

15. The PPG requires a local planning authority to review their case as part of sensible on-going case management and acting in accordance with well-established case law. In my view, the Council were unreasonable in restricting their assessment to the ten years immediately prior to the submission of the application in Appeal A in their proofs and not reviewing their case in the light of the Ocado judgement.

16. In relation to a lack of evidence to rebut the appellant's evidence the Council is not obliged to produce positive evidence. In its view the evidence from the appellant *'could be considered to lack precision and specificity'*. I consider it is reasonable to conclude that, even if the Council had considered any ten year period, it would have been more likely than not that they would have concluded that the evidence of the appellant lacked precision and was more generalised than specific. As my decision in relation to both appeals relies on the oral evidence, under affirmation, heard at the Inquiry to provide precision to the statutory declarations submitted for the applications this is a reasonable assumption to make. The consideration of the appellant's evidence is a matter of judgement and I do not find the Council were unreasonable in not producing positive evidence.

17. In relation to the handling of the application evidence the onus of proof in relation to the production of evidence is on the applicant. It is the applicant's responsibility to decide what evidence they will submit to support their case. I do not find the behaviour of the Council unreasonable in this regard.

18. Based on the original description of the application the subject of Appeal B the Breach of Condition Notice (BCN) was relevant to its determination. As such, reliance on it, and s191(3)(b) of the Act, was not unreasonable.

19. While I have found that the Council was unreasonable in not reviewing its case in the light of the Ocado judgment, I am not satisfied that this resulted in any unnecessary or wasted expense. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the Planning Practice Guidance, has not been demonstrated. The application for costs fails.

Hilda Higenbottam

Inspector