
Costs Decision

Inquiry Held on 1 November 2022

Site visit made on 2 November 2022

by Laura Renaudon LLM LARTPI Solicitor

an Inspector appointed by the Secretary of State

Decision date: 15 November 2022

Costs application in relation to Appeal Ref:

APP/B0230/C/22/3297997

121 Dorrington Close Luton LU3 1XP

- 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 Luton Council for a full or otherwise partial award of costs against Kiran Ayub.
 - The inquiry was in connection with appeals against an enforcement notice alleging the erection of a garden fence.
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Decision

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

The submissions for Luton Council

2. The Council's costs application was made in writing shortly before the opening of the inquiry, and an amended version submitted shortly afterwards in accordance with directions I gave at the inquiry. A full award of costs is sought on the basis of the appellant's unreasonable pursuit of an inquiry procedure; in the alternative, a partial award of costs is sought on the basis that it was unreasonable for the appellant to have pursued appeals on grounds (b) and (d) of section 174(2) of the 1990 Act.
3. The Council's written submission points out that Annex K of the Procedural Guide provides that an inquiry is an appropriate vehicle for determining an appeal where there is a clearly explained need for the evidence to be tested through formal questioning, the issues are complex, the appeal has generated substantial local interest, evidence needs to be given on oath, or the contents of the enforcement notice are unusual and particularly contentious.
4. The Council say that the appellant has not clearly explained why an inquiry was considered appropriate or addressed any of the relevant aforementioned factors. The Council's position is that it was both inappropriate and unreasonable for the appellant to have pursued an inquiry procedure, giving rise to unnecessary and wasted expense to the public purse.
5. In the alternative, the Council contend that the appeals on grounds (b) and (d) were unreasonable. As to ground (b) this is because, despite raising this ground of appeal, the appellant does not deny that there is a fence at the property in the position marked on the plan accompanying the notice. The

ground (b) appeal rests on the notice's reference to the 'front' curtilage, which is easily remediable under section 176(1) of the 1990 Act.

6. As to ground (d) on the appellant's own evidence the existing fence was constructed within four years of the notice being issued. The Council say that to pursue a ground of appeal that is contradicted by one's own evidence is plainly unreasonable. No questions were asked in chief of the appellant nor any closing submissions made on this ground until prompted by the Inspector.

The response by Kiran Ayub

7. In response, Mr Sadiq for the appellant says that the appeal became properly contentious in law upon service of the Council's Proof of Evidence. The Council had changed their position in relation to the extent of the highway; they had inaccurately reproduced planning condition no. 8 in their Statement of Case; and the appellant should not be required to meet the Council's misapplication of resources.
8. In relation to ground (b) the appellant says that the enforcement notice's requirement for the removal of the whole fence was inconsistent with the Council's case. In relation to ground (d) the appellant was accurate and truthful in her evidence, which is to be contrasted with the Council's correspondence and a photograph of the fence.

The reply by the Council

9. The appellant has misunderstood the purpose of a costs rebuttal and has rehearsed arguments made at the inquiry. By failing to engage with the points made the appellant has not disputed the Council's basis for seeking costs.

Reasons

10. Although the Council has presented its case for an award of partial costs, based on the particular grounds of appeal, distinctly from its contention that the appellant unreasonably pursued an inquiry procedure in seeking their costs in full, in practice I do not consider the two to be entirely distinguishable. The Secretary of State, when determining the appeal procedure, plainly must have regard to the grounds of appeal and the issues they raise.
11. In this case there was dispute between the parties as to the appeal procedure from the outset, the appellant seeking an inquiry and meeting the Council's resistance. An inquiry was sought from the outset by the appellant in order to establish whether the fence had been erected within four years prior to the issue of the notice. On 24 July 2022 the appellant identified that an inquiry was necessary so as to test the parties' disputed evidence on the ground (d) appeal. On 26 July 2022 the parties were informed that, as material facts were in dispute, the appeal would proceed by way of an inquiry.
12. It was then identified in early August, in correspondence from the Inspectorate, that the ground (d) appeal gave rise to the need to receive evidence on oath as to the extent of the works that had been carried out within the four years prior to the issuing of the notice (or potentially to the issue of an earlier notice that may have alleged the same matters). Other matters were raised by that correspondence but, as the Council point out, the prospect of legal submissions being made is not, on its own, a reason why a case would need to be conducted by inquiry.

13. Of the matters raised by the August correspondence from the Inspectorate, that leaves the point made that it was appropriate for evidence including that as to the extent of the highway to be tested by formal questioning, given the Council's reference by then to a planning condition that appeared in terms different from the restrictions found in the 2015 Order. This is relevant to the ground (c) appeal only. In the event, no expert evidence was called as to the extent of the highway by either party.
14. There was no significant dispute of fact as to the historic user of the accessway and parking area. Whether that undisputed user has resulted in the land acquiring the status of a highway is straightforwardly a matter for submissions. The appellant offered no technical evidence on this ground, saying in chief, understandably as the Council point out, that she did not have the legal knowledge to answer questions as to the extent of the highway. Her request for an inquiry was anyway not pursued on this ground. The appellant's reason for seeking an inquiry was limited to the ground (d) appeal, as well as to other points concerning allegations of discrimination and the Council's failure to issue enforcement notices against other fences in the area which I have found to be unrelated to the grounds of appeal pursued or otherwise beyond my jurisdiction for the reasons set out in my substantive decision.
15. Without the ground (d) appeal, there would have been no need to test any evidence on oath and it appears to me most unlikely therefore that an inquiry would have been warranted (or even sought).
16. As to the merits of the ground (d) appeal, the appellant's first witness statement referred to having "refurbished the existing fence which had in places completely fallen down". In reply to the Council's Statement of Case and third party representations, it was stated that the fence had been "replaced". Reference was made to an accompanying photograph that showed only bare remnants of a fence across the front of the property, and a picket fence, entirely different in appearance from what is there now, to the sides. No concrete bases or close-boarded fencing are visible on that photograph. The ground (d) appeal was nonetheless pursued on the basis that the erection of the wooden fence occurred on a date outside of the time limits provided by section 171B of the 1990 Act.
17. On no reasonable interpretation were the works carried out since the appellant's acquisition of the property only four years prior to the Council's issuing of the notice merely works of maintenance or repair to an existing fence. The Council's allegation was plainly correct. That the fence had been replaced within the four years prior to the issue of the notice was accepted by the appellant under cross-examination, no questions having been asked of her about it in her evidence in chief and no closing submissions made about it at all on her behalf until I asked for them.
18. Turning to the ground (b) appeal, I have no hesitation in concluding that raising this ground of appeal was unreasonable. Plainly it had no prospect of success. As it happens, I have agreed with the Council that the fence lies to the front of the property, but I accept that that is in itself an arguable point. However, it would not defeat the clarity of the notice even had I decided it to the contrary. The appellant's case was entirely clear that it was known which fence was being discussed. The accompanying plan to the notice could not have been plainer as to the allegation. Contending on appeal that no fence had

been constructed in the position identified by the notice, read as a whole, was wholly unwarranted.

19. Having regard to all these matters, I consider it incontrovertible that the appellant raised unreasonable grounds of appeal putting the Council to wasted expense. The appellant's first witness statement bore almost no relation to the grounds of appeal that were being raised. It was largely concerned with the Council's decision to issue the notice and an argument as to the planning merits of the fence although no ground (a) appeal was brought.
20. I also consider that, without having unreasonably brought the appeal on ground (d), a determination of the appeal by the inquiry procedure would have been most unlikely. I find that the appellant's unreasonable pursuit of ground (d) on appeal has resulted in the inquiry costs borne by the Council.
21. However, I do not think that this justifies a full award of costs, as sought, because there is no contention that the appeal on ground (c) was made unreasonably, and plainly some appeal costs would have been borne by the Council as a result of any appeal. Therefore I do not find the entirety of the Council's appeal costs to have been borne unnecessarily as the result of the unreasonable behaviour of the appellant, who has been professionally represented by a solicitor throughout.
22. Consequently my award of costs is a partial one. It is to reflect the Council's expense of defending the appeal on grounds (b) and (d). It is also to reflect the costs of the inquiry to include the production of the Council's proof of evidence and representation at the event. However, it is not to include the Council's general appeal costs prior to its preparation for the inquiry, save as those costs have related specifically to grounds (b) and (d). Nor shall it include the Council's costs of attending the accompanied site visit, as those costs would necessarily have been incurred in any event.

Costs Order

23. 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 Kiran Ayub shall pay to Luton Council the costs of the appeal proceedings described in the heading of this award limited to those costs incurred in dealing with the appeal on grounds (b) and (d), and the costs of preparing for and attending a Public Inquiry over and above preparing for and attending a Written Representations appeal; such costs to be assessed in the Senior Courts Costs Office if not agreed.
24. Luton Council is now invited to submit to Kiran Ayub, to whose solicitor a copy of this award has been sent, details of those costs with a view to reaching agreement as to the amount.

Laura Renaudon

INSPECTOR