
Costs Decision

Inquiry Held on 20,21,22, 23,26 June 2023 and 10 July 2023

Site visits made on 20 and 27 June 2023

by Paul Freer BA (Hons) LLM PhD MRTPI

an Inspector appointed by the Secretary of State

Decision date 25 August 2023

Costs application in relation to Appeal Refs: APP/H1705/C/20/3262226 & 3262297, and APP/H1705/X/20/3262235

Land at South of Berry Court Farm, Bramley Road, Little London, Hampshire

- 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 Basingstoke & Deane Borough Council for a full award of costs against Mr David Snook and Mr Philip Snook.
 - The Inquiry was in connection with appeals against an enforcement notice alleging, without planning permission, the change of use of the Land from agricultural use to use for the storage of caravans and motorhomes and associated operational development to facilitate the change of use, and against the refusal of a certificate of lawful use or development for, in summary, the formation of earth bunds around the perimeter of what was a paddock used for the keeping of horses.
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Decision: the application succeeds in part and a partial award is made in the terms set out in the Costs Order below

The submissions for Basingstoke & Deane Borough Council

1. The application for a full costs award or, in the alternative, a partial award of costs. The application is made on both procedural and substantive grounds.
2. In procedural terms, the appellants systematically and repeatedly failed to adhere to the deadlines for the submission of evidence. They failed to serve any ecological evidence in November 2022 (without any explanation whatsoever at the time or request to the Council for an extension of time), despite it being obvious that the impact on biodiversity caused by the development was not agreed. It was only for the first time at the Case Management Conference (CMC) on 21 December 2022 that the Appellants indicated that their original expert could not act "for personal reasons".
3. After being allowed permission by the Inspector to submit further ecological evidence at the CMC, they then failed to meet the new deadline for service of ecological proofs of evidence by 9 May 2023. The appellant's only excuse was that the Council had not suggested an alternative timetable but the appellants' planning agent already indicated that the delay in commissioning a new ecological expert would not affect the date set for exchange of proofs.
4. When it was submitted, the new ecological proof of evidence was in effect the introduction of a wholly new case on ecological matters, by seeking to argue that no woodland was affected, and the introduction of a new compensation

- package that failed to address the critical flaw in this development: namely its failure to avoid harm and adequately mitigate its ecological impact in the first place.
5. The unilateral introduction of the new (March 2023) Arboricultural Impact Assessment (AIA) was itself delayed and only submitted several weeks later, with no explanation from the appellants. It was submitted without any permission sought from the Inspector or any indication given at the CMC that this was the appellants' intention all along. The submission of this evidence was, in fact, the introduction of a wholly new issue: it was not to "update" the 2019 AIA but rather constituted a new assertion that in principle harm could be ascertainable after 6 years rather than the 20 years asserted previously. This caused the Council to instruct and call its tree officer (Mr Jan Polnik), and extended inquiry time to deal with it.
 6. The fact that the Council managed to produce rebuttal evidence in time to address this new, late evidence does not mean that no procedural award should not be made. Rather, the egregious behaviour of the appellants' and their wholesale lack of respect for the procedural deadlines established both prior to and at the CMC should be sanctioned with a procedural award of costs, limited if necessary to the costs incurred by the Council in having to deal with the new, and wholly weak, evidence introduced by the Appellants since February 2023.
 7. In substantive terms, the evidence purportedly in support of the appeals on grounds (b), (c), (d) and (g) was entirely weak, uncorroborated by supporting documentation, and full of inconsistencies, and in any event mutually contradictory to the appellants' own expert evidence and the instructions given to its ecological expert.
 8. In relation to Ground (b), the onus was on the appellants to establish on the balance of probability that the track and access had not occurred as a matter of fact, yet its own ecological report made it clear that at least 500m² of additional area has been surfaced and the access materially widened. In relation to Ground (c), the appellants' case regarding the purpose of the bunds was and is hopeless. The documentary evidence, which showed that the enterprise all along was intended to accommodate the caravan storage use, was directly contrary to the evidence of the only witness of fact called by the appellants.
 9. In relation to ground (d), the appellant's case was hopeless. No photographs pre-dating the critical cut-off date of 25 September 2016 showed the bunds were complete. The onus was on the Appellants to establish that the bunds were immune through passage of time: its case entirely failed to meet that onus. Again, the evidence given by the Appellants' only witness of fact was entirely contradictory to the documentation submitted on the appellants' behalf and on instructions when seeking a retrospective planning application: that stated the works were complete on 1 October 2016.
 10. The ground (g) appeal was entirely unsupported by any evidence whatsoever. The appellants appear to rely on evidence given on oath by users of the caravan facility. This was not evidence called by the appellants but given by third parties who had submitted representations: if the Appellants intended to rely on this evidence, they could and should have called these individuals

themselves. Mr Lasseter's evidence was entirely unsupported by any documentary evidence whatsoever.

11. In relation to ground (a), the development was clearly not in accordance in accordance with the development plan and no other material considerations such as national policy were advanced that indicated that the decision should have been made otherwise. In particular, the ecological evidence was inconsistent with the previous evidence submitted by the appellants, was based on criticising the HBIC survey not on substantive ecological grounds but solely on the classification of the woods as ancient, and introduced a thoroughly bad and ultimately irrelevant point for the first time about whether the Gypsy Lane trees constitute woodland.
12. No landscape evidence was submitted nor any reasons advanced to explain why the Council's approach to landscape harm was wrong. The arboricultural report that was submitted contradicted its earlier report, and the appellants' planning witness' evidence was wholly weak (and was inconsistent with the ecological evidence). The only two material considerations that were advanced (inconvenience to caravan users and biodiversity benefits) were self-evidently of insufficient weight to outweigh the harm by reason of conflict with the development plan (and Mr Lasseter himself, the appellants' planning witness, did not suggest in his evidence that they were).
13. The appeal follows a recent appeal decision in respect of the same development which dismissed the appeal. No changed material circumstances in the intervening period were advanced by the appellants in its evidence, other than it seems the B1 storage use that was permitted in Area D. That was clearly not a sufficient change of circumstance to depart from the findings of the Inspector in that case.
14. The pursuit of these appeals has clearly caused the Council to unnecessarily incur significant costs. In particular, in respect of Ground (a), the Council has had to instruct external consultants to deal with landscape and ecological matters which would have been avoided had the appeal not been pursued.

The response by Mr David Snook and Mr Philip Snook

15. The procedural element of the application identifies four sub-areas of complaint, which the appellant responds as follows.
16. (i) *Failure to adhere to November 2022 date for service of ecology evidence.* As was explained at Inquiry the appellants became aware in early November 2022 that the intended ecology witness would not be available for the (then) Inquiry. He (the then ecology witness) was not, and is not, required to provide documentary proof as to why he was not available. It is not unreasonable behaviour for the appellants to have a witness who becomes unavailable at short notice. In any event nothing turned on the matter, since the Inquiry scheduled for 6th December 2022 was postponed for reasons connected with the Inspector's personal circumstances (and perfectly properly so).
17. (ii) *Failure to adhere to 4 May 2023 date for service of ecology evidence.* The costs application is wrong in that the agreed date for submission of ecology evidence from the appellant at the CMC on 21 December 2022 was 9 May 2023 and not 4 May 2023, with rebuttals to follow 23 May 2023.

18. The wider context, ignored in the costs application, is that on 7 March 2023 Mr Lasseter emailed the Planning Inspectorate and the Council explaining that more time was required in relation to ecology, to explore whether more matters could be agreed and that an amended timetable might be agreed¹. Having received no response from the Planning Inspectorate Mr Lasseter emailed again on 27 March 2023, and again on 13 April 2023. On 18 April 2023 the Planning Inspectorate emailed Mr Lasseter and the Council requesting that the parties produce an agreed revised timetable for the Inspector to look at. On 12 May 2023, not having discussed a revised timetable with the appellants, the Council emailed the Planning Inspectorate (without copying in the appellants at all) seeking to exclude ecology evidence (and other evidence). The words highlighted in the text of those emails shows that the Council had either not read, or had not understood, the emails in the chain which refer to a revised timetable for submission of ecology evidence and not a revised timetable for the Inquiry.
19. On 18 May 2023 the Council emailed regarding timetables for the Inquiry (not revised timetables in relation to ecology evidence, as per the Planning Inspectorate's request on 18 April 2023 above). On the same date, just shy of an hour after the Council's email, Mr Lasseter emailed the Planning Inspectorate and the Council to advise, amongst other things, that *"my clients' ecologist has met the LPA's ecologist to discuss matters that can be agreed, and to identify those matters that will need to be examined at the Inquiry. Correspondence between the ecologists should be concluded in the next few days. This will hopefully enable the length of the Inquiry to be reduced, and the timetable finalised"*.
20. The Council emailed again on 18 May 2023 reiterating their objection to ecology evidence and seeking its exclusion (a) because it would apparently prejudice the Council since the Council would not be able to respond to it but (b) that Mr Sibbett and Ms Colebourn had met and discussed the case.
21. On 22 May 2023 Mr Lasseter emailed the Planning Inspectorate and the Council in which he said, amongst other things, that: *"I can only assume that the LPA was unaware of the Inspector's request in your email of 18 May, but I am surprised that the LPA should allege a lack of engagement when its officers were aware of discussions and a meeting between the appellants' ecologist and the Council's ecologist, in accordance with the Inspector's instruction to try to identify matters of agreement and matters that would need to be examined at the Inquiry" and "As you are aware, I have indicated that once the LPA has responded to the 17 May note, the appellants' ecologists' evidence will be submitted on or before 31 May. I trust this is acceptable to the Inspector."*
22. On the same day, the Planning Inspectorate emailed the appellants and the Council reminding of the original timetable from the CMC (December 2022) but with no reference to any of the subsequent correspondence. On 26 May 2023 the Council provided a response from Mr Sibbett in relation to the meeting between him and Ms Colebourn and complaining as to the absence of a proof of evidence from Ms Colebourn, and seemingly not having noted from previous emails that the proof would be served on 31 May 2023.

¹ The relevant email chain, and others relevant to the application for costs, were all appended to the appellant's response but are not repeated here.

23. It is clear that the appellants experienced difficulty in securing an ecology witness who was able to undertake the work required and attend the Inquiry as timetabled. Notwithstanding that, the complaint from the LPA is that the 4th (should be 9th) May date was not met, but the Council fail to acknowledge that they had been on notice for some time that this date required changing yet failed to engage with revising that timetable, seemingly because of the Council's own misapprehension that it was this timetable being sought to be revised by agreement. The appellants have sought to notify and engage with the Council as to revised timetabling of ecology evidence; the Council's response has been to ignore the same and seek to insist (through the Planning Inspectorate) on the timetable set in December 2022 notwithstanding that the Council knew of the need to revise the timetable and knew that submission of ecology evidence at the end of May would not prejudice an appeal starting at the end of June 2023.
24. It is not unreasonable behaviour on the part of an appellant to experience difficulty in securing a witness for Inquiry, to flag those difficulties, to identify that revisions to timetabling needs to occur, and (in the absence of any response from the Council discussing a varied timetable for evidence being submitted) then setting a date by which evidence will be served (and meeting that date, with enough time for the Council to address and respond to the same). None of that is unreasonable and the sum total effect was that the Council had the appellants' proof on ecology for three weeks, rather than the four ordinarily provided for. It is clear from the Council's submission of an ecology rebuttal in time for the Inquiry, and the Council's ability to address all ecological matters, that they were not prejudiced in any way.
25. *(ii) Failure to address mitigation.* This entirely overlooks the fact that the Council's development plan policy conflicts with national policy in that the Council place 'compensation' behind a threshold of 'overriding public need' which clearly conflicts with national policy which imposes no such requirement, only that the mitigation hierarchy be followed. The Council's case here is only good if one ignores the (blatant) conflict between policy EM4 of the Local Plan and paragraph 180(a) of the National Planning Policy Framework (Framework) which remains (unreasonably) unaddressed entirely by the Council.
26. *(iii) New arboricultural impact assessment.* This was provided to the Council on 24 April 2023. It is disingenuous to suggest that the 'new assertion of harm being ascertainable after 6 years' was what "*caused the Council to having [sic] to instruct and call its tree officer Mr Polnik, and extended Inquiry time to deal with it.*" Mr Polnik's evidence ranged far and wide, beyond the '6 year' point and introduced substantial new matters in evidence itself, although the appellants make no formal application in relation to the same. That is why Mr Polnik was called (to enable the Council to make all of the points he does, not simply the '6 year' point) and to enable the Council to discuss harms/lack thereof relating to removal of the bunds, and that is what Inquiry time was largely spent on in relation to trees.
27. The Council's costs application then proceeds to assert that "*...the egregious behaviour of the Appellants' and their wholesale lack of respect for the procedural deadlines established both prior to and at the CMC should be marked with a procedural award of costs, limited if necessary to the costs incurred by the Council in having to deal with the new, and wholly weak, evidence introduced by the Appellants since February 2023.*" This overlooks

- that costs awards are not punitive in nature, they are restorative, i.e. they are intended to ensure that parties are not required to meet what would otherwise be unnecessary expenditure as a direct result of unreasonable behaviour on the part of another.
28. There is no 'egregious behaviour' on the part of the appellants and nor has there been a 'wholesale lack of respect for procedural deadlines'. What has occurred is that the appellants experienced difficulties in securing an ecology witness who was available for the Inquiry. The appellants flagged this in emails to both the Planning Inspectorate and the Council which have gone largely unanswered on the germane point the appellants were trying to raise, namely the need to revisit the timetable for submission of ecology evidence. In any event there are no costs incurred by the Council, who were always going to produce rebuttal proofs and had that reflected in the timetable from the CMC onwards. No unnecessary or wasted expense is identified by the LPA, because none has been incurred.
 29. In response to the application made on substantive grounds, in relation to the appeal on ground (b), the application relates only to the purported discrepancy between the appellants' ecologist (Ms Colebourn) and the case neither the track nor the access had been *created*. The costs application itself makes the point that Ms Colebourn identified the access being *widened* (not *created*). The allegation on the enforcement notice is not *widening* of an access, but of *creation* of the access. The appellants' case, and the evidence, all points to an access being already in existence and as a matter of fact the access has not been *created*. This says nothing about whether it has been widened, but the LPA do not allege widening of the access. It has remained open to the LPA throughout to seek a correction of the description of the breach from 'creation' to 'widening' and the LPA still, as at the stage of costs, has not sought any such correction.
 30. The allegation of creation of the track, again resting on a suggested discrepancy between Ms Colebourn and others, misunderstands the appellants' case in relation to the track, which has been clear throughout: the track is itself of (very) long standing, comprised largely before of hardcore and rubble and latterly resurfaced to the track seen today. Neither the *expansion* nor *widening* of a track is alleged by the LPA in the EN – it is *creation* of the track only. The LPA cling on to the implied step of Anesco removing any track laid by them, but as discussed in evidence and submissions at Inquiry there is no evidence that Anesco did anything more than lay mats (if they even did that, given the layers of mud in the photographs relied on by the LPA) and there is no evidence Anesco removed anything relating to the track once they left. There is no evidence that a track has been created; the ground B is made out, and the costs application is without foundation.
 31. In relation to the appeal on ground (c), it is an error of law to require a purpose for the bunds in order that they fall within the remit of the Town and Country Planning (General Permitted Development) (England) Order 2015 (GPDO). Whether the bunds comprise a 'means of enclosure' is a question of fact as to whether they enclose something (here, sites A and C as identified in the appeal). There is no need to evidence 'purpose' and 'purpose' is not a relevant consideration.

32. Whether the bunds were substantially complete in and of themselves, or whether they were part of the wider change of use alleged, is a discrete question, although the LPA appear to confuse these two discrete issues in their costs application paragraph 4(b). The appellants maintain from the documentary evidence (invoices, photographs etc) and the evidence given at Inquiry, that the creation of the bunds was a discrete operation in itself and was not part of the wider change of use (and therefore did not originally contemplate the addition of fencing to the bunds). This is clear from the evidence. The LPA might disagree, and might think that the evidence shows something else, but disagreement and thinking the evidence shows differently does not make the appellants' case unreasonable.
33. In relation to the appeal on ground (c), the appellants' photographic evidence rests in the Council's own site visit photographs of 20th September 2016, five days before the 'cut off' date, and which clearly show substantially complete earth bunds. That the bunds are not grassed is irrelevant; that the area enclosed is not laid to hardstanding is irrelevant. The only issue is whether the 'red lined' earth bund was substantially complete. It clearly was and, when viewed in combination with the invoices which show the last working day for the 360 digger and operator was 20th September 2016, show *on balance* (i.e. 51%, or more likely than not) that the 'red' bund was substantially complete by the end of that day (20th September 2016).
34. The appeal on ground G was supported by evidence given on oath from users of the caravan facility who explained the terms of their agreements, and in evidence on oath from Mr Lasseter who explained the operation of the site. To assert the ground G to have been entirely unsupported by evidence whatsoever is to ignore evidence given on oath to the Inquiry.
35. In relation to the appeal on ground (a), the Council's application makes a number of misconceived points.
36. (i) *The development is clearly not in accordance with the development plan is a question of judgement.* In order to substantiate a costs award requires a conclusion that not only is Mr Lasseter's professional assessment wrong on everything but is unreasonably so (i.e. that matters on all counts go beyond mere disagreement as to compliance with policy). This is an enormous allegation to make and is clearly wrong. That the LPA might disagree with the appellants' view on policy compliance does not make the appellants' position unreasonable.
37. (ii) *That the ecological evidence inconsistent with that previously submitted.* The appellants have explained how Ms Colebourn came to be instructed and not only was she entitled to form her own professional view (even if different to that of the earlier ecology submission) she is required to do so, as a professional expert witness seeking to assist the Inquiry with what were her own professional views. It is misconceived to suggest that the appellants are somehow hidebound to an earlier ecology submission where that witness was not available to the Inquiry.
38. (iii) *No landscape evidence submitted and no reasons given as to why the Council's approach was wrong.* Mr Lasseter addressed the landscape roundtable session and it is frequently the case that areas such as landscape are not the subject of specific expert witness evidence and particularly so in a 'hearing' (roundtable) format. No issue was taken with the method adopted by

the Council's landscape witness, the difference between the parties is the value judgements to be made in assessing alleged impacts. Again that the appellants' reach differing conclusions on those alleged impacts does not make them unreasonable; if the Council's reasoning were to be adopted then the Inspector would be required to accept the Council's evidence on landscape because there was no other landscape expert. That is patently wrong. Inspectors are required to exercise their own judgement and are not bound to accept a point simply because there is no 'opposing expert view'.

39. (iv) Arboricultural report contradicted a previous report. This allegation is unparticularised and so fails in that respect alone. An application must be clear as to the basis on which it is made, and this element of the costs application does not identify the contradiction relied upon. If it is the '20 years' against 'six years' point (which is assumed for these purposes, but does not alleviate the LPA's failure to identify the proper basis for this aspect of the application) then this was discussed in the round table session. As with many other areas of the LPA's costs application, it ignores the evidence actually given and discussed.
40. (v). *Appellants' planning evidence was wholly weak and inconsistent with the ecological evidence.* Again this is entirely unparticularised. A proper costs application identifies specifically what is said to constitute the unreasonable behaviour and 'wholly weak' says nothing about what is said to be unreasonable. That the LPA disagrees with the appellants' consideration of policy is irrelevant. Disagreement, even strong disagreement, is not unreasonable behaviour. Mr Lasseter is a chartered town planner of several decades' experience in both public and private sectors, including for this Council. He presented in both his proof and at Inquiry his views on compliance (or otherwise) with development plan policy and national policy. The Council does not agree with him, but he was not unreasonable in his analysis or the case presented. Likewise, the allegation of 'inconsistency with the ecological evidence'. This is unparticularised and without being provided the detail of the Council's costs application the appellants cannot respond to the same. The defective application means that the appellants are unable to respond to this point.
41. (vi) *Material considerations.* This (again) overlooks entirely the material considerations discussed in evidence at the Inquiry and addressed in closing submissions. It has all the hallmarks of a costs application drafted before the Inquiry sat and remaining unamended (and hence not reflecting the actual evidence as at the close of the Inquiry). The appellants' case was not confined to the two material considerations at the LPA's paragraph 5(i) and to suggest that it was would be to misrepresent the appellants' case.
42. (vii) *Follows recent appeal decision.* This was discussed in Inquiry and the appellants were clear as to (a) the failure of PINS to have sent on the Council's appeal statement to the appellants in that case *and* (b) the limits of a written representations appeal. The instant appeal required at least half a day of roundtable discussion (e.g. landscape, trees) or longer, and formal cross-examination (e.g. planning policy, conflict between development plan policy and national policy, ecology). It is risible to suggest that these matters were ventilated in the same manner and depth in a written representations appeal as they were in a hybrid hearing/Inquiry format.

Reasons

43. The Planning Practice Guidance (PPG) advises that, irrespective of the outcome of the appeal, costs may only 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. The PPG indicates that one of the aims of the costs regime is to encourage all those involved in the appeal process to behave in a reasonable way and to follow good practice. The PPG states that the right of appeal should be exercised in a reasonable manner and goes on to provide example of unreasonable behaviour which may result in an award of costs against an appellant. These examples include: delay in providing information or other failure to adhere to deadlines, and introducing fresh and substantial evidence at a late stage necessitating an adjournment, or extra expense for preparatory work that would not otherwise have arisen.

The application on procedural grounds

44. The PPG makes it clear that appellants are required to behave reasonably in relation to procedural matters on the appeal, for example by complying with the requirements and deadlines of the appeals process. I completely accept that the appellants only became aware in early November 2022 that the intended ecology witness would not be available for the (then scheduled) Inquiry. In those circumstances, it is not unreasonable behaviour for the appellants to have a witness who becomes unavailable at short notice and not be able to submit evidence in accordance with the appeal timetable.
45. The same cannot be said of the failure to submit the ecology evidence in accordance with the deadline of 9 May 2023 agreed at the CMC. Even taking into account the Christmas/New Year holiday period, that is still a period of over four months. I do not underestimate the difficulties that the appellant faced in instructing a new ecologist and submitting the ecology evidence, and make no criticism in that respect. I also recognise that Mr Lassetter had attempted to engage the Council in discussions but to no avail and that, due to my involvement in other Inquiry casework, he had not received a reply from the Planning Inspectorate until 18 April 2023.
46. However, it is Mr Lassetter's emails of 18, 22 and 25 May 2023 that I find particularly instructive, both in terms of their content and timing. In the email of 18 May 2023, it was indicated that: *Notwithstanding the above, it is anticipated that my clients' ecologist's Proof will be submitted on 31 May 2023.* The date of that email, it should be remembered, was some two weeks *after* the deadline for the submission of evidence agreed at the CMC. Mr Lassetter repeated that commitment in his email dated 22 May 2023, adding that *"I trust this is acceptable to the Inspector"*. I note the language used: phrases such as "it is anticipated" and "trust this is acceptable". These were not requests to the Council or the Planning Inspectorate for an extension of the deadline: they were simply statements of the appellants' position.
47. In his email on 25 May 2023, Mr Lassetter indicated that an ecologist had been appointed, and her work was proceeding on the basis that *reasonable revisions* to the CMC timetable would be agreed (my emphasis). To reiterate, in an email that was sent two weeks after the deadline for the submission of that evidence and two days after rebuttal proofs were due to be submitted, the appellant was seeking reasonable revisions the deadlines agreed some five months previously.

48. The salient point is that the appellants were not exactly forthcoming in declaring those difficulties or the timetable that the appellant's team were clearly working towards. The first that the Council (or myself, for that matter) was aware of the appellants' intention to submit the ecology evidence on 31 May 2023 was Mr Lasseter's email on 18 May 2023. Even then, the divulgence of that information appears to have been prompted by the Council's email of an hour or so before: I have no confidence that this information would have been forthcoming without that. No explanation has been provided as to why the appellants did not voluntarily declare sooner their intention to submit the ecology evidence on 31 May 2023, or why Mr Lasseter did not specifically request the Council or the Planning Inspectorate to agree to that date.
49. Missing from the appellant's response to the costs application is the text of my email dated 22 May 2023: that was the email of which Mr Lasseter was "mystified as to its tone and content." In that email, I reminded the appellant of the deadlines agreed at the CMC and indicated that I was extremely concerned that the appellant has consistently failed to meet those deadlines. I indicated that I would need considerable persuasion why this late evidence should be accepted and drew the appellant's attention to the guidance relating to the award of costs set out in the PPG. I made it clear that the appellants could be at a risk of an award of costs against him as a result of the late submission of this evidence, particularly if it results in the Inquiry having to be adjourned in order for the Council to have sufficient time to consider that evidence.
50. My email of the 22 May 2023 was an expression of how I saw the position then, and how I still see it now: the appellants had unilaterally taken it upon themselves to re-write the deadlines agreed at the CMC. The deadline for the submission of the ecology evidence had not been agreed with the Council. Neither had it been agreed with the Planning Inspectorate. To put it bluntly, the appellants had pursued a timetable for the submission of the ecology evidence that suited themselves.
51. That placed me in an invidious position when the Inquiry opened. In the interest of fairness, I was keen to have before me the appellants' evidence on ecology: that is an important issue and one that needs to be informed by expert evidence if it is to be properly understood. That persuaded me to accept that evidence, notwithstanding the lateness of its submission. But I have no doubt that the Council was placed at considerable disadvantage by the late submission of that evidence.
52. The Council described the appellant's behaviour as "egregious". I consider that to be putting it too strongly. But I agree with the Council that the appellant's unilateral adoption of their own timetable for the submission of the ecology evidence did demonstrate a wholesale lack of respect for the procedural deadlines established and *agreed* at the CMC. I have no doubt in my mind that the appellants acted unreasonably in this regard.
53. Had the Council not been able to produce its rebuttal evidence in time for the opening of Inquiry, or if the Inquiry had been delayed so that the Council could produce that evidence, I would have had no hesitation in awarding costs against the appellants in this respect. However, the Council did produce that evidence. It undoubtedly incurred costs in doing so, but those costs were not wasted. They were necessary to respond to the appellant's evidence, the

submission of which had indeed been anticipated at the CMC. The PPG is very clear: costs may only be awarded when one party has both acted unreasonably and caused the other party unnecessary or wasted expense. That is not the case here, and an award of costs is not justified in this particular respect.

54. However, the same is not true of the unilateral introduction of the new AIA. There was no indication given at the CMC that it was the appellants' intention to submit that document. Moreover, when it was submitted, the new document was clearly not simply an update of the previous AIA: introduced of an entirely new issue, specifically the assertion that in principle harm to the trees could be ascertainable after 6 years rather than the 20 years asserted previously. I have no doubt that this directly caused the Council to instruct and call its tree officer, and extended inquiry time to deal with that point. The submission of this evidence did not result in an adjournment of the Inquiry, and I am mindful that the Council took the opportunity to raise new matters of its own. But the PPG specifically states that introducing fresh and substantial evidence at a late stage which necessitates extra expense for preparatory work that would not otherwise have arisen is unreasonable behaviour. Furthermore, the appellant's unreasonable behaviour in this respect did directly cause the Council to incur costs that it would otherwise have not incurred.

The application on substantive grounds

55. The appellants produced evidence in support of their case on the appeals on grounds (b) and (c). Although I ultimately found in favour of the Council in relation to those grounds of appeal, the appellants' evidence had substance and my decision turned on my assessment of all the evidence before me as a matter of fact and degree or on the balance of probability, as appropriate. The appellants cannot be said to have acted unreasonably in relation to either of those grounds of appeal.
56. Not so the appeals on ground (d). The photographs taken by the Council's Enforcement Officer on the morning of 20 September 2016 show that bund then under construction terminated short of the ditch running along the northern boundary at Areas A and C. The northern section of the red-lined bund is clearly not in place at that time. Indeed, although not so clear, close examination of the appellants' own photographs revealed the same thing. The red-lined bund was clearly not substantially complete on that date.
57. It was appellants' own evidence that the last working day for the digger and operator carrying out this work was 20 September 2016. There was no evidence before me to show that a digger and operator were hired for those four days between then and the relevant date of 25 September 2016. It follows that, on the appellants' own case, there was no evidence to show that on the balance of probabilities the bund itself was substantially complete on the relevant date. The PPG confirms that in enforcement and lawful development certificate appeals, the onus of proof on matters of fact is on the appellant. In relation to the appeal on ground (d), the appellants' own evidence failed to show that the development was lawful on the relevant date. The appellants therefore acted unreasonably in appealing on that ground and, in so doing, caused the Council to incur unnecessary expense in defending that ground of appeal.
58. As is often the case, the appeal on ground (g) was the 'Cinderella' ground of appeal in this case. The appellants' case as initially made was briefly stated

and lacked any supporting evidence. Nevertheless, in the event that did not greatly matter. The evidence, which I found to be compelling, came from the caravan owners who appeared at the Inquiry and Mr Lasseter's oral evidence at the Inquiry about the way the site operated. That evidence was sufficient to make the appeal on ground (g) successful to an extent. Whilst that evidence was not completely owned by the appellants, and I had to ask for that evidence to be provided, when it was given Mr Lasseter's oral evidence helped to substantiate the appellants' case on this ground of appeal. Consequently, the appellants cannot be said to have acted unreasonably in that respect.

59. In relation to the appeal on ground (a), the appellants provided evidence to substantiate their position on each of the main issues that arose from the reasons for issuing the enforcement notice. The landscape evidence produced by the Council was better and more detailed than that provided by the appellants, but that did not prevent the appellants' witnesses from taking part in the round-table discussion on that issue and making a meaningful contribution to that discussion. The appellants were thus able to make their case on that issue, even though I ultimately did not find in their favour.
60. The only two material considerations that were advanced, specifically the inconvenience to caravan users and biodiversity benefits, I ultimately found were not of insufficient weight to outweigh the harm by reason of conflict with the development plan. But it is quite wrong to say that this was evident as submitted. The inconvenience to the caravan owners, and the harm to their health and general well-being, was a material consideration to which I attached significant weight. I was ultimately not persuaded that the biodiversity benefits put forward by the appellant would be effective in securing the level of compensation required to offset the harm caused, but the appellants case was advanced by a suitably qualified ecologist and was very much a cogent argument. The appellants may not have succeeded on those arguments, but they were a very long way short of acting unreasonably in presenting their case.
61. The PPG expressly states that appellant is at risk of an award of costs being made against them if the appeal or ground of appeal had no reasonable prospect of succeeding when, for example, the appeal follows a recent appeal decision in respect of the same, or a very similar, development on the same site where an Inspector decided that the proposal was unacceptable and circumstances have not materially changed in the intervening period. But this does not necessarily mean that the appellants acted unreasonably in bringing this appeal.
62. I acknowledge that the previous appeal decision relating to this site issued in November 2020 (APP/H1705/W/20/3248772) did relate to a very similar development and on the same site. Circumstances had not materially changed in the intervening period. However, even setting aside the procedural anomaly in relation to the previous appeal, there are limitations to the Written Representations procedure under which that appeal was considered. The appellants elected that these appeals should be determined under the Inquiry procedure. That enabled the appellants to produce more and better evidence in relation to the planning merits of the development than was considered in relation to previous appeal. The previous appeal decision was clearly a significant material consideration in this case, but it was not in any way

unreasonable for the appellants to take advantage of the opportunity to present more evidence and a better case in a fresh appeal(s).

Conclusion

63. I conclude that the appellant did act unreasonably in procedural terms in the late submission of the ecology evidence, but ultimately that unreasonable behaviour did not cause the Council to incur any unnecessary or wasted expense. The two conditions for an award of costs set out in the PPG are not met, and accordingly an award of costs is not justified in that respect. However, I reach a different conclusion in relation to the submission of the AIA. The submission of that document did introduce fresh and substantial evidence at a late stage and, whilst it did not necessitate an adjournment, it nevertheless caused the Council to incur unnecessary expense. The two conditions for an award of costs set out in the PPG are both met, and an award of costs is justified in that respect.
64. I find that the appellants did not act unreasonably in substantive terms in relation to grounds (a) (b), (c) or (g) on the enforcement appeals, or at all in relation to the appeal against the refusal of the LDC. However, on the appellant's own evidence, the appeals on ground (d) had no reasonable prospect of success. The appellant acted unreasonably in relying on that ground of appeal, and the Council incurred unnecessary and wasted expense in defending the appeal on that ground. The two conditions for an award of costs set out in the PPG are both met, and an award of costs is justified in that respect.
65. Having regard to the above, I conclude that the full award of costs sought by the Council is not justified. However, in those circumstances I have the power to award partial costs where that is appropriate. In this case, I find that a partial award of costs is justified, limited to the costs incurred by the Council in responding to the submission of the AIA and the appeal on ground (d).

Costs Order

66. 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 Mr David Snook and Mr Philip Snook pay to Basingstoke and Deane Borough Council, partial costs of the appeal proceedings described in the heading of this decision, limited to the costs incurred by the Council in responding to the submission of the AIA and the appeal on ground (d); such costs to be assessed in the Senior Courts Costs Office if not agreed. The applicant is now invited to submit to Mr David Snook and Mr Philip Snook, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Paul Freer
INSPECTOR