



Costs Decision

Inquiry Held on 10 January & 08, 09 & 29 March 2023

Site visit made on 10 January 2023

by Chris Preston BA(Hons) BPI MRTPI

an Inspector appointed by the Secretary of State

Decision date: 04/09/2023

**Costs application in relation to Appeal Ref: APP/B5480/C/20/3263118
Land known as Scotch Smoked Salmon, Units B3, B12, B13 & B14, Suttons
Business Park, New Road, Rainham, Essex RM13 8DE**

- 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 Mr Simon Wane (Scotch Smoked Salmon Company Ltd) for a full award of costs against the Council of the London Borough of Havering.
The inquiry was in connection with an appeal against an enforcement notice alleging: Without the benefit of planning permission, the change of use of the car parking area shown hatched in black on the site plan to a primary use as B2 (General Industrial Use) and B8(Storage and Distribution Use) and operational development in the form of:
 - 1) Erection of 2.4 metre high metal palisade fencing bordering the area shown hatched as (A) on the site plan;
 - 2) Installation of air conditioning and refrigeration units on the roof of the freezer unit;
 - 3) Siting of freezer unit shown hatched as (B);
 - 4) Siting of metal containers;
 - 5) Siting of waste disposal receptors, wheelie bins, skips and refuse disposal containers; and
 - 6) Siting of goods in connection with Scotch Smoked Salmon business.

Decision

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

The submissions for Mr Simon Wane (Scotch Smoked Salmon Company Ltd.)

2. The application for costs was made orally at the Inquiry and in written form, in response to the LPAs reply. The following is a summary of the key submissions.
3. The application for a full award of costs is contingent on the assumption that 1) I quashed the notice on the basis that it was vague; 2), that the Council should have served a breach of condition (BOC) notice; and 3), that no reasonable finding of fact could have concluded that there had been a breach of planning control involving a material change of use to a B2/B8 use. The notice was vague, misguided and hopelessly wrong. It should never have been issued and was inherently unreasonable.
4. In response to the written response of the LPA the applicant submitted a detailed written response. That was far lengthier than the initial application

and the contents are familiar to the Council so I shall not repeat them in full. The following is therefore a summary.

5. The basis for the application was straightforward and a proportionate response from the LPA would only have taken a few moments to prepare; there was no need to take instructions from the Council's solicitor. There is nothing in the subsequent response that could not have been formulated at the Inquiry.
6. The LPAs response on the substantive points is disingenuous and misinterprets the applicant's claim. In stating that the findings were a matter for the Inspector and that the Inspector "may disagree" with the applicant the advocate was in no way making an admission that there were no grounds to grant the application for an award. No reasonable person could take that view. It should be understood by the LPA that it is always open for an Inspector to determine that a costs application should fail because a party's case is not made out. Just because that was recognised in an off-hand comment by the applicant's advocate does not indicate an admission that it was impossible that the LPA had acted unreasonably. The LPA makes a poor point in an insulting and unprofessional manner and the applicant requests that the Inspector determines the application as made.
7. The Council's points relating to the fact that the applicant chose not to appeal the refusal of the LDC or chose not to make a ground (a) appeal are largely immaterial to the application for costs which is based on the current proceedings.
8. With regard to the nullity point, the applicant's application for costs was predicated on the basis that the Inspector did, in fact, find it to be a nullity. Instead of addressing that point the LPA has sought to re-state its case on why it should be considered that the notice was not a nullity. That misses the point of the claim. Likewise, whether the first Inspector offered a view on the point is irrelevant because the application is made on the basis that the current Inspector finds the notice a nullity.
9. When addressing the question of whether the Council should have served a BOC notice the Council has introduced evidence in respect of the background to its decision, which should not have been submitted by an advocate, and had misstated the facts. The Council indicated that it was known that the original plans relating to planning permission P0635.90 had been lost but the evidence trail indicates the Council case officer only became aware of that fact a year after the notice was served.
10. If the LPA was aware that it had lost the plans at the time the notice was served, it compounds the errors in drawing up a notice which sought to enforce against a MCU, nor did it address that the lawful use of the area was already B2/B8. That suggests that the Council deliberately adopted the unreasonable position that the permission under P0635.90 only related to the buildings on site and not the hardstanding.
11. The points raised about the Inspector's ability to correct the notice are not well made because the application is based on a scenario that the Inspector determines that he cannot correct the notice without causing prejudice. It is self-evident that LPAs should not be serving notices that are so defective that they need to rely on an Inspector to correct them.

12. It is evident from the way the Council has run the appeal that it has no confidence in its primary case. The suggestion that the Inspector could correct the description to a BOC is trying to ride two horses at once. Having not elected to enforce BOC because the plans had been lost it was unreasonable to draft the notice in the way that it did. Further, when the applicant submitted the appeal and demonstrated his case, the LPA should have withdrawn the notice rather than look for an alternative argument. That was plainly unreasonable conduct.
13. In respect of the permitted use of the land no reasonable LPA could have construed planning permission P0635.90 as granting buildings on site for a B2/B8 purpose but somehow granting the hardstanding a wholly different, unmentioned and free standing sui-generis car parking use. The Inspector is best placed to judge whether the LPA's approach was reasonable based on the evidence presented.
14. Overall, the applicant maintains that an award of costs is justified where one or more of the three grounds are made out.

The response by the Council for the London Borough of Havering

15. The Council's written response will be familiar to the parties so the following is a brief summary.
16. The word unreasonable is used in its ordinary meaning as established by the Courts and the applicant's advocate acknowledged that the Inspector may disagree with his view which itself indicates that it is not unreasonable to take a different view based on planning judgement. Thus, the LPA did not act unreasonably and there is no basis for an award of costs.
17. The notice is no hopelessly vague or a nullity, the first Inspector gave that view in writing. If the present Inspector considered it to be a nullity he would have indicated such at the outset but did not do so. It follows that it was reasonable to issue it.
18. Even if the notice was hopelessly vague that does not mean it was unreasonable to have issued it in the circumstances of the case. There is no dispute that there has been development that is causing harm but the appellant says this is not an MCU but a breach of condition. There is no dispute that the plans have been lost and an informed decision was made by officers to issue a notice based on MCU in those circumstances. That was not unreasonable in the circumstances.
19. The question of whether the notice describes the breach accurately and can be corrected without causing injustice is different from whether it is hopelessly vague. The LPA has properly considered and responded to those points.
20. The allegation that the Inspector should quash the notice on the basis that what should have been issued was a BCN notice is misconceived. The LPA maintains that a MCU has occurred. It is possible for a MCU and breach of condition to have occurred and the Council invited the Inspector to amend the description of the breach if he considers it necessary and provided draft wording for that eventuality. That was not unreasonable conduct.
21. The LPA's case evolved in response to the applicant's grounds of appeal and did not amount to "riding back" on the view that a MCU had occurred. The points

raised about the notice being ultra vires are not well made and give no basis for a costs award.

22. In terms of whether there has been a MCU the Council's position is plainly correct in law. Even if that is found not to have been the case, it was not unreasonable to have issued the notice on the facts of the case and the planning history and the fact that the plans relating to the original consent had been lost. The issue is a matter of planning judgement. An Inspector may reach a different conclusion than the Council but that does not make the conduct of the Council unreasonable.
23. The parking area was plainly in a parking use and it is a question for the Inspector to determine whether the area hatched black is to be considered ancillary to the use of the units or whether the parking use is a mixed-use for the benefit of the whole estate. Regardless of the outcome the Council's case was not unreasonable.
24. Finally, it is poor conduct of the applicant to make a costs application which is without merit and was made without any notification. The application should have been made in writing. Advocates should not advise their clients to make hopeless costs applications which increase the burden on LPAs and the Inspectorate. If the application had been made in advance the Inquiry could have completed on its third day. Nonetheless, the LPA does not make a costs application of its own because it would be disproportionate to do so, even though it would be entitled to. The application should never have been made but it does not need a counter application from the Council for the Inspector to see that.

Reasons

25. The Planning Practice Guidance advises that awards of costs can be made on procedural and substantive grounds. In order to justify an award a party must have behaved unreasonably *and* that behaviour must have led another party to incur unnecessary expense.

Procedural Points

26. Whilst the Council did not make an application for costs it did claim that the application before me was unreasonably made. I find nothing in that contention. Clearly, the earlier a party makes a costs application, the more time the other party has to prepare a response and that can assist in the smooth running of an event. In this case, no indication that the applicant intended to apply was made until late in proceedings. However, it is not obligatory to apply at any given point and not unusual for a party to see how things progress at an event before deciding whether to make an application. Accordingly, there was nothing particularly unusual in the applicant's approach.
27. Equally, given the late stage in proceedings, at the end of a long day, it was not unreasonable for the Council to request an opportunity to respond in writing. The applicant's advocate may claim that it was a matter that could have been dealt with swiftly at the event but the fact that he submitted a 14 page reply in response to the Council's five page response is indicative that matters were not quite so straightforward, particularly given the somewhat terse and niggly relationship between the advocates at the event.

28. The applicant's advocate also drew exception to what he considered the introduction of new evidence by the Council's advocate in response to the application for costs. However, I am of the view that there was no attempt to submit evidence to undermine the applicant's case or to mislead me, rather a genuine attempt to respond to the costs application by explaining the background to the decision to issue an enforcement notice based on MCU as opposed to a BOC. The applicant has had the opportunity to respond and no prejudice has been caused.

Nullity/ Hopelessly Vague Points

29. As set out in my associated decision I did not find that the notice was a nullity, nor was it hopelessly vague, albeit that it did require correction. However, that of itself is not unusual and occurs in many cases. Although the notice contained some defects, it was not so badly drafted as to have been unreasonable and it was clear on its face what the allegation was. The question of whether those matters had actually occurred or whether they amounted to a breach of planning control were more appropriately covered under grounds (b) and (c) in the associated appeal.
30. Much ink has also been used over the fact that the applicant's advocate accepted that whether or not the Council had behaved unreasonably was a matter for my judgement and that I may disagree with his position. That clearly wasn't a tacit acceptance that the Council did not have behave unreasonably. It was merely an off the cuff remark made in response to a question raised by myself at the event. The fact that so much time was spent covering that minor point is indicative of the tit for tat approach to matters at the event more generally. It is difficult to attribute that to one party or the other but, in any event, I am satisfied that the notice was not so badly drafted as to amount to unreasonable behaviour.

Whether the Notice Should have been Directed at a BOC

31. I did not correct the notice to refer to a BOC for the reasons set out in my associated decision. It was not a matter that could appropriately be considered on the hoof at the Inquiry and there would have been a clear opportunity for injustice had I corrected the notice in that manner.
32. In addition, even if I had found that there was a possible BOC that would not mean it was necessarily unreasonable for the Council to have served a notice aimed at a MCU. It is possible for both to occur simultaneously. The Council could have served alternative notices and asked me to quash one or the other depending on my findings on the facts. The fact that it did not do so was a matter for it. That conclusion applies regardless of any arguments as to precisely when the Council realised that the plans relating to the planning permission had been lost. In other words, if the Council believed that a MCU had occurred it was entitled to serve a notice in that respect. Whether that was a reasonable approach to take I shall address later in this decision.
33. However, the issue of whether a BOC had occurred was not straightforward in the circumstances, given the missing file, and it was not a case where the Council should clearly have gone down that route. Its approach was not unreasonable in that respect.

34. Moreover, whilst the applicant has criticised the Council for “rowing back” on its position in relation to BOC that was largely as a result of how matters transpired during the long course of the appeal, including the need to respond to questions from myself and the Inquiry note submitted by the previous Inspector. I don’t consider that was part of a deliberate plan by the Council to alter its position or an acceptance that it no longer considered that it had a valid case to argue in respect of the appeal as it stood. It was merely presenting options if I decided to quash the current notice.
35. Finally, given that I didn’t correct the notice in respect of BOC the matter took up relatively little time at the event or in the submissions prior to it. Thus, it was not a matter that led to any significant wasted expense.

Whether it was Unreasonable to Allege a MCU

36. The crux of the appeal came down to this point. I was presented with much caselaw and the Council significantly added to its arguments late in the day in the lead up to the event and at the event itself. The appeal statement and proof of evidence focussed on the change in character from car parking to the way in which the land identified in the notice was being used at the time the notice was served. However, there was little analysis of what the permitted use of that land was, with relation to the 1990 permission or any notable consideration of what the relevant planning unit was and whether the car parking/ hardstanding was ancillary to another primary use. Certainly the argument that the area of hardstanding in the estate was a primary use in itself was only advanced at a very late stage.
37. That did give the impression that the Council only properly grappled with the issue once legal advice had been sought in the lead up to the Inquiry, rather than before deciding to issue the notice. That could have been viewed as unreasonable behaviour of itself because the Council should have presented a clearer argument as to why it considered a MCU had taken place much earlier in proceedings. However, taking a lenient view, I am mindful that the information submitted in the lead up to the Inquiry was in response to questions raised by myself and the Inspector who was previously allocated to the appeal.
38. In that sense, the timing of the Council’s submissions was not unreasonable in that it was simply responding to requests for information rather than trying to gain any advantage in proceedings by submitting late information. Nonetheless, the fact that the argument was only properly formulated at a late stage does indicate that the concept wasn’t in the minds of officers when the notice was served.
39. Ultimately, I concluded that no MCU had occurred and found that the Council’s suggestion that the car parking was a primary use in itself to be poorly founded. Whether that made the decision to allege the breach in the notice unreasonable is finely balanced. However, it is difficult to look beyond the fact that the 1990 permission was for “Three blocks comprising 29 units for B2 (General Industrial) & B8 (storage and distribution)”. The plans have been lost but there is general agreement that the application site included the buildings and the land surrounding them, including the car parking and estate roads. There is no reference to car parking within the description of development which is a clear indication that it was not considered to be a primary use of

itself. Rather, as is commonly the case in industrial estates, the parking was clearly provided for the purposes of serving the B2 & B8 units.

40. Condition 2 of the permission required that the car parking be laid out and surfaced prior to the first occupation of the buildings and retained permanently thereafter. Condition 7 was imposed to prevent the storage of external goods or the stationing of skips or waste disposal receptors on the designated parking areas. One of the reasons for imposing that condition was to “ensure adequate on-site parking to the LPA’s standards.....”.
41. In other words, the only reason the car parking is there is to serve the primary use of the estate and it clearly has an ancillary function as opposed to being a primary use of itself. That is quite different from a pay and display car park serving a town centre or a car park adjacent to a railway hub in the example provided by the Council. When one visits the estate signage and demarcations clearly show that parking is allocated to specific units within the estate, rather than being a general pool of that is available on a communal basis.
42. At a late stage the LPA formulated its position that the car parking was a primary use and submitted a bundle of caselaw relating to the interpretation of planning permissions. However, none of that assisted its case. Any reasonable person seeking to interpret the 1990 permission would conclude that permission was granted for a B2 & B8 use across the site as a whole and that the car parking was ancillary to that use. Conditions were imposed to regulate and place a limitation on that use and to reserve certain areas as car parking and to prevent storage within those areas. The fact that those conditions were imposed does not dictate that parking became a primary use of itself. An ordinary reading of the permission suggests that it did not.
43. Moreover, assessment of the planning unit and whether any change in character is not merely a legalistic exercise. It is necessary to examine what is actually happening on the ground. When one looks at how the individual units within the estate operates it is quite clear that the parking outside each is used for purposes related to the use within the building. There is no sense that parking is a communal function of the estate as a whole but the allocated areas are clearly linked to associated units. That should have been apparent to officers when examining the nature of the use at the site. Instead, reference was made to other car parking uses, specifically that in relation to a train station, which had little resemblance to the way the appeal site operates. In other words, the legalistic arguments presented in relation to the possibility of parking being a primary use did not relate to the actual situation on the ground.
44. Even if the Council’s contention that the planning unit should be viewed as the estate as a whole is correct, with parking forming a primary use within it, the subsequent analysis did not explain why an increase in the general industrial and distribution element in one small area of the estate altered the character of the use as a whole. The mix of uses across the estate remains in B2, B8 and parking use.
45. In its response to the costs application the Council sets out its view that development has taken that is causing harm but recognises that the plans relating to the 1990 permission have been lost. It is suggested that those circumstances represent an “extenuating” factor in the decision to serve an MCU. What that suggests is that the Council was aware that it would have

- difficulty in serving a BOC notice in the absence of plans or the associated file and was looking for an alternative route to take enforcement action.
46. The fact that it considered harm was being caused does not offer extenuating circumstances for issuing a notice based on MCU when any reasonable interpretation of the 1990 permission and circumstances on the ground would have led it to the conclusion that the land already had an authorised use for B2 & B8 purposes. The applicant should not have had to defend a poorly considered enforcement notice on account of the Council's administrative deficiency in maintaining accurate records.
47. Reference has also been made to the fact that the applicant did not appeal against the refusal of the LDC application which sought to demonstrate that the use was lawful. That was a different application and the fact that there was no appeal does not dictate that the Council behaved reasonably in serving the enforcement notice. In fact, when one reads the officer report relating to the LDC application, it is clear that it was refused was based on the fact that officers were not satisfied that sufficient evidence had been submitted to demonstrate a continual breach of condition 7 of the 1990 permission over a period of ten years. There was no reference to a MCU and officers at that stage did not appear to consider it.
48. Overall, the Council behaved unreasonably in serving the notice in the form that it did. It had opportunities to withdraw the notice throughout the process but did not do so. The original Inspector set out a clear view in her Inquiry note as far back as October 2021 that the car parking use appeared to be incidental to the permitted primary use of the estate. There was a pause in proceedings due to the pandemic but when proceedings resumed the Council indicated that it wished to make submissions in respect of that Inquiry Note.
49. It was entitled to do so but ultimately the submissions prolonged proceedings and the Council's case that the parking within the estate represented a primary use of itself was entirely unconvincing having regard to the 1990 permission and the way the estate operates when viewed on the ground. Ultimately, the whole premise of the notice being based on a MCU was poorly founded and unconvincingly justified by the Council.
50. I appreciate that such matters are often complex and not straightforward. However, the Council failed to grapple with planning concepts that should have been understood by it and should have been clearly thought through before the notice was served. The PPG highlights that a Council may be at risk of an award of costs where more diligent prior investigation would have avoided the service of an inaccurate notice¹. Ultimately, that is clearly the position in this case. Had the issue of the established use and correct planning unit been thought through carefully the Council should not have alleged that a MCU had occurred.
51. The behaviour was unreasonable in that respect and the appellant has been put to unnecessary expense in defending an appeal against an enforcement notice that should not have been issued in the form that it was. In my view a full award of costs is justified as a result. I shall allow the application accordingly.

¹ Paragraph: 048 Reference ID: 16-048-20140306

Costs Order

52. 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 the Council for the London Borough of Havering shall pay to Mr Simon Wane (Scotch Smoked Salmon Co. Ltd.), the costs of the appeal proceedings described in the heading of this decision such costs to be assessed in the Senior Courts Costs Office if not agreed.
53. The applicant is now invited to submit to the Council for the London Borough of Havering, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Chris Preston

INSPECTOR