



Costs Decision

Inquiry held on 30 January 2024

Site visit made on 30 January 2024

by D Boffin BSc (Hons), DipTP, MRTPI, DipBldg Cons (RICS), IHBC

an Inspector appointed by the Secretary of State

Decision date: 18/03/2024

Costs application in relation to Appeal Ref: APP/A5270/C/23/3330255 Land Adjacent to 42 Bideford Avenue, Perivale, Wembley, Middlesex HA0 3AU

- 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 the Council of the London Borough of Ealing for a full award of costs against Mr Shariq Jawed of Fortytwo restaurant & lounge.
 - The inquiry was in connection with an appeal against an enforcement notice alleging without planning permission the material change of use of premises to a shisha lounge.
-

Decision

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

The submissions for the Council

2. The costs application and the rebuttal to Mr Jawed's response was submitted in writing. No additional points were made orally at the Inquiry.

The response by Mr Jawed

3. The response was made in writing.

Reasons

4. Parties in planning appeals normally meet their own expenses. However, 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 PPG advises that the right of appeal should be exercised in a reasonable manner. The PPG provides some examples of unreasonable behaviour by an appellant that may lead to an award of costs with regards to procedural and substantive matters. Although the examples cited are not exhaustive, they include - failure to adhere to deadlines, providing information that is shown to be manifestly inaccurate or untrue and the appeal or ground of appeal had no reasonable prospect of succeeding.
6. The enforcement notice was issued on the 23 August 2023. The appeal form was dated 26 September 2023 and on that form the Inquiry procedure was requested, the appellant stated that 10 witnesses were intended to be called and that 7 days were estimated for the Inquiry to last. Given that the appeal had been made on grounds (b), (c) and (d) the Planning Inspectorate (PINS) started the appeal utilising the Inquiry procedure given that there potentially

appeared to be a need to test evidence under oath/affirmation. The duration of the Inquiry was set at 3 days due to the number of witnesses the appellant had stated were to be called.

7. On the 27 October 2023 a letter was sent to both parties in relation to a Case Management Conference (CMC) that was proposed to be held virtually on 27 November 2023. That letter requested that both parties indicate by the 6 November 2023 whether they would be able to attend the CMC. No response was received by that date from Mr Jawed.
8. On the 10 November 2023 a Pre-Conference note was sent to both parties. On the 20 November 2023 Mr Jawed was asked to confirm whether he was going to attend the CMC. He responded by asking 'where had he got to attend'. On the 22 November 2023 an email was received from Mr Jawed requesting more time to prepare given that his close relative was in ICU in hospital. A letter, dated 11 October 2023, from a consultant treating his relative was attached to the email indicating that the relative had been an in-patient in the hospital since March 2023. It also stated that the hospital admission had included a stay in ICU followed by a lengthy admission with several complex conditions from which he may not recover.
9. On the 23 November 2023 PINS sent an email to Mr Jawed explaining that the CMC was to be held virtually via MS Teams and that it would open at 14:00 on Monday 27 November 2023. It went on to state that *'you have asked for an extension to allow you the time to gather necessary information and prepare a comprehensive response. However, any deadlines for documentation to be submitted etc can be discussed at the CMC with the Inspector and the Council's representativeAn alternative date for the virtual CMC can then be set if required- attendance at the CMC will provide you with assistance on the process and deadlines that are associated with this appeal.'*
10. On the morning of the 27 November PINS contacted Mr Jawed and he confirmed he would not be able to attend the CMC. A new date of the 6 December 2023 was proposed for the CMC by PINS. On 5 December 2023 Mr Jawed stated he couldn't attend the CMC due to his presence being required at the hospital and he requested it be rescheduled to January 2024.
11. However, given that the Inquiry was scheduled to open on the 30 January 2024 the CMC could not be postponed until January 2024. As such, both parties were informed that *'the Inspector will issue a pre-inquiry note by the 8 December 2023 which will set out requests for information that are required to: assess whether an Inquiry is the appropriate procedure for this appeal; to ensure the efficient management of the Inquiry and the timetable for the remainder of the appeal process.'*
12. A Pre-Inquiry Note was sent out to both parties on the 8 December 2023. As no Statement of Case had been received from the appellant the deadline for submission was extended until the 20 December 2023. PINS sent out a reminder to both parties of the upcoming deadlines on the 18 December 2023. The Pre-Inquiry Note indicated that Mr Jawed could appoint someone to represent him and it provided an electronic link to details of organisations that offer free, independent and professional planning advice to communities and individuals. It also included; a request that both parties confirm the names of the witnesses to be called and that they would be available for the Inquiry; the likely main issues to be addressed at the Inquiry; a reminder of the deadlines

with regard to the submission of Proofs of Evidence and the Inquiry Timetable Questionnaire Forms and a reminder that costs could be awarded.

13. No responses to those requests/deadlines were received from Mr Jawed. As no responses had been received PINS, on the 11 January 2024, requested confirmation by the 17 January 2024 whether Mr Jawed intended to attend the Inquiry, whether he proposed to give, or call another person to give evidence at the inquiry, an estimate of the time required to present all of his/their evidence; and the number of witnesses that he intended to call to give evidence.
14. Mr Jawed sent in a response on the 15 January 2024 relaying his family circumstances and the difficulties that that was creating. He requested more time to collect all the required evidence, that his business solicitor was unable to assist due to the financial cost and asked for advice and guidance. A response from PINS was sent to him on the 17 January 2024 indicating that advice and guidance on the procedure and timetable had been provided in the Pre-Inquiry Note and that it included an electronic link to details of organisations that offer free, independent and professional planning advice. The link was provided again and the requests for information in relation to attendance at the Inquiry and witnesses was repeated with a deadline of the 22 January 2024. Mr Jawed responded on the 22 January 2024 requesting that he would like the Inquiry date changed as due to his family circumstances he had not had time to prepare for the Inquiry.
15. On the 23 January PINS responded indicating that I had not been able to ascertain whether an Inquiry was the appropriate procedure or whether a short postponement could have been accommodated or whether the proceedings could have been held as a virtual event as I had not been able to ascertain any of those facts due to his failure to respond to the previous requests for information. He was informed that therefore the Inquiry would open at 10:00 on the 30 January 2024 and he was again requested to supply details of his witnesses and advised that he may wish to appoint someone to represent him. Mr Jawed's response on the 23 January reiterated that he needed more time to prepare but that he intended to attend the Inquiry. Mr Jawed attended the Inquiry and both parties were given the option of converting the procedure to written representations. Nevertheless, the Council objected to that option and Mr Jawed stated that he agreed to give his evidence on that day and after an adjournment he did that, and he also called 1 witness to appear on his behalf.
16. In his response to the Council's costs application, he has stated that his primary focus during the appeal process has been attending to his hospitalised close relative and that this consumed much of his time and attention. He also states that he had every intention of presenting a robust defence and even planned to invite various witnesses to testify on his behalf. Moreover, paragraph 031 of the PPG makes it clear that extenuating circumstances can be taken into account when considering whether unreasonable behaviour has occurred.
17. It is acknowledged that Mr Jawed's family circumstances would naturally be his primary focus. However, it is not apparent from the details before me why he was not able to isolate some time to specifically answer the requests for information or attend the CMCs. He also states that he was erroneously advised that attending the CMC was unnecessary. Yet it is not clear where that

advice was obtained from. Therefore, in my judgment, by not responding to the specific requests for information and not attending either CMC that had been arranged Mr Jawed acted unreasonably even taking into account his extenuating circumstances.

18. Nevertheless, I consider that even if the deadlines had been adhered to and the information requested had been submitted it is highly likely that the appeal would not have been withdrawn and the Inquiry would have been required due to the need to hear evidence on oath/affirmation. However, the number of sitting days set aside for the Inquiry would have been based on an up-to-date assessment of the number of witnesses that were to be called. The Council booked the venue for 3 days and ensured its advocate and staff were available for those 3 days and the Inquiry only sat for 1 day. Therefore, the Council will have incurred unnecessary costs associated with the additional days that the Inquiry did not sit including retaining its advocate and reservation of the venue.
19. The Council has stated that facts on the appeal form are simply untrue with regard to; there is no restaurant, food menu nor 'professionally trained culinary team', it is not a 'food-centric business, fortytwo lounge restaurant has not been part of the local community for several years, it has not followed regulatory guidelines and it operates past 23:00. Mr Jawed's oral evidence given under affirmation was that he had had a chef but he had left, he had tried to employ three other chefs and that they had had trial periods but none of them were suitable. He had also looked into a catering company in Milton Keynes. It is apparent that in his mind he wanted to and intended to run a restaurant from the premises but there is little evidence to indicate that between February 2023 and 23 August 2023 a restaurant was operating from it.
20. Moreover, Mr Jawed's also stated at the Inquiry that someone else had completed the appeal form for him. It is not apparent if it was completed by a planning professional or that he had any professional planning advice during the appeal process. The form refers to fortytwo restaurant and lounge and also 42C Bideford Avenue. The references to a longstanding restaurant and outdoor smoking area could reasonably be taken to relate to the previous businesses that have operated from 42C Bideford Avenue. The appellant stated that he had not had any association with the other businesses that had operated from 42C Bideford Avenue, that his business was open past 23:00 at times and that the food registration forms were submitted after the appeal was submitted. The information contained with the appeal form in respect of the grounds of appeal is confusing and contradictory with regards to the facts provided and whether it is referring to fortytwo lounge and restaurant or previous businesses at 42C Bideford Avenue. However, there is little to demonstrate that the facts on the appeal form are manifestly inaccurate or untrue. Unreasonable behaviour in this respect has not been demonstrated.
21. In terms of the ground (b) appeal the only evidence provided within the appeal form relates to planning merits and not a ground (b) appeal. However, the evidence within the other grounds of appeal could reasonably be considered to be representations under ground (b) in that it states that the primary focus is to serve food rather than shisha. The ground (c) appeal was construed on the basis that shisha smoking and a restaurant did not amount to a material change from the previous use of the premises. Moreover, taking the appeal

form and the oral evidence from Mr Jawed and his supporting witness both the ground (c) and (d) appeals were made based on their belief that the past use of the premises as a restaurant where shisha smoking took place meant that there was not a breach of planning control or that it was immune from enforcement action.

22. All three grounds of appeal require assessment on a fact and degree basis, application of the balance of probability test and the onus is on the appellant in an appeal on those grounds. The Council clearly disputed the Mr Jawed's version of events with their own evidence and I have agreed with the Council within my substantive decision. However, it is difficult to conclude that Mr Jawed should have realised that his grounds of appeal did not stand a realistic prospect of success given that, other than someone else filling in the form, he was not professionally represented. The appellant also referred to having limited experience of the planning system and the business constituting his first business venture. In addition, his focus was the hospitalisation of his close relative. Taking into account this context, the appellant cannot reasonably be expected to have a thorough understanding of the intricacies of planning law. I acknowledge that he was provided with details of organisations that provide free planning advice. Nonetheless, these factors provide an insight into why the grounds of appeal were pursued in the manner they were.
23. I regard the above factors as amounting to extenuating circumstances in relation to the behaviour by the appellant with regards the grounds (b), (c) and (d) appeals which might otherwise have been construed as unreasonable in terms of the substance of the appeal. Even if I had concluded that grounds (b), (c) and (d) were pursued unreasonably, this would have weighed against awarding costs in these respects.
24. Taking into account all of the above, I find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the PPG, has been demonstrated and that a partial award of costs is justified.

Costs Order

25. 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 Shariq Jawed shall pay to the Council of the London Borough of Ealing the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in:

- Retaining its advocate and the reservation of the venue for the additional 2 days that the Inquiry did not sit.

such costs to be assessed in the Senior Courts Costs Office if not agreed. The applicant is now invited to submit to Mr Shariq Jawed, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

D Boffin

INSPECTOR