



Costs Decision

Site visit made on 6 February 2024

by Thomas Shields MA DipURP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 03 April 2024

Costs application in relation to Appeal Ref: APP/T5150/C/22/3296971 9 Buxton Road, London, NW2 5BL

- The application is made under the Town and Country Planning Act 1990 ("the Act"), sections 174, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
 - The application is made by the Council of the London Borough of Brent for a partial award of costs against Ben Adler (Willesden Investments Limited).
 - The application is in connection with an appeal against an enforcement notice relating to a material change of use of the property to use as a house in multiple occupation (HMO) and one flat.
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Decision

1. The application for a partial award of costs is allowed in the terms set out below.
2. The application is made in respect of the related appeal on grounds (b), (c) and (e). The arguments advanced on behalf of both parties were set out in their written submissions. As such, I need not repeat them in any detail here.
3. The Planning Practice Guidance (PPG)¹ advises that irrespective of the outcome of an appeal, costs may be awarded where a party has behaved unreasonably in the appeal process and that behaviour resulted in the other party incurring unnecessary or wasted expense. The PPG lists examples of behaviour whereby an award of costs on substantive and/or procedural grounds may be justified. However, the list of examples should not be regarded as exhaustive.

Summary of the parties' cases

Ground (e)

4. The Council's case in summary is that the enforcement notice was properly served in accordance with the Act and that there was no reason for the appellant to argue otherwise. The ground was withdrawn late in the appeal process by which time the Council had incurred unnecessary and wasted expense in preparing its case.
5. In response the appellant argues the notice did not list the individual rooms which would have needed to have been served. Once they were satisfied all of the tenants had been served a copy of the notice the ground (e) was withdrawn.

¹ Paragraph 030 ref 16-030-20140306

Grounds (b) and (c)

6. The Council's case in summary on procedural grounds, is that the appellant failed to engage with the Council or discuss the appeals in a constructive manner. Had the appellant done so the appeals need never have been made or could have been narrowed at a much earlier stage in the appeal process.
7. On substantive grounds the Council's case, in summary, is that the burden of proof was on the appellant to make their case on the basis of precise and unambiguous evidence, but failed to do so. The appeals on grounds (b) and (c) were always destined to fail.
8. In response to ground (b) it is argued that prior to the submission of a third party's (neighbour) evidence the appellant honestly believed they could demonstrate on the balance of probability that the use of the property at the time the notice was served was a HMO. Therefore, the appellant did exercise a reasonable manner when pursuing the ground (b) appeal, and it was not the case that the appeal had no reasonable prospect of succeeding before the third-party evidence was submitted.
9. The appellant withdrew their appeal on 20th November 2023 following assessment of the neighbour's evidence which included eye witness accounts from within the property. Because the appellant did not live at the property, he was unable to reasonably dispute under oath the assertions of the neighbour. The appellant was advised by his planning consultant that the evidence from the neighbour meant that the appellant's evidence would be undermined to the extent it would probably not satisfy the test of being unambiguous and precise. The appellant demonstrated reasonable behaviour by withdrawing the ground (b) appeal within 7 days of receiving the evidence provided by the neighbour.
10. In response to ground (c) the appellant rehearses their appeal arguments that the extensions were constructed as permitted development.

Analysis

Ground (e)

11. Enforcement notices are required to include a list of names and addresses of persons on whom a copy has been served². It was served by post and by hand at the property on 15 and 16 March 2022 respectively. It contained a list of persons served. Amongst others it included: "The Owner/Occupier/Anyone with an interest in the land at 9 Buxton Road, London, NW2 5BL". The appeal form setting out the grounds of appeal including ground (e) was dated 13 April 2022. Given this timeline the appellant had 4 weeks before appealing to check who, if anyone, had not been properly served with a copy of the notice.
12. However, no evidence was ever submitted by the appellant to demonstrate who had not been properly served contrary to the requirements of the Act. The appellant withdrew the appeal on 4 July 2022 in submitted final comments. By that time the Council had provided certificated evidence and photographs as an Appendix to its statement of case in defending its position.
13. At all times the appellant has been represented by a professional agent. It thus should have been clear that without any evidence of a failure to properly serve

² S173(10) of the Act and Regulation 5(c) Town and Country Planning (Enforcement Notices and Appeals) (England) Regulations 2002

the notice the ground (e) appeal had no merit. The appellant had sufficient time to check whether there had been improper service before lodging the appeal and before statements of case were prepared and submitted. For these reasons I find the appellant behaved unreasonably resulting in unnecessary and wasted expense for the Council.

Ground (b)

14. For appeals on grounds (b) and (c) in enforcement appeals the onus of proof on matters of fact lies with the appellant and is tested on the balance of probability. Hence, it was for the appellant to show on ground (b) that the matters stated in the alleged breach had not occurred, and in ground (c) that those matters (if they occurred) do not constitute a breach of planning control.
15. While I acknowledge the appellant does not live at the property they are a property-based business who were responsible for the property. They acquired and developed No. 9 and let it to tenants (including a flat) in a relatively short space of time. Hence, it would or should have been clear to them in lodging their appeal and making their case from the outset, and to their professional agent advising them, of the need to provide clear and unambiguous evidence to show on a factual basis that the matters alleged had not occurred. They only retracted their case once they knew it would not stand up to testing, and after the Council had incurred expense in preparing their case.
16. As such, I find the lodging of the appeal on ground (b) amounted to unreasonable behaviour, compounded by further unreasonable behaviour resulting from its late withdrawal in the appeal process. This resulted in unnecessary and wasted expense for the Council.

Ground (c)

17. As set out in detail at paragraphs 11-16 in the related appeal Decision, the appellant failed to submit any convincing evidence to demonstrate the extensions were carried out and used as part of the lawful use of the property as a single dwellinghouse, before the unauthorised material change of use to a HMO and one flat occurred. Given that they were professionally advised during the appeal process it should have been obvious to the appellant the appeal on ground (c) would fail. This amounts to unreasonable behaviour which resulted in the Council incurring unnecessary and wasted expense.

Costs Order

18. 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 Ben Adler (Willesden Investments Limited) shall pay to the Council of the London Borough of Brent the costs of the appeal proceedings described in the heading of this decision, limited to those costs incurred in respect of the appeal on grounds (b), (c) and (e), and this related application for costs; such costs to be assessed in the Senior Courts Costs Office if not agreed.
19. The applicant is now invited to submit to Ben Adler (Willesden Investments Limited), to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Thomas Shields INSPECTOR