The Planning Inspectorate

Costs Decision

Inquiry Held on 12 March 2024

by Paul Freer BA (Hons) LLM PhD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 4 September 2024

Costs application in relation to Appeal Ref: APP/Z3635/C/23/3331902
Land at Stanwell Farm, Bedfont Road, Stanwell TW19 7LY

- The application is made under the Town and Country Planning Act 1990 (the 1990 Act), sections 174, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The application is made by O'Connor Properties Limited for a full award of costs against Spelthorne Borough Council.
- The inquiry was in connection with appeals against enforcement notices alleging the material change of use of the land from open land to use comprising the storage of builders merchants materials and, without planning permission, the erection of a warehouse building.

Decision: the application is refused

The submissions for O'Connor Properties Limited

1. When issuing an enforcement notice, Spelthorne Borough Council needed to meet the statutory requirements set out in section 173 of the Town and Country Planning Act 1990. There were a number of failures to do so.

2. The Inspector has found that there were a range of defects in the two enforcement notices, which would have required correction. But among those failures/defects, one was apparent on the face of both notices, and meant that each were nullities: the two different compliance periods, which meant that the recipient would not know when compliance was required by, even though failure to comply (in the absence of an appeal before the notice comes into effect), is a criminal offence.

3. The appellant had, from the earliest stage, expressed concern about the notices, pointing to a range of defects and asking the Council to review them. This was re-iterated at the Case Management Conference (CMC) and the Inspector himself asked the Council to review the notices and to address, in detail, the corrections/amendments required. In truth, this exercise was not undertaken properly in the Council's evidence, or at all, despite the fact that it is the Council's responsibility to do so. The PPG does not deal with this situation directly, but at paragraph 48, the sort of conduct which is mentioned as an illustration of what is unreasonable in an enforcement context is akin to the circumstances here: where an appeal inquiry has happened unnecessarily and fruitlessly, because the Council did not ensure the notices were accurate.

4. The error with the compliance period was an error that should have been picked up before the notices were issued; it is a basic, crucial requirement so that there is clarity about what needs to be done and by when. Failing that, it

should have been picked up by the Council when it was asked specifically to review the notices by the Inspector at the CMC. But it was not. Instead, when given the opportunity to respond, the Council's position was that the Inspector could and should use his powers under section 176 of the 1990 Act to amend both notices, to introduce consistent compliance periods. The Council did not recognise then, or seemingly at any time, that these defects on the notices meant that for the recipient, there would be a genuine inability to know what was required, rendering the notices a nullity.

5. In commenting on the Council's Costs Response, the appellant points out that both enforcement notices were served on O'Connor Properties Limited (the appellant). Thus, at the point of service, the Council had reason to believe that the appellant was the owner or occupier of the appeal site. The Council's Costs Response is simply factually incorrect when it asserts that "The appellant offered no evidence of interest in its statement of case or proofs of evidence".

6. It is unacceptably unfair and inaccurate for the Council to allege that the appellant was not prepared to deal with the nullity point at the CMC. The appellant's counsel said that hearing detailed submissions at the CMC was an option for the Inspector and outlined those submissions. In the event, the Inspector preferred to deal with it at the beginning of the inquiry. That procedural decision was a matter for his discretion and was not the subject of any objection whatever by the Council. The Council did not challenge the procedural decision, nor even suggest an alternative course, before, during or afterwards. It is tendentious, at the very least, to have that raised in support of suggestion that the appellant's conduct has been in any way unreasonable.

The response by Spelthorne Borough Council

7. Whilst the jurisdiction to seek costs is not challenged, the appellant's standing to do so is challenged. In Mr Whitaker's proof of evidence, the council pointed out that the appellant was not the registered owner of any part of the appeal site. It is still not the registered owner. Its standing to appeal is therefore not demonstrated. The appellant offered no evidence of interest in its statement of case or its proofs of evidence. The inquiry having been truncated as a result of the nullity point, the matter was not decided. I t is self-evident that, if the appellant does not have standing to bring the appeal to inquiry, it does not have standing to claim costs.

8. The Planning Practice Guidance (PPG) makes no distinction between points which give rise to the notices being nullities and those which simply lead to invalidity. As might be expected given that the jurisdiction is independent of the notice, there is nothing in the appeals PPG that specifies that issuing a notice which turns out to be a nullity is necessarily unreasonable behaviour. The only distinction between challenges which result in nullity and those which result in invalidity is in the effect on the notice, not the reasonableness of the behaviour which lead to it. For costs, the only test is whether there has been unreasonable behaviour.

9. The point of the costs regime is also relevant. The obligation is on all parties. Failure to behave reasonably is two-sided. Where the appellant has not behaved reasonably, any failures on the council's part need to be considered in that context. This it is relevant both to the reasonableness of the council's actions and to the existence of extenuating circumstances.

10. Not once in any of the appeal documents did the appellant challenge the notices on grounds of the compliance period. The first time this was mentioned was in the inquiry itself, in the statement prepared by the appellant's counsel. It is notable that the Inspector expressed the view, before adjourning, that he needed to consider a point which had not previously been considered.

11. The appellant says that the council failed to appreciate the significance of the point. The council's advocate was giving an oral, off the cuff, response to a point which had not previously been raised. Had it been raised previously, no doubt it could have been addressed as fully as the other points were addressed. The appeals regime exists to allow the appellant to challenge the notices. It is incumbent on the appellant to make the challenge. If it fails to do so, it is not unreasonable for the Council and the Inspector to proceed on the basis that the notices are valid until demonstrated otherwise. Doing so cannot be unreasonable behaviour. Conversely, for the appellant to make such a substantial challenge for the first time at the inquiry is neither reasonable behaviour nor is it following good practice in terms of the timeliness and presentation of its case.

12. In the CMC Note, the Inspector asked the Council to deal with the points raised on nullity in the proof of evidence. In his proof of evidence, Mr Whitaker did so fully. Contrary to the appellant's suggestion, there was no direction to fully review the notices, only to respond to the points raised and to propose any necessary amendments.

13. Paragraph 48 of the PPG is not engaged. No point has been raised in relation to the prior investigation. The only point raised, for costs, relates to the compliance period. This is not an issue with the prior investigation or the conduct of the appeal. It is a typo. A typo with serious implications for the notices but, at heart, still a typo. In terms of the other issues with the notices, the inspector indicated that he would have been prepared to amend the notices in respect of these. By definition, then, there was no injustice in doing so. It cannot have been unreasonable to issue the notices with these defects.

Reasons

14. The PPG advises that, irrespective of the outcome of the appeal, costs may only be awarded against a party who has behaved unreasonably <u>and</u> 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 provides example of unreasonable behaviour which may result in an award of costs against a local planning authority. These examples include not reviewing their case promptly following the lodging of an appeal against refusal of planning permission (or non-determination), or an application to remove or vary one or more conditions, as part of sensible on-going case management.

15. It is first necessary to deal with the question of the appellant's standing to firstly bring the appeals and then to make an application for costs. The Council served copies of both notices on the appellant. Consequently, at the point of service, the Council had reason to believe that the appellant was the owner or occupier of the appeal site, or at the very least had a legal interest in the land. It follows that had the notice taken affect, either if no appeal had been made

against it or if the notice had been upheld on appeal, the Council might have sought to prosecute the appellant (amongst others) for non-compliance with the notice.

16. At the most basic level, it is highly unlikely that the appellant would have embarked on the appeal process at all if they were not the landowner or otherwise had no legal interest in the land. This then begs an obvious question: why would the appellant go to the trouble and expense of commissioning expert witnesses and instructing King's Counsel to represent it if they had no legal interest in the land? In that scenario, the more obvious approach would have been to distance themselves from the land and the notice in order to avoid the risk of prosecution proceedings. The only reasonable inference to be drawn is that the appellants are the land owners, as stated. In those circumstances, I fail to see how the appellant would not have standing to appeal.

17. The modern approach to the question of nullity is to be found in the judgment of the High Court in *Oates v SoCLG and Canterbury*[1], which drew extensively upon the preceding case law on the subject. A number of principles emerge from this judgment, including that the test in relation to nullity is best understood not as one of 'hopeless ambiguity' but rather as a failure to tell the recipient with 'reasonable certainty' what the breach of planning control is and what must be done to remedy it. The judgment in *Oates* also indicates that a degree of uncertainty does not necessarily render it non-compliant with statute and that the notice should be read as a whole. It was held in *Oates* that it was open to an inspector to conclude that while one section of a notice was too uncertain and could not stand, taken as a whole the notice did comply with the statutory requirements. Overall, the judgment in *Oates* indicates that the question of nullity should not be approached in a way which is unduly technical or formalistic.

18. At the simplest level, Notice A is a material change of use notice that alleges a material change of use to a use comprising the storage of builders merchants materials. Notice B is an operational development notice that alleges, without planning permission, the erection of a warehouse building. There are elements in each notice that mask that central message to a greater or lesser extent. Even so, on a plain reading of each notice and reading the notice as whole, that central message comes across loud and clear.

19. The appellant advanced several issues with each notice which, it was claimed, rendered that notice a nullity. In my judgement, none of those issues, taken individually or cumulatively, were sufficient to render the notice(s) a nullity. Moreover, if the allegations or requirements in the notice(s) had been somewhat uncertain, the judgment in *Oates* indicates that this would not necessarily rendered the notice(s) a nullity.

20. Furthermore, some of the complaints raised by the appellant were tenuous at best. For example, the appellant in this case happens to be the landowner. It is reasonable to expect that, as the landowner, the appellant would be familiar with the site, buildings on the site and the history of the site throughout the period of this ownership. The warehouse building alleged in Notice B had been in situ for much of the period that the appellant owned the land. It is the only new building to have been erected in that position that matched the description

[1] *Oates v SoCLG and Canterbury* [2017] EWHC 2716

of the building attacked by the notice. It is the only building in the position shown on the plan attached to notice. It is simply not credible that the appellant was unable to identify the building attacked by the notice from the written description and the plan attached to the notice.

21. That said, both Notice A and Notice B share a common, and fatal, defect: the discrepancy between the periods for compliance stated in the covering letter (being part of the notice) and in Schedule 4 of the notice. It was that reason, and that reason alone, that led me to the conclusion that both notices were nullities. Had that not been the case, the notices could have been rescued by correcting and/or varying the notices to rectify the other defects. I am satisfied that no injustice would have been caused by so doing.

22. There is a reasonable expectation that a local planning authority should be capable of drafting an enforcement that conforms with statute. In this case, I suspect that the discrepancy in the periods of compliance was simply a typographical error. The perpetuation of that error was clearly an oversight and/or the result of the documents not being thoroughly checked before issue. The unusual format of the notices with covering letter, in which the period of compliance appears twice, no doubt played a large part in that. It is axiomatic that the defect that ultimately led to the notices being a nullity could not have occurred if the notices had followed the more commonplace approach of only setting out the period of compliance in one place.

23. Nevertheless, irrespective of the cause, the Council acted unreasonably by issuing enforcement notices that did not comply with statute.

24. The appellant had, from the earliest stage of the appeal process, expressed concern about the notices, pointing to a range of defects and asking the Council to review them. This was re-iterated at the CMC and as a consequence I asked the Council to review the notices and to address, in detail, the corrections/amendments required.

25. The salient point is that the discrepancy with the compliance dates, and which ultimately led to the notices being declared a nullity, was not amongst the defects that I asked to be reviewed. That issue only arose later, at the Inquiry itself. My working assumption is that the appellant did not raise this matter earlier simply because the error was not picked up earlier. It would not have been in anyone's interest, and certainly not good practice/professional conduct, if the error had been spotted earlier and the matter not raised sooner.

26. I must bear some of the responsibility for that. I had not spotted the error myself in my preparation for CMC or the Inquiry itself, hence why I adjourned the Inquiry to consider the point. Had I done so, it would have been raised much earlier.

27. I take the Council's point that the responsibility for following good practice in the appeals process is a shared one: paragraph 27 of the PPG makes clear that the costs regime exists to encourage *all* those involved in the appeal process to behave in a reasonable way and to follow good practice (emphasis added). I include myself in that. The typographical error that resulted on the notices being declared nullities was an unfortunate one, brought about by the (in my experience) unique practice of having compliance dates in both the notice itself and in a covering letter. It was unfortunate that this was not picked up in the subsequent review of the notice following the CMC but, because this was not

one of the matters that I asked to be reviewed, no blame attaches to the Council in that respect.

28. The possibility that the notices were null was obviously on the appellant's radar right from the start. The appellant considers that the error with the compliance period was a basic, crucial requirement that should have been picked up before the notices were issued. And yet the appellant themselves did not spot that error until the eleventh hour and fifty-ninth minute, and only drew it to my attention once the Inquiry had opened. It is unfortunate that the appellant did not spot sooner the error that ultimately led to the noticed being declared a nullity but, having failed to spot the error until the very last minute, it is then somewhat disingenuous to criticise the Council for not having doing so.

29. It was equally unfortunate that I did not spot the error myself. Had I done so, the matter would have been raised at the CMC or before, and the appeals would have gone no further. Expense – to all parties – would have been saved.

30. So here with have a situation whereby three groups of planning and legal professionals – the appellant's team, the Council's team and the Planning Inspectorate – collectively failed to spot a fundamental flaw with two enforcement notices. To my mind, that speaks volumes about the difficulty in spotting that error due, I have no doubt, to the unusual format in which the notices were served. In such circumstances, it not possible to apportion blame for the expenses incurred by the appellant in bringing these appeals: wasted and unnecessary expense was incurred by all parties. Opportunities to rectify those errors, and to avoid incurring wasted expense all round, were missed by all concerned at every stage of the proceedings. The blame for that must be shared equally by all those involved.

Conclusion

31. The PPG is very clear in that, irrespective of the outcome of the appeal, costs may only be awarded against a party who has behaved unreasonably <u>and</u> thereby caused the party applying for costs to incur unnecessary or wasted expense in the appeal process. In this case, the Council did act unreasonably by issuing enforcement notices that did not comply with statute. To the extent that the appellant did incur any wasted and unnecessary expense, the appellant must bear an equal and joint responsibility for not spotting the error sooner that led to that non-compliance with statute. In these circumstances, and having regard to the guidance in the PPG, I am not persuaded that an aware of costs is justified.

Paul Freer

INSPECTOR