The Planning Inspectorate

Costs Decision

Inquiry Held on 24 January 2023
Site visit made on 24 January 2023

by Chris Preston BA(Hons) BPl MRTPI

an Inspector appointed by the Secretary of State

Decision date: 26 April 2023

Costs application in relation to Appeal Ref: APP/H2265/X/21/3273837
2 Keepers Cottage, Hurst Wood, Platt, Sevenoaks, Kent TN15 8TA

- The application is made under the Town and Country Planning Act 1990, sections 195, 320 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The application is made by Mr Ian Williams for a full award of costs against Tonbridge & Malling Borough Council.
- The inquiry was in connection with an appeal against the refusal of an application for a certificate of lawful development for the erection of the building subject of EN1 issued on June 2009, as shown on drawing number 014-1042-21A.

Decision

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

The submissions for Mr Ian Williams

2. The Council's decision was not well-founded and wrong in law in that the application was refused because of the failure to comply with two enforcement notices, despite the second enforcement notice being irrelevant to the case. That approach was clearly wrong.

3. There were clear errors in the Council's case. Paragraph 6.5 of its Statement of Case refers to beds being witnessed by a previous Inspector in the annex. Those beds were not in the annex but were in 2 Keepers Cottage.

4. The Council has not put forward any witnesses with direct knowledge of the site from the relevant period. The Council's witness, Mr Thompson, was not provided with a key committee report from 2011 which confirmed that officers at the time were satisfied that the appellant had complied with the requirements of the notice. The Council have disclosed no notes or photographs it holds in relation to visits that were taken at the time.

5. Mr Thompson's claims at paragraph 5.4 of his proof that the appellant accepted that he hadn't complied with the notice are factually incorrect. He has accepted no such thing. When referring to the Inspector's comments about the "cramped nature" of accommodation in paragraph 6.5 of his proof it should have been obvious to Mr Thompson that this was referring to accommodation within the dwelling and not the annex.

6. Overall, the Council has displayed unreasonable conduct leading to wasted cost. They should not have resisted the appeal and a full award of costs is justified.

The response by Tonbridge & Malling Borough Council

7. For a costs award to succeed there needs to be unreasonable behaviour and wasted expense. Even if the first element was met there has been no wasted expense. The burden of proof rests with the appellant. His statement of case is threadbare with no dates. Only at the point of exchange of proofs has much of the evidence become clear.

8. Bearing in mind the context of other breaches in 2017 and the appeal decision of 24 April 2017, which referred to section 173(11) the Council's approach was certainly not unreasonable. All of the costs incurred were necessary.

9. Even though the reason for refusal refers to two enforcement notices, the officer report clearly focusses on the 2009 notice and there would still have been an appeal based on the issue of compliance with that notice. Thus, the reference to the second notice did not lead to any wasted expense.

10. Mr Thompson accepted that the reference to cramped accommodation in his proof was wrong and didn't seek to carry that forward. Similarly, in reference to paragraph 5.4 of his proof there was no attempt from Mr Thompson to deliberately mislead, the comments about compliance and the 2017 Court proceedings were provided for context. The appeal had already been made by that point so there was no extra cost. Similarly, the Council's points about the temporary cessation did not lead to any additional or wasted expense.

11. No witnesses were called with direct evidence, such as photographs or site notes because there was no evidence or material to give. Even if there was Council's regularly appoint consultants to give evidence for them. Due to the passage of time, most officers have moved on.

12. It is the case that Mr Thompson was not given the April 2011 committee report but the appellant has overplayed the significance of this. It did not lead to any wasted expense.

Reasons

13. An award of costs may be made on both procedural and substantive grounds where a party has behaved unreasonably and that behaviour has led another party to incur unnecessary or wasted expense.

14. The Council's reason for refusing the LDC application was muddled with regards to the reference to compliance with the second enforcement notice (EN2) when, as was later agreed in the Statement of Common Ground, that notice didn't have any bearing on whether the first notice (EN1) had been complied with. EN2 had no bearing on the case. The Council's reference and reliance upon compliance with EN2 was clearly wrong and did effect its decision to refuse the application.

15. Although the Council eventually accepted that point, it was a matter that persisted throughout its statement of case and in the proof of Mr Thompson. However, it wasn't a matter that took up any time at the Inquiry due to the Statement of Common Ground and it only took up minimal coverage within the applicant's proof and statement. Consequently, although I find the Council's reference to the second enforcement notice was unreasonable it did not lead to any notable wasted expense, of itself. The primary issue in dispute was

compliance with EN1 and that took up the majority of time in relation to proceedings.

16. The Planning Practice Guidance sets out that Councils are expected to cooperate with an applicant who is seeking information that they may hold about the planning status of land in relation to applications for LDCs[1]. In relation to applications for costs a local authority may be liable if it has failed to cooperate with the other party.

17. From the information before me the Council did fail to cooperate in terms of its response, or lack of it, to requests from the applicant in terms of information it held that could be relevant to the case. The agent for the applicant made repeated requests for access to information the Council held in relation to the planning history of the site, in the knowledge that Council officers had made numerous visits to the property during the critical period in question. Mr Williams recalled officers taking photographs during those visits. It is clear that numerous visits took place.

18. From the information presented to the Inquiry, the only response from the Council was an email suggesting that it wasn't clear what information the applicant was requesting. His agent replied to that email repeating what the request entailed. There appears to have been no further response from the Council. Having read the correspondence I find no difficulty in understanding what information the applicant was seeking and the Council's lack of response is puzzling. No satisfactory explanation has been given by the Council as to why it failed to respond.

19. On the day of the Inquiry, fairly late in proceedings, the Council suggested that it hadn't provided any information was because it didn't hold anything to provide. If that was the case, a much earlier explanation to the applicant in writing would have been a simple exercise. I can appreciate, from the applicant's perspective, that the Council's failure to respond gave the impression that it was holding onto information that may have been relevant, even if that wasn't the case.

20. Even now, it isn't clear what has happened to the information that was previously held by the Council. I appreciate that public bodies generally have data retention policies that require information to be disposed of after a certain period of time. However, in this case, the Council simply hasn't explained what has happened to information it must have held in relation to the site given the enforcement history and recorded visits to the premises. That failure to cooperate and the lack of transparency over what has happened to any previous records is patently unreasonable.

21. Moreover, the issue of historic records had a clear bearing on the case. Although site notes and photographs were not available, the applicant produced a copy of a Council committee report from April 2011, relating to a planning application at the site. Within that report officers confirmed their view that the appellant "*has and is continuing to comply with the requirements of the Enforcement Notice".* That conclusion was reached after visits to the property around 2010 and 2011 and after the applicant had been interviewed under caution.

[1] Paragraph: 006 Reference ID: 17c-006-20140306

22. Significantly, it emerged at the Inquiry that the Council had not provided a copy of that report to Mr Thompson, the planning consultant who had been engaged to represent the authority in the Inquiry. He only became aware of its existence when it was provided by the applicant in his proof of evidence. Given the obvious importance of that report, why the Council didn't submit it in evidence is not clear.

23. Whilst the report was not a formal confirmation of compliance with the weight of an LDC it is a very strong indication that the Council was satisfied that the applicant had complied with the notice. Anyone reading that conclusion, including the applicant, would have reason to believe that the Council was satisfied that the necessary steps had been taken.

24. Corroboration that the applicant was complying with the notice is available in the comments of the Inspector who visited in June 2011. In the light of its own contemporaneous conclusions it seems to me that it was incumbent on the Council, in refusing the LDC application, to set out why it had changed its mind.

25. However, it provided no new information to support its stance. It didn't put forward any evidence from officers who visited the premises over the relevant period, even though it appears that some of those who had visited the premises are still employed at the Council and may have been able to shed some light on the situation as it stood at the relevant time. It is not unusual for consultants to act for local authorities but Mr Thompson was not provided with any direct contemporaneous evidence and had no personal knowledge of events over that period.

26. In fairness to him, he could only write his evidence on the information provided. However, it does beg the question as to why the Council did not pass on the relevant committee report. Whether it had been lost, deleted, or misplaced is unclear. Until the report was produced by the applicant the Council was seemingly unaware – at least on the evidence presented in this case – that its officers had previously concluded that the applicant had complied with the notice. Given the importance of that previous conclusion, the failure of the Council to keep an accurate record of compliance with the notice was not only unreasonable from a procedural point of view but also in substantive terms due to the impact on the outcome of the LDC.

27. The Council's case leading up to the Inquiry also contained numerous errors. In addition to reliance upon the second enforcement notice, as discussed above, there was a clear misinterpretation of the Inspector's report in relation to the 2011 appeal[2]. It is clear that the beds referred to in paragraph 11 of the decision letter were within the main dwelling at 2 Keepers Cottage and not the outbuilding, as suggested at paragraph 6.5 of the Council's statement of case. That error clearly had a bearing on the Council's view that the notice had not been complied with.

28. In light of the evidence presented, including the previous conclusions of its own officers that the notice had been complied with, the Council could have reviewed its position as the appeal progressed. Instead, the Council introduced new arguments at the event. One to the effect that the applicant hadn't fully complied with the notice, even if he had ceased the use and undertaken the required works, on the basis that he always intended to continue the

[2] APP/H2265/A/11/2152477

unauthorised use. In other words, that he hadn't genuinely complied but had stopped only temporarily. The other that the building was still occupied as a dwellinghouse, even if the applicant had removed the kitchen and beds/ furniture designed for sleeping.

29. Those arguments were not present in any of the Council's written submissions. The introduction of new points at such a late stage in proceedings is unreasonable of itself, given the requirement to stick to appeal deadlines for the submission of information as set out in the PPG[3]. I disagreed with the Council's arguments for the reasons set out in my associated decision and it wasn't a matter that created significant wasted expense. However, the introduction of the late arguments it did create the impression that the Council was seeking to add to its case, perhaps because the balance of the evidence presented, and the accepted errors in its own case, were pointing the dial towards the appeal being allowed.

30. I appreciate that the burden of proof falls on the applicant to make his case. Photographs or contemporaneous documents were lacking from either party. However, evidence of the interview under caution close to the time and the applicant's evidence under oath at the event were consistent. And fundamentally, the Council had accepted compliance with the notice in its committee report. The attempt to review that conclusion some 12 years on, based on assumed motives, without any new evidence dating from the crucial period was unconvincing.

31. As can often occur in long running planning sagas it has the hallmarks of lines being drawn in the sand and a reluctance to concede or accept any ground. The fact that the applicant had subsequently been prosecuted for non-compliance had no bearing on the lawfulness of the development in question. Nor can the Council reasonably fall back on the Inspector's decision letter from the 2017 appeals[4]. That Inspector witnessed a kitchen on the ground floor and beds on the upper floor and she took that as an indication that the first enforcement notice had not been complied with.

32. However, it is not clear whether any evidence was presented to her in terms of the timeline of events or the possibility that the notice had previously been complied with only for a further breach to occur. Those appeals were made against the service of EN2 and were conducted by the written procedure, without the ability to interrogate any evidence under oath as in the present case. The evidence now available, including the conclusions of Council officers who visited at the time, strongly indicates that the first notice had been complied with and that the 2017 Inspector was observing a subsequent breach. In my view, it was unreasonable of the Council to stick to its previous position in the light of the evidence presented to the Inquiry.

33. On the basis of that evidence it was clearly a case where an LDC should have been granted and the way the Council defended the case was unreasonable on both procedural and substantive grounds. I consider that a full award of costs is justified. The April 2011 committee report, which proved to be a crucial piece of evidence, was only produced as an appendix to the proof of the applicant. Thus, the Council did not consider it at the application stage. At the time of

[3] Paragraph: 047 Reference ID: 16-047-20140306
[4] APP/H2265/C/16/ 3154625 (Appeal A) &APP/H2265/C/16/3154626 (Appeal B)

dealing with the application, the Council focussed primarily on the conclusions of the 2017 Inspector.

34. In circumstances where a party unreasonably fails to adjust its position in light of convincing new evidence it will often be the case that a partial award of costs is justified on account of the fact that a party could not reasonably have been expected to take account of it earlier in the process. However, in this case, I find that the Council should have kept records of its previous conclusions regarding compliance with the first enforcement notice. It was unreasonable not to do so and no satisfactory reason why the Council failed to refer to the April 2011 committee report has been provided. Similarly, no witnesses with any contemporaneous knowledge of the site were put forward. As such, no clear reason has been offered as to why officers who didn't visit the site during the relevant period now have a different view to those who did.

35. When that is added to the clear lack of cooperation with the applicant in terms of requests for documentation and the other errors in the Council's case, as described above, a full award of costs is justified.

Costs Order

36. 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 Tonbridge & Malling Borough Council shall pay to Mr Ian Williams, 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.

37. Mr Ian Williams is now invited to submit to Tonbridge & Malling Borough Council details of those costs with a view to reaching agreement as to the amount.

Chris Preston

INSPECTOR