Costs Decisions

Inquiry held on 24 February 2010
Site visit made on 23 February 2010

by Gloria McFarlane LLB(Hons) BA(Hons) Solicitor (Non-practising)

an Inspector appointed by the Secretary of State for Communities and Local Government

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Decision date:
9 March 2010

Application A: The Council's Application
Costs application in relation to Appeal Ref: APP/X5210/X/09/2106980
85a Fitzjohn's Avenue, Lower Ground Floor Flat, London, NW3 6NY

- 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 the Council of the London Borough of Camden for a full award of costs against Bankway Properties Limited.
- The inquiry was in connection with an appeal against the refusal of the Council to issue a certificate of lawful use or development for the use of the lower ground floor as a self-contained residential flat (Class C3).

Summary of Decision: The application is allowed in the terms set out below in the Formal Decision and Costs Order.

Application B: The Appellant's Application
Costs application in relation to Appeal Ref: APP/X5210/X/09/2106980
85a Fitzjohn's Avenue, Lower Ground Floor Flat, London, NW3 6NY

- 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 Bankway Properties Limited for a full award of costs against the Council of the London Borough of Camden.
- The inquiry was in connection with an appeal against the refusal of the Council to issue a certificate of lawful use or development for the use of the lower ground floor as a self-contained residential flat (Class C3).

Summary of Decision: The application is refused.

The Submissions for the Council

1. The Council's application is for a full award of costs against the Appellant on the basis that the Appellant acted unreasonably and that that unreasonable behaviour caused the Council to incur unnecessary or wasted expense in the shape of having to defend the appeal.

2. The central issue in this case is whether the appeal premises are self-contained. The Appellant's own agents, in letters to the Council in November and December 2006 stated that the appeal premises were non self-contained. This was confirmed at the site visit on 23 January 2007 by Ms Arbery and Mr Durrant and at the site visit of the Rent Assessment Panel held on 1 March 2007. Further support for the appeal premises being non self-contained is included in the remarks of Mr Gunby in his application for a HMO licence of 8 May 2006 and in his email of 28 April 2006 quoted in the Rent Assessment Panel Report.

3. The contents of the letters from the Appellant's agents dated November and December are agreed in the Statement of Common Ground (SOGC) as are the findings of the site visits on 23 January 2007 and 1 March 2007.

4. In light of this overwhelming evidence that the appeal premises is not self-contained, all of which was available before the appeal was made, it is unreasonable for the Appellant now to argue that the appeal premises is self-contained. To do so offends against the first bullet point of paragraph B13 of the Costs Circular[1], in that it flies in the face of national planning guidance in the shape of Circular 03/05, which the SOGC confirms is relevant and agreed.

5. There were also procedural failings in that the Appellant did not provide any Rule 6[2] statement or proofs of evidence; the SOCG was initiated by the Council contrary to the sixth bullet point of paragraph B4. Despite a letter from the Inspectorate the Appellant gave no indication of which witnesses would attend at the Inquiry pursuant to Rule 12[3]. The Council was in the dark as to what case it had to deal with.

6. The consequences of the Appellant's unreasonable behaviour in appealing are that the Council has had to incur the unnecessary and wasted expense of defending its decision to the Inquiry. Adopting the terminology of paragraph A12, it should not have been necessary for the matter of whether the lower ground floor of 85 Fitzjohn's Avenue is self-contained or not to have been determined by the Secretary of State; it plainly is not self-contained and has not been since at least May 2006 when Mr Gunby MRICS stated as much in his HMO[4] licence application form.

The Response by the Appellant

7. The Council is totally incorrect with regard to the SOCG. It was agreed between Mr Kent and Ms Arbery that she would prepare the first draft. It was also quite clear from the correspondence that proofs of evidence were only required if the witness was to read a proof. As this was a LDC appeal all the papers were before the Inspector, these covered the central issue and formed the basis of the evidence. There is no requirement in the Rules that proofs of evidence have to be provided and any attempt to imply there is such a rule is wrong.

8. With regard to substance, the Appellant says the case was well founded. The costs application stands or falls with the decision. It is for the Secretary of State to determine whether the Appellant's case was sufficient.

The Submissions for the Appellant

9. The Appellant makes an application for full costs against the Council. The Appellant refers to Counsel's opinion submitted with the appeal. The emails between Council officers were not challenged and in a report the Council says that the existing lower ground floor was a HMO in Planning legislation. At the heart of this case the Council was wrong, it never sought to go back to take the

[1] Circular 03/2009 - Costs Awards in Appeals and Other Planning Proceedings
[2] SI 2002 No.2685 - The Town and Country Planning (Enforcement)(Determination by Inspectors)(Inquiries Procedure)(England) Rules 2002
[3] SI 2002 No.2685
[4] House in Multiple Occupation

view that there is no legal definition of a HMO in planning terms. The Council took the view that the premises were a HMO and it looked at the case from a blinkered position and confused the Housing and Planning legislation. The Council did not look at all the evidence in the round and take a balanced view.

The Response by the Council

10. What the Appellant is complaining about is how the Council has mishandled a different application which is not the one in front of the Inspector at this appeal. The costs application is based on Mr Edwards' opinion which is a critique of the Council's refusal of a s.192 application in February 2007. That is not before this Inquiry. The Appellant has not asserted that the Council has acted unreasonably in this appeal, it is wholly wrong to allege it was unreasonable in respect of application that was not appealed and therefore never before the Inspector. The application for costs is fatally flawed.

11. In paragraph 2 of his opinion Mr Edwards says the s.192 refusal is not relevant with regard to the existing use of the flat and therefore it is irrelevant to the question of costs. Mr Edwards wants to criticise the Council for mishandling the s.192 application and that founds his application for costs. The Appellant has sought to undermine its own application. The Appellant's costs application must fail.

Appraisal

12. Circular 03/2009 advises that, irrespective of the outcome of the appeal, costs may only 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.

13. In submitting the application for the s.191 LDC the Appellant provided Mr Edwards' opinion dated 23 October 2008 and various attachments in support of its case. In paragraph 1 of the opinion Mr Edwards writes that he is asked to provide an opinion regarding the planning status of the lower ground floor flat at 85 Fitzjohn's Avenue for the purposes of a potential application for a LDC pursuant to s.191. The opinion then considers at some length the Council's decision to refuse a s.192 application for the 'conversion of a house in multiple occupation (Sui Generis) at basement and ground floor level to two self-contained residential units (Class C3)'. With respect to Mr Edwards and his instructing solicitors, in my view, this is irrelevant to the application for the s.191 application and the subsequent appeal with which I am concerned. I noted in my appeal decision that the Council appeared to have approached the case with some overlapping between Housing and Planning legislation which at times was confused and confusing. But I had to determine the appeal before me on the basis of the evidence presented to the Inquiry, taking into account Planning legislation and guidance.

14. Some evidence was provided by the Appellant and some by the Council. The latter included letters from, and applications made, by the Appellant's agents. I found on the basis of that evidence that the Council's refusal to grant a certificate of lawful use or development in respect of the use of the lower ground floor as a self-contained residential flat (Class C3) was well-founded. As the evidence was, in the main, the Appellant's it seems to me that the appeal had no reasonable prospect of succeeding and that the Appellant acted

unreasonably in pursuing the appeal within the terms of paragraph B13 of the Circular.

15. The Appellant did not provide a Rule 6 statement. Rule 16[5] provides that the Council and the Appellant shall together prepare an agreed SOCG. The email correspondence I have, and I appreciate it may not be comprehensive, indicates that Ms Arbery volunteered to draft the first version of the SOCG; I did not see anything other than the completed document and I cannot speculate how much was done by either party in respect of it.

16. The Appellant took the view that it was not necessary to provide a proof of evidence. It is for a party to proceedings to decide how to present its case and Rule 15 refers to a person giving evidence by reading a proof and so, if this was not the intention of the Appellant then no proof needed to be lodged. But Rule 12 requires that the Secretary of State is informed in writing no later than four weeks before the Inquiry of the number of witnesses that a party intends to call to give evidence. No such information was provided to the Secretary of State by the Appellant and I exercised my powers pursuant to Rule 17 in allowing Mr Kent to give oral evidence.

17. The Appellant makes no submission that the Council acted unreasonably with regard to this appeal but that it misdirected itself in respect of a previous application and in the background to this appeal. I do not have to consider the reasons for the Council's decision but the decision itself. The Appellant quite clearly takes the view that the costs application stands or falls with the decision and the appeal was dismissed.

18. Taken as a whole, and bearing in mind that the Appellant was professionally represented throughout, I consider that with regard to procedural requirements the Appellant acted unreasonably within the terms of paragraph B4.

Appeal A : Conclusions – the Council's application

19. I therefore find that unreasonable behaviour resulting in unnecessary expense, as described in Circular 03/2009, has been demonstrated and that a full award of costs is justified.

Appeal A : Formal Decision and Costs Order – the Council's application

20. In exercise of my 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 powers enabling me in that behalf, I HEREBY ORDER that Bankway Properties Limited shall pay to the Council of the London Borough of Camden the costs of the appeal proceedings, such costs to be assessed in the Senior Courts Costs Office if not agreed. The proceedings concerned an appeal more particularly described in the heading of this decision.

21. The Council is now invited to submit to Bankway Properties Limited to whose agents a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount. In the event that the parties cannot agree on the amount, a copy of the guidance note on how to apply for a detailed assessment by the Senior Courts Costs Office is enclosed.

[5] SI 2002 No.2685

Appeal B : Conclusions – the Appellant's application

22. I consider that unreasonable behaviour resulting in unnecessary expense, as described in Circular 03/2009, has not been demonstrated and I therefore conclude that an award of costs is not justified.

Appeal B : Formal Decision – the Appellant's application

23. I refuse the application for an award of costs.

Gloria McFarlane

Inspector