The Planning Inspectorate

Costs Decisions

Inquiry Held on 2 - 5 April 2019 and 20 – 22 August 2019
Site visit made on 2 April 2019

by J A Murray LLB (Hons),Dip.Plan Env, DMS, Solicitor

an Inspector appointed by the Secretary of State

Decision date: 13 September 2019

Costs applications in relation to Appeal Ref: APP/X5210/C/18/3193167
Land at South Fairground Site, Vale of Health, London, NW3 1AU

- The applications are 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 applications are made by (1) the Council of the London Borough of Camden, (2) The City of London Corporation and (3) The Heath and Hampstead Society and The Vale of Health Society for full awards of costs against Miss Jita Lukka.
- The inquiry was in connection with an appeal against an enforcement notice alleging, without planning permission, the construction of a one-storey dwelling.

Decision

1. The applications for awards of costs are allowed in part in the terms set out below.

Procedural matters

2. The inquiry closed on 22 August 2019 but, before closing, I agreed that costs applications could be submitted in writing in accordance with a fixed timetable. Advance notice of the applications had been given, but there was insufficient time to hear them during the inquiry. The applications, response and final comments were duly submitted on time.

3. A joint application was submitted by the Council of the London Borough of Camden (the Council) and one of the Rule 6 parties, The City of London Corporation (the CoL). A separate application was made by the other Rule 6 Party, The Heath and Hampstead and Vale of Health Societies (the Societies).

4. I have had regard to the full content of the written submissions, including Mr Longden's schedule/annotated time sheet, but the submissions are summarised below.

The submissions for the Council and the CoL

5. The respondent behaved unreasonably because:

    - The appeal had no reasonable prospect of success.
    - The respondent's evidence fell far below the standard required to discharge the burden of proof and her case was neither precise nor unambiguous, as required by the Planning Practice Guidance, nor trustworthy.

- None of the respondent's evidence demonstrated substantial completion by 20 December 2013 or pinpointed the state of the site at that date.
- The respondent was unable or unwilling to provide relevant evidence to prove that she had not created a new dwelling. Furthermore, she could not remember important details of her actions, chose not to call individuals involved in the construction project in 2017 and produced no contemporaneous documentary evidence, despite the scale of the project.
- The respondent had failed to comply with Mr Sheehy's statutory notice seeking admission to view the works. As a result, his evidence was prolonged, as he had to spend time explaining photographs taken from outside the site in July 2017.
- The respondent appears to have obfuscated and concealed evidence and it is unreasonable to put forward a case which is not worthy of belief.
- The respondent failed to ensure that she had a clear case before making the appeal, contrary to the Planning Inspectorate's Enforcement Appeals Procedural Guidance (March 2016). This is exemplified by the fact that she brought, could not justify and then, at a late stage, withdrew 2 of her 3 original grounds of appeal.

6. If the above matters are not considered to justify a full award, a partial award is sought on the basis that:

- Grounds (b) and (c) were put before the inquiry by the respondent but had no reasonable prospect of success.
- In relation to ground (b), the respondent has never disputed that a one-storey dwellinghouse has been constructed. She could never have established that the alleged matters had not occurred, but the applicants incurred costs preparing on the basis that ground (b) was being pursued.
- In relation to ground (c), it was unreasonable of the respondent to contend that her works were undertaken for the "maintenance, improvement or other alteration" of a building and did not "materially affect" its exterior, such that they would not be development by virtue of s55(2) of the 1990 Act.
- As recognised by the respondent's witnesses (Howard, Pratchett and Taylor), the works clearly materially affected the external appearance of any building in existence in February 2017 and the difficulties with this ground were pointed out by the Inspector during the inquiry.
- The applicants incurred costs in being required to prepare on the basis that the appeal would proceed on ground (c).
- Though the hopelessness of grounds (c) and (b) was explained at an early stage, the respondent failed to withdraw them until day 4 of the inquiry and 26 April 2019 respectively. A material part of the first 4 inquiry days was devoted to the respondent's evidence for ground (c) and whether she wished to withdraw grounds (b) and (c). The failure to withdraw these for some considerable time was unreasonable procedural behaviour which resulted in unnecessary expense.

The submissions for the Societies

7. In relation to grounds (b), (c) and (d), the arguments of the Council and the CoL are adopted. In addition, the respondent and her adviser (Mr Watts) behaved unreasonably before and during the inquiry, failing to present full, detailed and relevant evidence in a timely fashion, such that unnecessary and wasted expense has been incurred and a full award is sought.

8. If the respondent had behaved and cooperated reasonably:

    - The inquiry would have concerned ground (d) only.
    - Mr Longden would have been allowed a joint site inspection with Mr Covey, (even though the respondent was not legally obliged to allow this) so that a list of agreed and disputed matters of fact and opinion could have been produced. On 19 February 2019, Mr Watts refused a written request for Mr Longden to inspect the site, but the respondent then agreed to an inspection on the first day of the inquiry. Mr Longden worked on his notes late into that night, attended to give evidence on Day 2, but was not reached until Day 3.
    - Mr Longden should have been allowed to further inspect the site during the long adjournment, so he could provide further observations to the Societies before cross examination of the respondent.
    - The time spent by Mr Longden would have been considerably reduced because, in the absence of a pre-inquiry inspection, he had to speculate and reserve his position, extending the time he had to spend. In all, he spent 36 abortive hours on the case.
    - The respondent should have focussed on the need for sufficient and precise evidence to establish when substantial completion occurred.
    - The respondent and/or her builder should have submitted proofs and documentary evidence to specify the works undertaken and cross examination could have been limited to known issues.
    - There is a good chance that evidence could have been completed in 3.5 days, with closing submissions on the afternoon of the fourth.

9. Three extra days of inquiry time have been caused by the respondent:

    - Pursuing unarguable grounds (b) and (c).
    - Failing to focus on issues and evidence necessary for ground (d).
    - Refusing a site inspection by Mr Longden before the inquiry and during the long adjournment.
    - Failing to reduce the relevant part of her case to writing but presenting a plethora of often irrelevant written material. Given the respondent's oral evidence, further costs were incurred consulting Mr Longden during the long adjournment.
    - As a result of Mr Watts making lengthy, irrelevant and unreasonable submissions, arguing with the Inspector and putting inappropriate questions to witnesses.

The response by Jita Lukka

10. Whether the works carried out in 2017 needed planning permission was not a question before the inquiry; this "canard" was first set off by the Societies. The issues were only correctly identified in Mr Harwood QC's legal note of May 2019, so even reasonably relevant evidence had been "slightly off beam." Objecting parties raised many irrelevant matters, such that a lot of time was wasted by them.

11. In relation to ground (d):

- It was at least reasonable to contend the respondent should succeed.
- Aerial photographs and written and oral evidence were capable of being relevant in showing the existence of a building and substantial completion of a dwellinghouse in the position of the respondent's dwelling in 2013. Evidence indicates Mr Litvoi was living in the building.
- The respondent gave honest evidence of how she ran the project and that the walls, roof and base of the building remained with external surfaces added and internal changes, such that it could be considered the same building.
- Precise and unambiguous evidence is to be welcomed but, in law, something need only be more than 50% likely to be right. This recognises that evidence will often be less precise, full or robust.

12. In relation to grounds (b) and (c):

- These were never really in issue and could be answered simply by saying there was a dwellinghouse on the site and, whenever it was erected, it did not have planning permission.
- Without representation, the respondent cited these grounds when, on the common facts, they could not succeed. It should have cost nothing to deal with these grounds. Evidence of whether the 2017 works needed permission, was only relevant to ground (d) and points raised by the objecting parties were never relevant. A costs decision should be based on whether costs were genuinely wasted on the grounds, rather than material which was and should not have been raised.
- In relation to the Societies' procedural partial claims, the Societies say the inquiry would have lasted 4 days, not 7, but for the respondent's unreasonable behaviour. They also say Mr Longden's work would have been about halved, had he been allowed on the site earlier.

  However:

- Even as a Rule 6 party, the Societies were not even entitled to attend the Inspector's accompanied site visit. There is no legal and policy context to the request for Mr Longden to go onto the site.
- The request for Mr Longden to go on site and "poke around" in the respondent's house came late in the appeal process and at short notice. It might have been reasonable to allow it, but it was not unreasonable to refuse.

- Mr Longden's report remained largely relevant after his visit; its principal problem was that it was directed to the wrong issues.
- On any view, Mr Longden was going to be needed from day 1 until the conclusion of his evidence. His and Mr Covey's evidence took almost 2 full siting days.
- The late delivery of the Statement of Common Ground and its limited content, including as to matters not agreed, shows the inability of the parties to resolve issues and does not suggest the inquiry could have been dramatically reduced in length through agreements between Messrs Longden and Covey.
- Presentation of the objecting parties' cases, including cross examination of the appellant's witnesses took over 19 hours, or 3.5 normal sitting days. It is unrealistic to think the inquiry could have been 3 days, or materially shorter.
- The Societies' complaints about Mr Watts amount to a collection of small disputes, but not unreasonable conduct which caused wasted costs.

Reasons

13. The Appeals section of the Planning Practice Guidance 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.

14. For the respondent, I considered the aerial photographs and associated expert's report; the report and oral evidence of Mr Covey (a member of the Chartered Association of Building Engineers); the written and oral testimony of several local people, including an adjoining neighbour; and other sworn and unsworn written evidence, including the contentious and problematic statements of a previous occupier. I dismissed the appeal on ground (d) because, in the context of the tested, sworn, contrary evidence of someone with direct experience of the appeal site, I was not persuaded on the balance of probability that there was a dwellinghouse, which was substantially complete on site by 20 December 2013.

15. The respondent was faced with the difficulty of having no direct personal knowledge of the site at the relevant time, but there was some evidence in her favour, which was worthy of testing. Ultimately, that evidence did not withstand the test, but this was not a case where there was no reasonable prospect of proving on the balance of probability, that a dwelling was substantially completed by the relevant date.

16. Given my conclusion on the question of substantial completion, I did not go on to consider the second part of the ground (d) issue, namely whether, if a dwelling was substantially complete by the relevant date, works undertaken by the respondent amounted to the construction of a new dwelling. In these circumstances, concluding on whether that part of the respondent's case had any reasonable prospect of success presents some difficulty. There were aspects of her case which were unusual and surprising, not least her complete inability to say how much she spent on the works or produce any documentary evidence relating to them and her decision not to provide any evidence from her builder. Furthermore, the respondent did not give a satisfactory

explanation for substantially delaying an inspection of the site and the works by the Council.

17. Nevertheless, to indicate what was on the appeal site when the respondent purchased it, the most important evidence was the photographic and video evidence from the end of 2016; a Cadmap survey; the report and evidence of Mr Covey; and the testimony of the respondent herself. As to the works subsequently undertaken, I had the evidence of Mr Covey and the respondent, albeit that she chose not to provide obvious means of corroboration. I also saw the existing building myself and I benefitted from Mr Longden's observations and analysis.

18. The parties have differing views about the probable extent and detail of the works undertaken by the respondent. However, concluding on that second part of the main ground (d) issue would have involved a fact and degree judgement. I do not need to reach a firm conclusion in those terms in this costs decision, but Mr Harwood QC made cogent submissions on the point in closing. I do not say that the respondent's evidence was sufficiently precise and unambiguous for her to succeed on that second part of ground (d). However, she did produce some evidence worthy of serious consideration and I am not persuaded she had no reasonable prospect of success on this aspect.

19. In all the circumstances, the respondent did not behave unreasonably in pursuing ground (d) and a full award of costs is not justified in favour of any of the applicants.

20. Ground (b) had no prospect of success, but it was not withdrawn until 26 April 2019. Each of the applicants dealt with this ground briefly in opening and some limited expense will have been incurred in addressing it. It was unreasonable to advance this ground and to maintain it until the long adjournment, and that unreasonable behaviour did result in some limited wasted expense, justifying a partial award.

21. In relation to ground (c), the respondent contends that the applicants' appeal submissions and evidence concerned whether the 2017 works in themselves needed permission and this matter did not arise on ground (c), because the whole building needed planning permission. Whilst that is true, it was not the applicants for these awards who first set off this "canard."

22. The respondent's email to the Council of 14 August 2017, submitted as part of her initial appeal documents, said *"building works in the form of restoration to a permanent building that has been on site since 2007…is not development within Section 55 TCPA 1990 as amended and does not require planning consent."* The appeal form indicated that ground (c) was included and the respondent's statutory declaration of 14 September 2018, submitted with her Statement of Case, said her works were merely *"refurbishment works"* (para SD19). A report and statutory declaration from Mr Covey submitted with the Statement of Case suggested that the repair and refurbishment work carried out by the respondent did not amount to development and he elaborated on this argument in his proof, in which he specifically referred to s55(2)(a).

23. The substance of the respondent's ground (c) appeal was misconceived, because, leaving aside the question of whether any existing building was lawful in any event, there was no realistic basis for contending that her works had not materially affected its external appearance. However, in the course of the

inquiry, consideration might have been given to amending the allegation to refer to alterations to a building, subject to there being no resulting injustice. It was therefore reasonable for the applicants to address the s55(2)(a) arguments. Ground (c) was not withdrawn until the start of the fourth day of the inquiry. Pursuing ground (c) and failing to withdraw it until day 4 was unreasonable and costs were unnecessarily incurred in responding to it. Again, this justifies a partial award.

24. I turn now to the suggestions of general procedural unreasonableness. I accept that, had the respondent allowed Mr Longden an opportunity to inspect the site in advance of the inquiry, that would have reduced the time he spent in preparing his evidence and this might also have saved inquiry time by enabling the production of a list of agreed and disputed matters of fact. However, there was no obligation on the respondent to accede to that request and her refusal falls short of being unreasonable. Accordingly, not all the necessary criteria for an award of costs are fulfilled.

25. Similarly, I do not characterise the respondent's refusal of another site inspection by Mr Longden during the long adjournment as unreasonable. In any event, whilst this would probably have assisted the Societies' cross examination of the respondent, I have no reason to believe it would have saved inquiry time or otherwise reduced costs. Indeed, that second site inspection would itself have involved additional costs.

26. Given, the Council's rights of entry under the 1990 Act, it was unreasonable of the respondent to refuse Mr Sheehy's formal request to enter the site in July 2017, however, I am not persuaded that this led to wasted expense. Whilst Mr Sheehy had to spend time during examination in chief explaining photographs taken from outside the site, I have no reason to conclude that his evidence would have been shorter had he been dealing with photographs and observations taken and made within the site.

27. When giving oral evidence, the respondent did add a considerable amount of detail that was not in her written evidence. This is reflected in the fact that her examination in chief lasted for some 4.5 hrs, which was much longer than any other witness. This also inevitably resulted in lengthier cross examinations, lasting more than 6 hours in all, as the applicants had to address this additional evidence. This totals something approaching 2 normal sitting days. It is likely that if this extra detail had been properly covered in written evidence, about 4 hours of an inquiry day could have been saved on the respondent's evidence. The failure to cover the evidence adequately in writing was unreasonable behaviour and it led to unnecessary expense through extending inquiry time.

28. I acknowledge that the respondent's first advocate was a layman, unused to the formality of inquiry proceedings. Whilst the applicants objected to many of the questions he put to witnesses, I do not characterise his behaviour as unreasonable in that regard. However, despite warnings, that first advocate made several serious allegations about other participants in the appeal process to which, understandably, they felt bound to respond. He also persisted with representations about how I should treat the evidence of an absent witness, even though I had made my approach clear at an early stage, and indeed he contended that the inquiry was untenable in the absence of that witness. Arguing with an Inspector is not necessarily unreasonable, but the persistent

attempts to revive dead points was unreasonable behaviour on behalf of the respondent and probably wasted a further 2 hours of inquiry time.

29. In all then, the unreasonable failure to cover the respondent's evidence properly in writing and the unreasonable pursuit of certain points at the inquiry (leaving aside the separate points concerning grounds (b) and (c) covered above), probably resulted in 1 day of inquiry time being wasted. This further justifies a partial award.

30. The Societies also asked Mr Longden to identify additional chargeable hours incurred by him in addressing queries about new evidence revealed by the respondent during evidence in chief. His schedule identifies 2.5 hours of "abortive" work. That represents additional costs incurred as a result of the respondent's unreasonable behaviour already identified and should also be covered by a partial award.

Conclusions

31. It was not unreasonable of the respondent to appeal on ground (d). It was unreasonable to pursue grounds (b) and (c) and this resulted in unnecessary expense being incurred by all the applicants in addressing that ground, such that a partial award is justified.

32. It was not unreasonable to refuse inspections by Mr Longden. It was unreasonable to refuse an inspection by the Council in July 2017, but I am not satisfied, on the balance of probability, that this resulted in unnecessary expense.

33. The respondent did behave unreasonably in providing a substantial amount of new detail in her oral evidence which was not covered in her written evidence. This, together with her first advocate's repetition of unmeritorious points probably lengthened the inquiry by 1 day, thereby resulting in unnecessary expense for all the applicants. The Societies incurred the additional unnecessary expense of 2.5 hours of Mr Longden's time considering the respondent's new evidence. These factors will also be covered by a partial award.

Costs Order

34. 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 Miss Jita Lukka shall pay:

    (a) to each of the Council of the London Borough of Camden and The City of London Corporation the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred by them:

        i. in responding to grounds (b) and (c) of the appeal; and

        ii. in relation to 1 inquiry day; and

    (b) to The Heath and Hampstead Society and The Vale of Health Society the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred by them:

        i. in responding to grounds (b) and (c) of the appeal;

ii. in relation to 1 inquiry day; and

iii. in relation to 2.5 hours of Mr Jonathan Longden's chargeable time,

such costs to be assessed in the Senior Courts Costs Office if not agreed.

35. The applicants are now invited to submit to Miss Jita Lukka, 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.

J A Murray

INSPECTOR