
Costs Decisions

Inquiry held on 31 January 2017

Site visit made on 6 December 2016

by Sukie Tamplin DipTP Pg Dip Arch Cons IHBC MRTPI

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

Decision date: 7 February 2017

Costs application A: In relation to Appeal Ref: APP/T5150/C/15/3138227 33 Humber Road, London NW2 6EN

- The application is 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 application is made by Nathan Kuflik for a full award of costs against the Council of the London Borough of Brent.
 - The Inquiry was in connection with an appeal against an enforcement notice alleging the erection of a single storey rear extension and the material change of use of the premises to five flats.
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Costs application B: In relation to Appeal Ref: APP/T5150/C/15/3138227 33 Humber Road, London NW2 6EN

- The application is 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 application is made by the Council of the London Borough of Brent for a full award of costs against Nathan Kuflik.
 - The Inquiry was in connection with an appeal against an enforcement notice alleging the erection of a single storey rear extension and the material change of use of the premises to five flats.
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Procedural matters

1. The National Planning Practice Guidance (NPPG) 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. The NPPG also says that in enforcement appeals the onus of proof on matters of fact is on the appellant.
2. Neither party provided a skeleton of their respective applications in advance of the Inquiry and thus these are summarised below.

Application A: The application by the appellant.

Decision

3. The application by Nathan Kuflik for a full award of costs is refused.

Summary of submissions for Nathan Kuflik:

4. The Council failed to carry out adequate prior investigation and more diligent investigation would have avoided the need for enforcement action¹

¹ Paragraph 048 of the National Planning Policy Guidance

5. The Council failed to make proper efforts to inspect the property and has admitted that it did not use its statutory powers to investigate. This it should have done before alleging breaches of planning control for which it had no evidence whatsoever. The evidence submitted amounted merely to unsupported supposition.
6. This was contrary to good practice as evidenced by the appeal decisions relied upon by the appellant and it was unreasonable to issue a Notice in the absence of diligent investigation. In any event the applicant was in the best position to know whether or not cooking took place within the units.

Summary of response by the London Borough of Brent:

7. The Council made numerous attempts to visit the premises prior to taking enforcement action; this included serving a 'Notice of Entry' in advance. However access was not granted on any occasion.
8. The documentary evidence, namely the housing benefit applications and Valuation Office records, provided sufficient reason to initiate enforcement action.
9. Once a Notice is issued, the onus of proof in an enforcement appeal falls on the appellant. The relevant test is the balance of probabilities, but no cogent evidence has been submitted and thus could not be tested and hence the onus has not been discharged.
10. Consequently there is no evidence of unreasonable behaviour.

Reasons

11. The essence of the application is that the Council relied too much on 'supposition' because it did not inspect the interior of the property before instigating enforcement action. I agree that the Council's evidence was indeed sparse and its case was not supported by any first hand evidence about the use of cooking facilities within the 5 individual units in No.33.
12. However, it is apparent that the applicant's agents prevented all attempts by the Council to visit the property and thus severely hampered its ability to diligently investigate. The Council reported that the builder was obstructive, the tenants were told that they should not allow entry and the Management Company did not respond to any requests for access. None of these parties gave evidence at the Inquiry and thus the appellant did not provide any evidence to undermine these reports. In these circumstances, it is apparent that the suggested shortcomings of the Council's case were not due to any lack of will or application.
13. Notwithstanding this the Council was able to provide sufficient evidence to justify taking enforcement action as my appeal decision demonstrates. In these circumstances there is no evidence of unreasonable behaviour which has led to unnecessary expense in the appeal process.

Application B: The application by the Council.

Decision

14. The application by the Council of the London Borough of Brent for a full award of costs is allowed in the terms set out below.

Summary of submissions by the London Borough of Brent:

15. The appellant has failed to provide full and detailed evidence to support their case and this unreasonable behaviour has incurred unnecessary expense. Moreover the appellant has not discharged the onus of proof as is necessary in enforcement appeals².
16. The failure to provide evidence to support the appeal is demonstrated amongst other matters, by the poor quality of affidavits, no evidence about the use of communal cooking facilities, and the failure to call any witnesses who could provide first hand evidence.
17. Grounds (b) and (c) had no chance of success because there was no evidence to counter the documentary evidence provided by the Council. Similarly Ground (f) had no chance of success as the erection of the extension was integral to the change to use of the property. No evidence was provided to support Ground (g).

Summary of response by Nathan Kuflik:

18. The application fails to follow the guidelines and was not supported by a skeleton application. In any event the Council's application is simply re-running the evidence in the enforcement appeal which is a waste of Inquiry time.
19. The purpose of an Inquiry is to test evidence and the weight to be attributed is a matter for the decision maker. Affidavits tend to be prepared by oath commissioners and what is important is the declaration by the tenants not the wording. There is no requirement on the appellant to field particular witnesses.
20. It is not agreed that Grounds (b) and (c) had no chance of success, as is shown by other appeal decisions submitted in support of the appellant's case. The test of the evidence is the balance of probabilities and in the light of *Gabbitas*³ the evidence given by the appellant does not need to be corroborated.
21. The use by the Council of Housing Benefit forms as evidence in a planning appeal is unlawful and in any event what they show is inconsistent.

Reasons

22. The respondent has a right of appeal but this right needs to be exercised in a reasonable manner, in the light of the material factors that led to the issuing of the Enforcement Notice.
23. There is no requirement for an appellant to field particular witnesses and the failure to do so does not amount in itself to unreasonable behaviour. Similarly I agree that the purpose of an Inquiry is to test evidence and the test is the balance of probabilities.
24. But the NPPG says that in an enforcement appeal the onus of proof lies on the appellant and thus it is incumbent on him to provide adequate evidence in order to discharge that duty. There was clear evidence in advance that the Council was investigating the use of No 33, not least because it sent a Planning Contravention Notice to the appellant about 6 months before issuing the

² Paragraphs 28,30,32,40 and 53 of the National Planning Policy Guidance

³ *Gabbitas v SSE & Newham LBC* [1985] JPL 630

Enforcement Notice. Mr Kuflik confirmed that he received this and completed it himself. Moreover, as I have noted above, the Council has provided evidence of its attempts to investigate the use on several occasions. In these circumstances it is surprising that the appellant did not provide any substantive evidence to demonstrate his assertion that the building was in use as an HMO at that time. Neither did Mr Kuflik submit an application for a lawful development certificate, a course of action which he has used previously as was demonstrated in his evidence.

25. Neither of the respondent's witnesses appears to have visited the premises prior to the issue of the Notice because all day-to-day matters were left with the management agent and thus they were unable to provide any substantive or cogent evidence. For the reasons I have given in the appeal decision I give little weight to the submitted affidavits.
26. Nor do I find the 'Preston' and 'Woolnough' appeal decisions determinative, not least because in those cases first hand evidence was provided by tenants, and there was a lack of independent evidence such as Housing Benefit applications. Thus the circumstances are not comparable.
27. The Courts have held that the appellant's own evidence does not need to be corroborated, particularly if it is unchallenged⁴. However in this appeal that evidence is challenged, and in any event I have found that it is internally contradictory, vague and unspecific. Consequently the onus of proof on matters of fact has not been discharged.
28. For these reasons, the appeal had little or no chance of success because there was inadequate supporting evidence. In these circumstances the submission of the appeal amounted to unreasonable behaviour leading to unnecessary expense. Consequently the application for full costs succeeds.

Costs Order

29. 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 powers in that behalf, IT IS HEREBY ORDERED that Nathan Kuflik shall pay the Council of the London Borough of Brent the full costs of the appeal proceedings described in the heading of this decision.
30. The applicant is now invited to submit to Nathan Kuflik to whom 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.

Sukie Tamplin

INSPECTOR

⁴ *Gabbitas v SSE & Newham LBC* [1985] JPL 630