The Planning Inspectorate

Costs Decisions

Inquiry Held on 30 November to 2 December 2016, and 24 May and 14 June 2017
Site visit made on 30 November 2016

by V F Ammoun BSc DipTP MRTPI FRGS

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

Decision date: 06 December 2017

Costs applications in relation to appeals reference Appeal A - APP/T5150/C/15/3031342 (Flats 1-5, 108 Gresham Road, London NW10 9BY); Appeal B - APP/T5150/C/15/3031361 (Flats 1-6, 34 Oldfield Road, London NW10 9UE); and Appeal C - APP/T5150/C/15/3095752 (Flats 1-6, 55 Gresham Road, London NW10 9DA)

- The applications are made under the Town and Country Planning Act 1990, sections 78, 322 and Schedule 6 and the Local Government Act 1972, section 250(5).
- The applications are made by Quadrex Limited, Pineview Property Limited, and Commercial Acceptances Limited for a full award of costs against the London Borough of Brent Council, and by the said Council for a full award of costs against the aforementioned three appellants.
- The Inquiry was in connection with appeals against three enforcement notices issued by the Council alleging use of the buildings as self contained flats and in the case of the two Gresham Road properties, the construction of extensions.

Summary of decisions

1. The Appellants' costs application fails and the Council's costs application succeeds and a Costs Order is made, as set out in the Formal Decisions.

The Council's costs application

The submissions for the Council

2. The application was for a full award of costs, but failing that for a partial award. The application was made in writing (Document 21), and I do not summarise it.

3. In answer to my questions it was added that the Appellants' introduction of additional late evidence had involved the Council in the costs of Mr Wick's new statement and associated evidence, and had resulted in the Inquiry lasting a further day. I drew attention to the Appellants' email letter (Document 22) to the Inspectorate explaining the reasons for submitting the late evidence and gave notice that I would take it into account in relation to the application for a partial award.

The response for the Appellants

4. The costs application was no more than a rerun of the Council's planning case, claiming that the Appellants had not submitted substantial evidence. There was no particular requirement as to how evidence should be collected, or as to its corroboration. The Appellants had produced evidence from a number of individuals as to the circumstances when the Notices were issued. There was a

difference between preferring one sides evidence to that of another, and the failure to provide evidence that justified making an appeal. There had been ample evidence put forward in support of the appeals.

5. As to the lack of evidence from tenants, the Council had in its characterisation of the tenants shown how inappropriate it would have been to have called upon them for evidence.

6. The application for a partial award of costs was responded to in writing in respect of paragraphs 17 to 21 of the Council Costs application (Documents 23 and 24), and I do not summarise it.

7. In relation to the remainder of the partial award application, attention was drawn to the very serious illness of the Appellants' original agent which had led to the late addition of a ground (b) appeal in respect of the Gresham Road properties, and the October proof having come later than the August 2016 proof provided by the Council. Neither had caused unnecessary expense to the Council, and the Inspectorate had not required a timetabled proof.

8. The introduction of additional evidence prior to the 23 May 2017 sitting of the Inquiry had been justified in the new agent Mr Posen's application to do so, he had concluded from a February 2017 "Mascotts Close" appeal decision (Document 17) that on the precautionary principle a witness should be called who had had direct knowledge of what was happening within appeal premises.

9. In any event the additional evidence had not unnecessarily involved additional Inquiry time, and could have been dealt with as well as closing submissions on 23rd May. There had been time to do this. As for additional expense, all that had been needed from Mr Wicks was a 2-3 page statement rather than the evidence he had provided.

10. Thus there was no basis for the costs application.

The Council's rejoinder

11. The Appellants' justification for submitting additional evidence had been the Mascotts Close decision, but none of the new evidence they had put forward had referred to it. Their new evidence had said nothing that could not have been said at the previous sittings of the Inquiry. Mascott had not justified the late submission of additional evidence in the appeal cases.

12. The Council responded to the written part of the Appellants response to the application in writing, and I do not summarise this.

Reasons – the Council's costs application

13. 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. **The application for a full award of costs** turns on whether the Appellants provided evidence to substantiate their cases. A central part of each case was the appeal on ground (b) that as a matter of fact the units had not been flats, but rather rooms in a Class C4 HMO. In these cases this turned on whether, on the balance of probability, the premises had had facilities for cooking/heating food within each room on the dates in March and May 2015 when the Notices were issued. As neither party had carried out an inspection on the said dates, it

was clear that a decision would have to be taken based on evidence and argument relating to a wider period. The centrality to a decision of the likely presence or absence of in-room cooking facilities was or should have been self evident. In response the Appellants called three[1] witnesses who were involved in the management of the premises. Their evidence included that tenants were told not to cook in their rooms, that regular inspections were made in part to enforce this requirement, that breaches were very rarely found, and that where cooking facilities were found warnings were given and action up to and including ending the tenancy was taken.

15. The four points set out above do not actually preclude the presence of in-room cooking facilities when the Notices were issued in 2015, but had there been no Council evidence of in-room cooking facilities they could have amounted to evidence to substantiate the Appellants' cases. As a matter of fact, however, the Council had found on single site inspections in 2016 two or three in-room cooking facilities at each of the appeal properties, and been told these had been provided at the start of tenancy. Though the Appellants deprecated Mr Wicks's attitude to them and to the cases, there was no evidence that he had mis-reported either what he saw or what he was told. Nor did they suggest both a mechanism and a motivation for tenants in three different properties to have wrongly informed him of the same thing. As a result the inconsistency between the thrust of the Appellants' three witnesses' evidence and the extent of in-room cooking facilities found in 2016 was not effectively addressed.

16. It follows that the Appellants knew or should have known that something more by way of direct evidence would be needed to provide a substantiated case as to the situation in 2015 when the Notices were issued. Their case indeed dealt vigorously with various Council arguments supporting its position, but in the event did not provide such direct evidence. One possible source of such evidence would have been the persons who directly introduced tenants into the properties in late 2014 and early 2015, and who would have been in a position to say what each unit was equipped with when the tenants took over. A second would be the tenants themselves. The Appellants responded that the nature of the tenants as described by Mr Wicks made them unlikely to be helpful to the Inquiry. The weight which might have been given to this point ls, however, greatly reduced by the fact that part way through the Inquiry the Appellants turned to their tenants and provided statutory declarations from two residents. These stated in part that they had been told not to cook in their rooms, and that they had not done so[2]. But neither affidavit addressed whether the tenants had been provided with cooking equipment at the outset of their tenancies as the Council had been told.

17. There is no set formula for what evidence a party should provide, and what is reasonably required will differ with the circumstances of each case. But there remains a requirement to substantiate whatever case is made. I have concluded that there was a failure to provide evidence to substantiate the Appellants' cases on ground (b). This was central to the appeals, as it was essential to success on ground (c) in respect of the extensions, and to the argument that there had been a change of use from C3 to C4 which in turn was crucial to an argument that any change from C4 to flats use would not in these cases have been material. The existence of a lawful C4 use was also central to

[1] A fourth witness gave evidence relating to construction of extensions.
[2] One affidavit was withdrawn because it was found that the tenant had in fact cooked in his room for a period.

part of the appeal on ground (f) as supporting the claim that it was the introduction of cooking facilities to such a lawful use that was the actual breach.

18. I have concluded that the absence of evidence to substantiate the appeal on ground (b) constituted unreasonable behaviour by the Appellants, and that in these cases involved the Council in the unnecessary expense of the whole Inquiry. I shall make a costs order accordingly.

19. My conclusion on the application of a full award of costs has the effect that **the application for a partial award of costs** does not need to be considered further, as whatever were to be my decision on the latter application it could neither add to nor detract from the full award of costs that will be made.

The Appellants' costs application

The submissions for the Appellants

20. The Appellants sought a full award of costs, and failing that a partial award of costs. Councils should have a proper evidential basis for taking enforcement action, that there was a breach of control. This had been wholly absent in all three cases. This was most starkly expressed in respect of No.108 when enforcement action was authorised before the building was even completed. Yet the evidence needed related to the presence and use of small scale electrical devices, microwaves, hobs and the like. Also in the cases of Nos 34 and 65 there had been no proper evidence to justify beginning enforcement action.

21. There had been no evidence as to what the use of the premises was when the Notices were issued. Attention was directed to the enforcement officer reports seeking authority for enforcement action and the appeal statements provided when the appeals were to be dealt with at a Hearing or by written representations. There was no evidence or even assertion therein relating to the presence of cooking facilities.

22. Mr Wick's attempts to catch up with this situation had wholly failed. The cases should never have come to Inquiry.

23. The application for a partial award was for the costs of attending the final day of the Inquiry. A month before the resumption of the Inquiry the Appellant had received permission to submit new evidence, and the Council given permission to provide counter evidence. This latter had been received only on the 23rd May a day before the resumed Inquiry, and was an 86 page document. It had been plainly impossible to digest and respond to this in the time available. The Council had acted unreasonably in this regard.

24. In the event it turned out that the Council evidence did not contain a great deal to respond to, but this was not known at the time. Had the Council provided its response earlier the Inquiry could have been completed that day. In the event the Inquiry had had to be adjourned.

The response for the Council

25. The Council had had substantial grounds for taking enforcement action. It knew the developers very well, and the appeal developments had been part of a pattern in this area characterised by the same agents, builders, companies,

owners and with the same development outcomes. This was reflected in a there having been a rash of HMO Inquiries in the area.

26. The Council had had the same difficulties in obtaining access in these as in other cases. The Appellants had been forming flats as shown by tenancy agreements and rental levels, and that the alterations to the buildings were for that purpose.

27. As to the partial application for costs Mr Wicks's evidence had been provided within the Inspectors timetable. One of the documents provided was the same Mascotts appeal decision as had been provided by the Appellants. Most of the appeal decisions referred to had been known to them. Photographs and letters provided were ones already before the Inquiry. The Appellants could have responded to the Council's evidence. A partial award of costs should not be made.

The Appellants' rejoinder

28. The Council's justification for taking enforcement action when it did amounted to saying that they knew these developments were going on because other ones had. The fact that they might have a suspicion was not a proper basis for taking action without evidence. It had been wrong to take enforcement action on the basis of a pre-conceived notion. The claim of lack of access was dealt with in correspondence before the Inquiry.

29. As a matter of fact the Council had in an email of 18th May stated that Mr Wicks would explain its response to the Appellants new evidence by reference to contemporaneous documents, photos including some already in evidence and changes in the management structure. This suggested that by that date the Council knew what it was dealing with.

Reasons – the Appellants' costs application

30. 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.

31. **The application for a full award of costs** claims that the Council had had no proper evidential basis for taking enforcement action when it did so. In respect of No 108 it was asserted that enforcement action had been authorised before the building was even completed, but as set out in my main decision the evidence is that enforcement action was authorised following an officer delegated report of March 2015 and the Notice served later that month. The building had in fact been completed and partially occupied in January. At No 55 a Council inspecting officer had been told that the property was intended as "studio flats". No appeal was initially made on ground (b) and this was reflected in a Council appeal statement. At No 34 a Council inspecting officer stated that all the units contained all the facilities required for day to day living and that he had been told all cooking facilities had been provided by the landlords. This is reflected in a Council appeal statement. I conclude that the applicants' case is not made out in this regard.

32. That the Council had acknowledged that it had had regard to other cases in which the Appellants and/or their agents had been involved is not in itself unreasonable, provided the Council provided evidence at the Inquiry to substantiate its cases. In the event they did provide such evidence, as is

reflected in my decision on the appeals. I have concluded that the Council's behaviour was not unreasonable, and that the costs of the Inquiry were therefore not an unnecessary expense to the Appellants.

33. **The application for a partial award** was for the costs of attending the final day of the Inquiry. This was attributed to an adjournment on the penultimate day of the Inquiry due to the provision by the Council of an 86 page proof and appendices document, in rebuttal of further evidence from the Appellants. The allegation of unreasonable behaviour turns on the documents reaching the Appellants side the day before the resumed Inquiry, and the sheer size of what was provided. As to the amount of material, this significantly exceeded what I would have expected in response to the Appellants' further evidence. Nevertheless professional witnesses differ in their approach, and I do not consider that in this case the amount provided was so large nor the content so non-relevant as to be unreasonable. It was not disputed that the Council had provided its evidence within the agreed timescale. I have concluded that the behaviour of the Council was not unreasonable. The application for a partial award of costs fails.

FORMAL DECISIONS

The Council's application

34. The application succeeds, and the following **Costs Order** is made.

35. 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 Quadrex Limited, Pineview Property Limited, and Commercial Acceptances Limited shall pay to the London Borough of Brent Council the costs of the appeal proceedings, such costs to be assessed in the Senior Courts Costs Office if not agreed. The proceedings concerned three appeals against enforcement notices whose references are set out in the heading of this decision.

36. The applicant is now invited to submit to Quadrex Limited, Pineview Property Limited, and Commercial Acceptances Limited 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.

The Appellants' application

37. The application fails.

V F Ammoun

INSPECTOR