The Planning Inspectorate

Costs Decisions

Site visit made on 26 February 2019

by Jessica Graham BA(Hons) PgDipL

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

Decision date: 19 March 2019

COSTS APPLICATION BY THE APPELLANT in relation to two linked appeals
Appeal A Ref: APP/T5150/W/17/3188605 &
Appeal B Ref: APP/T5150/C/17/3192342
274 Dollis Hill Lane, London NW2 6HH

- The application is made under the Town and Country Planning Act 1990, sections 78, 174, 322 and Schedule 6, and the Local Government Act 1972, section 250(5).
- The application is made by Mrs Arousiak Klendjian for an award of costs against the Council of the London Borough of Brent.
- The appeals were against: (Appeal A) the refusal of the Council to grant planning permission for development described as "retention of loft alterations (involving hip to gable, rear dormer and three front rooflights)", and (Appeal B) an enforcement notice alleging the erection of a hip to gable end roof extension, rear dormer window, and insertion of rooflights to the front of the premises, all without planning permission.

Summary of decision: The application for an award of costs is refused.

COSTS APPLICATION BY THE COUNCIL in relation to two linked appeals
Appeal A Ref: APP/T5150/W/17/3188605 &
Appeal B Ref: APP/T5150/C/17/3192342
274 Dollis Hill Lane, London NW2 6HH

- The application is made under the Town and Country Planning Act 1990, sections 78, 174, 322 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 an award of costs against Mrs Arousiak Klendjian
- The appeals were against: (Appeal A) the refusal of the Council to grant planning permission for development described as "retention of loft alterations (involving hip to gable, rear dormer and three front rooflights)", and (Appeal B) an enforcement notice alleging the erection of a hip to gable end roof extension, rear dormer window, and insertion of rooflights to the front of the premises, all without planning permission.

Summary of decision: The application for an award of costs is allowed in part, in the terms set out below.

Procedural matters

1. The Government's Planning Practice Guidance (PPG) advises that, irrespective of the outcome of an appeal, costs may be awarded where a party has behaved unreasonably and that unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the appeal process.

2. The appeals were the subject of two changes to their procedure, which I discuss below. Both the Council and the Appellant had submitted costs applications prior to the second change in procedure. In the light of the

decision to make this second change, and the events leading up to it, it was clearly necessary to give both parties the opportunity to comment on the implications for their respective costs applications. Rather than amend or add to the existing applications, the parties were requested to submit fresh applications setting out their grounds in full and were then given the opportunity to respond to the application against them. It is these fresh submissions on which my determination of each application is based.

3. Since the background to, and procedure of, the appeals is common to both applications it will be helpful to begin by setting out some relevant points.

Background

4. In August 2016 the Council issued an enforcement notice alleging the material change of use of the premises to a House in Multiple Occupation (HMO), and the erection of an outbuilding in the rear garden for residential purposes.

5. The Appellant's appeal[1] against that notice ("the 2017 Appeal") was partially successful, in that the Inspector found that the main house had been in a *sui generis* HMO use for a period that rendered that use immune from enforcement, and varied the notice accordingly; the requirement of the notice to stop using, and then demolish, the outbuilding was however retained and upheld. The Decision Letter records the Inspector's finding that *It is clear that the garden building is not in use as an HMO… The 2 units were constructed with their own self-contained facilities for day to day living and although they are accessed through the main house, the occupants do not need to rely on the facilities within it for their essential living requirements."*

6. In August 2017 the Council wrote to the Appellant setting out its view that the loft conversion had taken place without the benefit of planning permission. The Appellant, while contesting that view, submitted an application (now the subject of Appeal A) for the retrospective grant of planning permission for the loft conversion. The Council refused the application, and issued an enforcement notice against the development (now the subject of Appeal B).

7. On submitting Appeal A and Appeal B, the Appellant requested that they be determined by the written representations procedure. The Council expressed the view that the appeals should instead be determined by public inquiry. On the basis of the evidence available at that time, the Planning Inspectorate decided that the written representations procedure would be appropriate.

8. However, as is customary, the Inspector then appointed to determine the appeals reviewed the available evidence. He concluded that the procedure should be changed from written representations to an inquiry. The parties were notified of this change by letter dated 8 November 2018, which explained that *…there is no sign of any agreement on the sequence of events at the appeal site and various matters of law are in open dispute. In these circumstances, there is a need for the evidence to be questioned and clarified and some of it should be given on oath."*

9. By email dated 21 February 2019 the Appellant notified the Planning Inspectorate that because the development detailed in the enforcement notice was not Permitted Development the appeal on ground (c) was considered untenable and was consequently withdrawn. The Appellant requested that in

[1] Ref APP/Y5420/C/16/3158369, Decision Letter dated 21 July 2017

the light of this withdrawal, the scheduled inquiry be cancelled and the appeals determined by written representations. The Council expressed the view that the inquiry should go ahead as scheduled.

10. As the Inspector then appointed to determine the appeals, I reviewed the available evidence and concluded that in light of the Appellant's concession that the development in question did not after all constitute Permitted Development, and the consequent withdrawal of ground (c), it was no longer necessary to the determination of the appeals to establish the precise sequence of events at the appeal site, and so there was no need for evidence to be given or cross-examined on oath. Since the parties had provided detailed written submissions on their cases and their respective interpretation of the relevant legislation, and there were no submissions from any other interested parties, there was no longer any other justification for holding a public inquiry. By email dated 25 February the parties were notified that the appeals would instead be determined by the written representations procedure.

The Appellant's Application for an award of costs

11. Article 3 of The Town and Country Planning (General Permitted Development Order) 2015 as amended ("the GPDO") grants permission for the classes of development described as Permitted Development in Schedule 2. Part 1 of Schedule 2 to the GPDO concerns "Development within the curtilage of a dwellinghouse." The Appellant's case on ground (c) of Appeal B was, in brief, that the loft conversion did not constitute a breach of planning control because it could lawfully have been carried out under Class B of Part 1, Schedule 2 to the GPDO. The Council contested this.

12. The Appellant correctly points out that in the 2017 Appeal Decision Letter, it is clear from the Inspector's reasoning that the creation and use of the two self-contained units in the garden building had no bearing on the use of the dwellinghouse; the use of that dwellinghouse as a *sui generis* HMO was found to be lawful through the passage of time.

13. However, it is important to be clear that there is a distinction between establishing whether or not there has been any material change in the use of a dwellinghouse (the matter at issue in ground (d) of the 2017 Appeal) and establishing whether or not a dwellinghouse benefits from Permitted Development Rights within the terms of the GPDO (the matter at issue in ground (c) of Appeal B).

14. The Appellant contended that the loft conversion was completed and occupied before the two self-contained units were brought into residential use, but the Council disputed this sequence of events. In order to determine whether the dwellinghouse at No. 274 did in fact benefit from the relevant Permitted Development Rights at the time the loft conversion was carried out, it would have been necessary to resolve this dispute. The dates on which the units were constructed and brought into residential use (which the parties could not agree) would have been critical to establishing whether the loft conversion was carried out within the curtilage of *a* dwellinghouse (singular), or *three* dwellinghouses (that is, the main house and the two self-contained units constructed in its back garden).

15. I do not, therefore, see any merit in the Appellant's claim that the Council was unreasonable to regard the existence of the two self-contained units as

relevant to the issue of whether or not the dwellinghouse could benefit from Permitted Development Rights. I consider the (then) appointed Inspector's decision that a public inquiry was needed was entirely correct: to determine the appeal on ground (c) it would have been necessary to hear, and test, the evidence of both parties on oath.

16. I note the Appellant's contention that the inquiry procedure was chosen at the insistence of the Council, but this is not right. While the views of the main parties will be taken into consideration, the procedure that each appeal should follow is ultimately a matter to be decided by the Planning Inspectorate. So it was the Planning Inspectorate's decision (not the Council's) that, in the light of the dispute between the main parties as to relevant dates and factual matters necessary to determine the appeal on ground (c), an inquiry was the appropriate procedure. It was the Planning Inspectorate, not the Council, who revised that decision when the Appellant withdrew the appeal on ground (c).

17. I therefore find that the costs incurred by the Appellant in producing material to evidence the construction and occupation of the loft conversion and the self-contained units, and the costs associated with the conversion of the appeal to an inquiry, were not attributable to unreasonable behaviour on the part of the Council.

18. The Appellant further contends that the Council acted unreasonably in insisting that the appeal should continue to inquiry after the case on ground (c) had been withdrawn. Leaving aside the point I have made above about appeal procedure being determined by the Planning Inspectorate rather than the Council, it cannot be fair to attribute additional preparation and travel costs incurred by the Appellant's professional representatives, following the late withdrawal of ground (c), to actions of the Council. That matter was entirely in the hands of the Appellant. Had the appeal on ground (c) been withdrawn earlier than three working days prior to the date scheduled for the Inquiry (and since it had been open to the Appellant to measure the relevant dimensions of the development at any time, there appears to be no reason why it could not have been) those costs could have been avoided.

19. I find that unreasonable behaviour on the part of the Council, such as to directly cause the Appellant to incur unnecessary or wasted expense in the appeal process, has not been demonstrated. I conclude that the application for costs should be refused.

The Council's Application for an award of Costs

20. The Council gives eight examples of unreasonable behaviour which may result in a procedural award against an Appellant, taken from the list provided by the PPG, and contends that the Appellant in this case has exhibited all of them.

21. Three of these can be dealt with shortly. The evidence before me does not indicate that the Appellant has only supplied relevant information at appeal when it was requested, but not provided, at application stage; or that she has introduced fresh and substantial evidence at a late stage. As to deliberately concealing relevant evidence, the Council's allegations on this head relate to the case made (and subsequently withdrawn) by the Appellant on ground (c) which was not – as an obvious consequence of its withdrawal – considered in my determination of Appeals A and B. I return below to the implications of the withdrawal of the Appellant's case on ground (c).

22. Behaviour involving resistance to or lack of co-operation with the Council in providing information; delay in providing information; and not completing a timely statement of common ground seems to me to relate here to the Appellant's clearly expressed, and continuing, view that the status of No. 274 as "a dwellinghouse" for the purposes of the GPDO had been confirmed by the 2017 Appeal Decision Letter. For the reasons set out above I do not share that view, but since it formed an integral component of the case made by the Appellant in Appeal B it was not unreasonable, in accordance with that case, for her to query the need for the further information requested by the Council and persist in the view that the appeals could be determined without it.

23. Turning to the withdrawal of the appeal on ground (c), under the heading "Can an award of costs be made if the appellant withdraws an appeal?" the PPG states that Appellants are encouraged to withdraw their appeal at the earliest opportunity if there is good reason to do so. It goes on to say that if an appeal is withdrawn without any material change in the Council's case, or any other material change in circumstances relevant to the planning issues arising on the appeal, an award of costs may be made against the Appellant.

24. In this case, the reason given by the Appellant for the withdrawal of the appeal on ground (c) was that in the context of seeking to agree a Statement of Common Ground with the Council, the Appellant's agent had visited the appeal site to measure (among other things) the height above the floor of the openable element of the new side-elevation window forming part of the contested development. This distance was measured as less than 1.7m and it was concluded that "Consequently, because this element does not meet the conditions associated with Class B the whole development is not permitted development and therefore the appeal on ground (c) is untenable".

25. The appeal on ground (c), then, was not withdrawn in response to any material change in the Council's case, or any other material change in circumstances relevant to the planning issues arising on the appeal. It was simply the case that a window had not previously been measured correctly.

26. The Appellant has not provided any explanation as to why the correct measurement was only established at a very late stage in the appeal process. The Council had earlier (in October 2017, prior to its determination of the planning application that is now the subject of Appeal A) queried the fact that the window in question was not shown in the plans submitted with the application, and set out the requirements of Condition C of Class B, Schedule 2 to the GPDO, which include the provision that opening parts of a window installed in a side elevation must be more than 1.7m above the floor of the room in which it is installed. In response, the Appellant's agent advised that the window was in a stairwell and confirmed that "The opening part is above the 1.7m level from the stairs."

27. That being the case, the Appellant's contention that the height of the openable window being less than 1.7m above floor level is "a detail that was capable of being picked up at an earlier stage by either party" appears somewhat disingenuous. It was a detail that was specifically queried at an early stage by the Council, and the Appellant could reasonably be expected to obtain and provide the correct measurement in response. In the light of the Appellant's email of 21 February 2019 it must be presumed that had she done so, she would have reached the conclusion at that stage that "the whole development

is not permitted development" and would not subsequently have considered an appeal on ground (c) tenable.

28. I therefore find that the reason given for the withdrawal of the appeal on ground (c) was not (in the terms of the PPG) a good reason, since the Appellant could and should have established the correct measurement of the window prior to the Council's determination of the application. Further, the Appellant's confirmation to the Council that the opening part of the window was above the 1.7m level from the stairs constitutes "providing information that is shown to be manifestly inaccurate or untrue", another of the examples of unreasonable behaviour listed in the PPG and cited by the Council.

29. Taking all of this into account, I conclude that the Appellant behaved unreasonably in these respects.

30. As to whether that unreasonable behaviour directly caused the Council to incur unnecessary or wasted expense in the appeal process, the Planning Inspectorate's decision that an inquiry was the appropriate procedure to determine the appeals was informed by the fact that the parties were not able to agree the relevant dates and factual matters necessary to determine the appeal on ground (c). Once the appeal on ground (c) was withdrawn, there was no longer a need to establish the disputed sequence of development at the appeal site, and so no longer a need for an inquiry.

31. It follows that such costs as were incurred by the Council in defending the appeal on ground (c), and in preparing for the abortive inquiry, were directly attributable to the Appellant's unreasonable behaviour in pursuing an appeal on ground (c) when simply establishing the dimensions of the development she had undertaken would, in her own terms, have revealed an appeal on that ground to be "untenable".

32. I conclude that the application should succeed in part, limited to the costs incurred in defending Appeal B on ground (c) and in preparing for the inquiry.

Costs Order

33. 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 Mrs Arousiak Klendjian shall pay to the Council of the London Borough of Brent the costs of the appeal proceedings described in the heading of this decision limited to those costs incurred in connection with defending Appeal B on ground (c) and in preparing for the inquiry scheduled for 26 February 2019 that was subsequently cancelled on 25 February 2019; such costs to be assessed in the Senior Courts Costs Office if not agreed.

34. The Council is now invited to submit to the Appellant, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Jessica Graham

INSPECTOR