



## Costs Decision

Inquiry Opened on 27 March 2018

Site visit made on 29 March 2018

**by Martin Elliott BSc FIPROW**

**an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs**

**Decision date: 28 December 2018**

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### **Costs application in relation to Order Ref: ROW/3178391**

- The application is made under the Wildlife and Countryside Act 1981 (the 1981 Act), Schedule 15 (as amended) and the Local Government Act 1972, section 250 (5).
  - The application is made by Byron Court (Liverpool) Management Company Ltd (the Company) for a full award of costs against Liverpool City Council.
  - The inquiry was held in connection with the Liverpool City Council Definitive Map and Statement Modification No. 5 Order 2016.
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### **Decision**

1. The application for an award of costs is refused.

### **Preliminary Matters**

2. At the Inquiry I requested copies of documents referred to in the costs application. These were circulated to the Council and I have had regard to these additional documents and comments in reaching my decision.

### **The submissions for Byron Court (Liverpool) Management Company Ltd**

3. Costs are being sought for all costs relating to the preparation for and the appeal against the definitive map modification order.
4. The Company went through all the required processes with the local authority in relation of the construction of the wall. The Company was advised that planning permission was not required and that there was no public right of way through the property.
5. The evidence at the inquiry is that the Gateacre Society had made a claim that a right of way over the land should be recorded in 1994 and 2000. Annex 18 and 19 of their submissions are proof that the local authority were aware of this and reasonably expected a challenge to the closing of the boundary between the two properties. The Council's rights of way officer was involved in the enquiry process prior to the construction of the wall but at no point did he inform the Company that the closing of the boundary between Byron Court and Glenacres could lead to a claim to a right of way.
6. Having been advised that there was no public right of way the Company erected the wall. Had the Company been informed that a claim for a right of

- way could be made then the Company would have taken steps to address the risk prior to incurring expense.
7. Once an application for a definitive map modification order is made the Council is under a statutory duty to investigate. It is evident that the rights of way officer did not carry out an investigation. The report authorising the making of the Order contains substantial direct lifts and arguments from Mr Chitty's report to his initial claim (annex 1 of the Gateacre Society evidence). The Council have rubber stamped the claim without investigation. This is apparent from the cross examination of Mr Cassidy as the Council had not even requested the Freehold Titles from the Land Registry. Had the Council carried out a full investigation and applied the correct tests, for example in respect of whether or not objections by the Director of Social Services (1984) were sufficient evidence of a lack of intention to dedicate, the Company believes that a completely different decision would have been reached and not authorised the making of the Order.
  8. The OMA raised issues at the inquiry in respect of the Head Lease. The Company had no option to seek Counsels opinion. Had the Council investigated the matter fully and requested the title deeds then the arguments would have been raised in sufficient time for the Company to have resolved the issue regarding the head lease. In any event the Company would have expected the rights of way officer and City Solicitor to have an understanding of the Highways Act 1980 with regards to their arguments that the Byron Court Tenants actions were not capable of bringing into question the right of the public to use the route.
  9. The Council, having been served with the Company's case, were asked to take a neutral position by the local Member of Parliament. The local Member of Parliament supported the Company because of the statements and the issues residents were having.
  10. Given the statutory responsibilities of the Council their actions throughout the process were unreasonable. As a result the Company had to carry out a thorough investigation and consequently incurred unnecessary costs. It is hoped that the application for costs stands as a warning to the Council in relation to future Orders.

### **The response by Liverpool City Council**

11. Mr Cassidy makes it clear that he was not involved in the inquiry process as evidenced in correspondence.
12. It is suggested that had the Council carried out a full investigation then the Council would have reached a different decision. The Council, as shown in their closing submissions in respect of the inquiry, are satisfied that they have acted correctly.
13. The Council expects that the Company establish the legal title to the land before claiming to be the landowner. The Council did carry out a search which indicated that there were no title deeds to request. The Company has had 16 years in which to check that they had registered title and they are now going to the expense of rectifying the matter; this suggests that this is an important matter.

14. In respect of the intervention of the local Member of Parliament it was based on a misunderstanding that the Council should spend money on maintaining roads rather than recording public rights of way. However, the recording of public rights of way is a statutory duty and not a political issue.

### **Reasons**

15. I have considered this application for costs in light of the published guidance available and all the papers submitted in relation to the Order. Irrespective of the outcome of the Order, costs may only be awarded against a party who has behaved unreasonably and thereby caused another party to incur or waste expense unnecessarily.
16. I note the issues in relation to the advice given by the Council in connection with the erection of the wall and can appreciate the concerns as to the expenditure. However, this is not a matter which relates to the making of the Order but relates to the administrative conduct of the Council. That is not a matter relevant to any costs application and the procedures connected with the Order.
17. In respect of the decision making process, the Council is under a statutory duty to investigate claims. Whilst the Company may consider that the Council had not applied the correct tests there is nothing to indicate from the evidence before me that had other evidence been taken into account the decision of the Council would have been different. The decision to make the Order was therefore not unreasonable noting that the threshold for making an order can be relatively low, namely that a right of way is reasonably alleged to subsist.
18. As regards the Head Lease, it was not until Mr Reynolds gave evidence on the second day of the inquiry that it became apparent that the land at Byron Court was subject to a Head Lease. The Company makes the point that had the Council requested title deeds from the Land Registry then these issues arising from the Head Lease could have been raised earlier. However, whilst the Council did carry out searches with the Land Registry the Head Lease had not been registered and would not, as a consequence of those searches, been revealed. I therefore do not consider the Council to have acted unreasonably in this respect. Neither did the Council leave the Company with no option other than to incur additional costs in seeking advice, that was a matter for the Company.
19. Whilst the local Member of Parliament requested the Council to take a neutral there is a reasonable expectation that, having made an Order, the Council would promote their Order at any public inquiry. Although the Council will have been aware of the case promoted by the Company there is nothing before me to suggest that circumstances changed such that the Council could no longer support its own Order. The continued support of the Order was not unreasonable. It is noted from the correspondence before me that issues raised by the Local Member of Parliament, namely issues relating to antisocial behaviour and suitability are not matters which are relevant to an Order made under the 1981 Act. The issues would not justify a change in position in respect of an Order to be determined on evidential matters.

## **Conclusions**

20. I therefore find that unreasonable behaviour resulting in unnecessary or wasted expense, as described in the published guidance, has not been demonstrated.

*Martin Elliott*

Inspector