The Planning Inspectorate

Costs Decision

Inquiry held on 6-8 November 2018

by Mark Yates BA(Hons) MIPROW

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

Decision date: 23 October 2019

Costs application in relation to case Ref: ROW/3181878

- This application is made under the Wildlife and Countryside Act 1981, Schedule 15 (as amended) and the Local Government Act 1972, Section 250(5).
- The application is made on behalf of Harving Limited ("Harving") for a full award of costs against Hampshire County Council ("the Council").
- The inquiry was held in connection with The Hampshire (Test Valley Borough No. 63) (Parish of East Dean) Definitive Map Modification Order 2017.

Summary of Decision

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

The Submissions by Ms Lieven for Harving

2. The application is made on the basis of unreasonable conduct by the Council, and in particular their unreasonable conduct in not reviewing their position in the light of material submitted. It is for a full award of costs. This Order relies upon the Council's Decision Report ("the Report").

3. The original proposal was received in 2005. Mr R. Parry (the principal landowner) responded to explain that the footpaths were closed in 1939[1].

4. The matter went into abeyance until July 2012. Mr Piper (the Council officer) met Mr J. Parry and he relied on the temporary closure argument. In support, reliance was placed by Mr Piper on the Shonleigh case. There has been no subsequent reliance on Shonleigh which is plainly a case about a different provision.

5. Harving's solicitors wrote to the Council explaining that no temporary closure was possible[2]. Ms Seeliger responded by saying that she would consult with the legal advisor but there is nothing to suggest that this was done. The Council ignored the legal opinion.

6. Mr J. Parry received the Report on 23 May 2014. There is no suggestion of an informal closure but copious references are made to the lack of a 'formal Order'. Attention is particularly drawn to the conclusion at paragraph 12.19 of the Report. This sets out the view that in the absence of an Extinguishment Order it is reasonable to allege that any rights of way that existed in 1939 are still public rights of way.

---

[1] Page 53 of the Council's inquiry bundle

[2] Pages 56-57 of the bundle

7. The Report therefore proceeded on a fundamental error of law – that a lack of a legal Order had any relevance in a case under Section 16 of the Defence Act 1842.

8. In light of the draft Report, Harving sent out an opinion dated 11 July 2014[3]. Attention is drawn to paragraphs 9-12 of this document whereby it is explained that no formal legal process is required. Reference was also made to the case of *R (oao the Ramblers Association) v Secretary of State for Defence 2007 ("Ramblers")*. This case confirmed that there is no need for a legal Order.

9. The Council's Regulatory Committee ignored this opinion but did not amend the Report. There is nothing to suggest (and freedom of information requests have been made) that the Council sought legal advice on this point.

10. The Council has changed position again with the statement of case now based on an argument that Section 17 of the Defence Act 1842 requires more than one replacement path and an alleged 'informal agreement'. The 'informal agreement' is critical to Ms Seeliger's evidence, but she simply ignored the simple explanation that it was evidence of consultation not agreement.

11. For the reasons given in closing these arguments are hopeless. It would make Section 17 unworkable and there is no evidence to support an informal agreement. It is noticeable that the informal agreement was given little mention in the Council's closing submissions.

12. In conclusion the Council's position seems to have been determined by a search for a formal Order, and when not finding one trying to find an alternative explanation for closure. Their case is unreasonable because they have refused to accept the obvious and overwhelming evidence of the use of the Defence Act 1842. Paragraph 3.45 of the Councils closing submissions is still looking for evidence, but all that would have happened is the erection of the fence.

13. The objectors have been put to very significant expense.

The Response by Mr Grant on Behalf of the Council

14. The application turns on an interpretation of the Defence Acts. It is not a well-trodden path for the true legal position. Some of the early material mentioned in the costs application is not familiar to him, but it does not matter. The inference is that the Council did not reconsider its position.

15. For the application to be successful there needs to be unreasonable behaviour which leads to unnecessary expense being incurred. The early part of the narrative does not support a costs application.

16. The Council does not ditch the informal agreement point which is part of its case. You have to judge the historical correspondence in the context of what happened at the inquiry.

17. It is not argued that there was a lack of an Order under the Defence Act 1842. This is not the case produced. It is evidence of what happened. The Council have had regard to the *Ramblers* case.

[3] Attached to the costs application

18. The opinion is based on a view to which the Council disagrees and this case has been put. The *Ramblers* case is different from the six paths in this case. It is not relevant that there was no legal advice in the early days.

19. There is disagreement between the parties. However, if the Inspector disagrees with the Council, they have nonetheless adopted a reasonable position. The Council has presented a reasonable view on the facts.

20. No reference has been made by Ms Lieven to the Defence Act 1860. There is no evidence of the procedure for the Act being engaged in this case.

21. The application should be rejected.

Reasons

22. I have considered this application for costs in light of the published Planning Practice Guidance relating to costs. The guidance advises that costs may only be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense.

23. A full award of costs will only apply to those costs incurred following the making of the Order. When a surveying authority, the Council in this case, considers whether to make an Order to modify the definitive map in accordance with Section 53(3)(c)(i) of the Wildlife and Countryside Act 1981, they should, after consideration of the available evidence, be able to conclude that a right of way subsists or is reasonably alleged to subsist. Provided it can be shown by evidence presented at the inquiry that the Order was consistent with the "*reasonably alleged*" test set out above, the Council should be able to show that it acted reasonably in making the Order.

24. Harving did not pursue an objection at the inquiry on the pre-1939 documentary evidence. Its position is that the claimed rights of way were stopped up by the use of powers contained in the Defence Acts of 1842 and 1860. The documentary evidence provided in support of a number of the claimed rights of way was not substantial. However, it would in my view be sufficient to reasonably allege that the routes were public rights of way prior to 1939.

25. The Council does not accept that the claimed rights of way were stopped up by the use of powers contained in the Defence Acts. Although the reasons given by the Council for adopting such a position have varied over time. In terms of the lack of an Order to stop up the claimed routes, as was made clear by Harving, there is no such requirement in this case.

26. It was necessary to consider and interpret the available documents before determining whether any public rights were stopped up by the Defence Acts. In respect of the claimed footpaths, I found on balance that the evidence pointed to them being stopped up. In reaching this conclusion I disagreed with the view of the Council on particular points. However, it would not be unreasonable to take a different view on these matters.

27. There is an issue in relation to whether an alternative route was provided as required by Section 17 of the Defence Act 1842. There is some doubt regarding the provision of such a route and this point was made by the Council. This is distinct from the point pursued by the Council in relation to whether there needs to be an alternative route for each path stopped up. It was reasonable

for the Council to pursue this point at the inquiry, which cast some doubt on whether the routes had been stopped up.

28. A further issue arises in relation to the claimed restricted byway. I did not agree with the view of Harving that this route has been stopped up by the use of powers contained in Section 40 of the Defence Act 1860. The Order has been confirmed in relation to this route on the ground that a right of way subsists on the balance of probabilities. Therefore, the Council was justified in reaching its decision for this route.

29. For these reasons I do not conclude that unreasonable behaviour resulting in unnecessary or wasted expense has been demonstrated.

Mark Yates

Inspector

The Planning Inspectorate

Costs Decision

Inquiry held on 6-8 November 2018

by Mark Yates BA(Hons) MIPROW

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

Decision date: 23 October 2019

Costs application in relation to case Ref: ROW/3181878

- This application is made under the Wildlife and Countryside Act 1981, Schedule 15 (as amended) and the Local Government Act 1972, Section 250(5).
- The application is made on behalf of Network Rail Infrastructure Limited ("NRIL") for a full award of costs against Hampshire County Council ("the Council"). Alternatively, a partial award of costs is sought against the Council.
- The inquiry was held in connection with The Hampshire (Test Valley Borough No. 63) (Parish of East Dean) Definitive Map Modification Order 2017.

Summary of Decision

1. A partial award of costs is made.

The Submissions by Mr Lopez on behalf of NRIL

2. NRIL as a public body strives to avoid, whenever possible, attending public inquiries. These are invariably costly and draw public funds from key infrastructure investment and from reinforcing NRIL's key objective of promoting safety on the railway. It is therefore important for the Council to act reasonably. NRIL has had close relations with the Council but this fact only underscores why, with regard to the route, the Council has acted unreasonably. NRIL's primary concern has been to see that the Operational Railway Land ("ORL") is excluded from any confirmed Order. This was unambiguously telegraphed to the Council at the earliest stage and was apparent to the Council, as confirmed by Ms Seeliger in cross-examination.

3. NRIL has had to repeatedly chase the Council (by its statement of case on 24 July and again on 19 October), which prompted the last-minute reply by the Council on 23 October. However, it still missed entirely the point the Council finally agreed on the opening day of the inquiry. NRIL had no forewarning of either the Council's *volte face* or of the fact that NRIL's safety case was not in dispute until the first day of the inquiry. The Council's conduct is unreasonable. No explanation was given to the inquiry.

4. The Council's exclamations of inadequate "*time*" or "*resources*" can be neither persuasive nor justifiable in a costs context. It has made and promoted the Order despite the prejudice to NRIL's strategic interest. The Council has had since at least 2012 to review the position and has since been under a continuing duty of review. This duty exists for good reason. There has unarguably been adequate "*time*" and "*resources*" available to the Council. Nor even has the Council been left unaided. NRIL has proactively drawn its attention to the case of *Ramblers Association v Secretary of State for*

Environment, Food and Rural Affairs and others 2017 ("Ramblers") in addition to demonstrating criminality/illegality and support for the case of Harving Ltd. Alarmingly, the first Ms Seeliger knew of the *Ramblers* judgment was during cross-examination.

5. The Council was equally duty bound to keep itself abreast of obviously relevant statute (Section 23 of the Regulation of Railways Act 1868). Despite NRIL's statement of case, no consideration was ever given to Section 23 until the Council's most cursory discussion on the first day of the inquiry. Even the Council's late response of 23 October considered only Section 16 of the Railway Regulation Act 1840 and offered no alternative view on Section 23 of the later Act. It said nothing on either the *Ramblers* case or the Defence Act 1842.

6. A full award of costs is well founded in light of the Council's volte face on the opening day alone. The Council's behaviour as regards the ORL is a paradigm example of what causes needless and wasted public expenditure.

7. It is also no answer whatsoever for the Council to point to NRIL's objection extending to the remainder of the route. First the objection appropriately relates to an identifiable Order route and points (and the Council's intransigent case has been that the *whole* of this route should be confirmed, and not merely part). Second, absent the Council's day one agreement, NRIL was bound to attend the inquiry, to prepare fully in advance, to have all of its witnesses attend, and to have legal representation. It is completely unsurprising that given NRIL has been caused by the Council to make its case at the inquiry, that it did not withdraw the balance of its objection (outside of the ORL) when somewhat curiously invited by the Council to do so on the second day of the inquiry. Why should it do so? It has been caused to object and to attend, and that objection so happens to be well founded with regard to the entirety of the route.

Procedural Award: Heads

- Lack of cooperation with NRIL on incompatibility with the Council only confirming its position concerning the ORL on the first day of the inquiry, not before.
- Not agreeing, in any timely fashion, common ground (now formulated in the agreement) on matters that go to the heart of the objection.
- (Effective) last minute withdrawal of any argued justification for making the Order in respect of the ORL; unreasonably defending the Order with regard to the ORL.

Substantive Award: Heads

- Failure to produce evidence to substantiate any proper and lawful rationale for the route as a whole (i.e. including the ORL).
- Acting contrary to well-established case law (*Ramblers*).
- No or no adequate consideration given to statute; and it application, regarding criminality and extinguishment.

Statutory Incompatibility

8. The Council agrees that the Order must be modified, by reason of statutory incompatibility with regard to the ORL. Not before the morning of the first day of the inquiry did the Council set out its position. By this agreement, the Council agrees that the Order should never have included the ORL. Even having made the Order, had the Council reviewed its case far sooner NRIL may possibly have been able to avoid the incurrence of costs.

Criminality

9. Reference is drawn to Section 23 of the Regulation of Railways Act 1868.

    - The Council now agrees that a *warning* would be satisfied by trespass signage.
    - A clear statement that signage would have historically existed for statutory purposes installed by the railway company along the railway (including at the nearest stations).
    - Historical signage coincides with the convention of railway companies, and the existence of signage, historically.
    - The Council produces no evidence to doubt NRIL's clear statement or this convention.

10. The Council has offered no evidence in challenge to: (a) the known conventional practice historically to staff the railway at each platform; at manned crossings; and to maintain the railway. The resulting likelihood is that trespassers would have been actively challenged and required to quit; (b) various statutory provisions that empower the continuous (platforms, crossings) and transient (maintenance) manning of the railway.

11. No public right of way authority is known to have challenged (and on the basis of no evidence) the conventional practice of railway companies; and the probability that flows from this fact. This is unsurprising. The convention is well known amongst authorities; it is consistent with standardised provisions of special acts authorising the creation of branch railways, as is the case here.

12. Accordingly, the Inspector is respectively invited to make a full award of costs.

13. Only if a full award is not made, should a partial award follow.

The Response by Mr Grant on Behalf of the Council

14. It is accepted that NRIL are a public body and have an interest in respect of the section N-O in the Order. In cross-examination, Mr Hajnus responded that he would not pursue the matter. This is relevant to NRIL pursuing the position through to the inquiry and at the inquiry. Mr Greenwood's position needs to be considered against the agreement reached on day one of the inquiry.

15. In relation to the issue of incompatibility, this matter relates to safety and is covered in the evidence of Ms Ingram. The Council reviewed the position when the matter was first raised and did not pursue any case in relation to it. Criminality is not considered at the confirmation stage in the same way as incompatibility. NRIL pursued the criminality argument. The matter in the *Ramblers* case was a point of contention involving the law.

16. The position is the full application is misconceived on the approach taken by NRIL. It was agreed that N-O should be rejected and no case was pursued in terms of the documentary evidence.

17. The only potential basis for costs is that an earlier decision could have been made on the incompatibility issue. NRIL maintained the objection even when the incompatibility issue was agreed. So it cannot be said that they would have gone away. The only potential award could be for the evidence of Ms Ingram, in respect of her attendance at the inquiry.

18. The case on Section 23 will either be accepted or rejected. It is submitted that criminality needs to be considered during the relevant time period. If the user at the time was as of right then Section 23 would not be engaged in terms of criminality. This is a reasonable argument.

19. There is no basis for a full award of costs. Any claim for partial costs (which is not agreed) should be limited to Ms Ingram's attendance at the inquiry.

Reasons

20. I have considered this application for costs in light of the published Planning Practice Guidance relating to costs. The guidance advises that costs may only be awarded against a party who has behaved unreasonably and thereby caused the party applying for costs to incur unnecessary or wasted expense.

21. Whilst the objection pursued by NRIL covered other matters, it is apparent that the costs application relates primarily to the Council's conduct in relation to the issues of criminality and incompatibility. Further, I do not find that the Council acted unreasonably in its presentation of the documentary evidence at the inquiry. It was reasonable to allege that a right of way subsists from the documentary evidence.

22. Bearing in mind my other conclusions in the Order Decision, I did not need to reach a finding on the criminality point. However, my view regarding the difficulty of reaching a conclusion on this matter suggests that the Council did not act unreasonably in challenging NRIL on this point. I therefore consider that the costs application should be considered in light of the incompatibility issue.

23. There is no reference to the incompatibility issue in the Council's statement of case. The objection to the Order from NRIL had covered the point and this was amplified in its statement of case. NRIL also drew attention to the *Ramblers* case and a copy of the judgment was included with the statement of case. By this time, the Council should have been well aware of the view of NRIL on the issue and the implications of the *Ramblers* case.

24. The Council's case officer (Ms Seeliger) produced a proof of evidence for the inquiry. This is stated to have focussed on the key areas of disagreement between the Council and the objectors. The bulk of the proof deals with another objection. In terms of the NRIL objection, there is no specific response on the incompatibility issue. Ms Seeliger does briefly address the issue of criminality.

25. The proofs of evidence for the witnesses proposed to be called by NRIL again addressed the issue of incompatibility, most notably in the evidence of Ms Ingram. NRIL wrote to the Council on 19 October 2018 to seek clarification on

the legal basis for the Council's case. A similar request had been made in the statement of case. The Council's response outlined its view regarding the dedication of the route. Reference is made to the relevance of the Railway Regulation Act 1840, in respect of the issue of criminality. No reference is made to the incompatibility issue.

26. On the opening morning of the inquiry, Mr Grant expressed the view that he did not consider it appropriate to challenge the incompatibility ground. He stated that it was likely that a modification would be requested on this basis. Such a modification would remove any public right of way from the ORL. An agreement was later drawn up by NRIL and this was signed by the parties. The Council's position was confirmed again in closing.

27. Ultimately, I concluded that a public right of way does not subsist over the N-(R)-O route. However, I did not disagree with the parties on the incompatibility point. Therefore, irrespective of the other conclusions reached, the Order could not have been confirmed in relation to the ORL.

28. I consider that the Council acted unreasonably in not revealing its position on the incompatibility issue until the opening day of the inquiry. NRIL had put forward this argument in its objection letter and expanded further on the point in the statement of case and proofs of evidence. It also sought clarification from the Council. If the Council's position had been revealed earlier, NRIL would have had the opportunity to seek the necessary assurances and may not have needed to attend the inquiry. The absence of any response from the Council meant that NRIL had to incur the unnecessary expense of pursuing its objection up to the inquiry.

29. I do not believe it was unreasonable for NRIL to pursue its objection in full during the course of the inquiry. Nonetheless, the Council had conceded on the incompatibility issue on the opening morning of the inquiry. It is on this matter that I consider the Council has acted unreasonably. This means that I do not consider that a full award of costs should be made in terms of the attendance by NRIL representatives for the duration of the inquiry. However, a partial award of costs would in my view be justified in light of the lack of notification by the Council on the incompatibility issue prior to the inquiry. This meant that NRIL's advocate and witnesses had to attend the opening morning of the inquiry and unnecessary expense was incurred. The first morning of the inquiry finished at 13:00 hours.

30. For these reasons I conclude that a partial award of costs should be made in favour of NRIL. This should be limited to the expenses incurred following the submission of its statement of case through to the attendance and representation on the opening morning of the inquiry by NRIL's advocate and witnesses.

Costs Order

31. In exercise of my powers under Section 250(5) of the Local Government Act 1972, the Wildlife and Countryside Act 1981, Schedule 15 (as amended) and all other enabling powers in that behalf, I **HEREBY ORDER** that Hampshire County Council shall pay Network Rail Infrastructure Limited the costs incurred following the submission of its statement of case up to and including the attendance and representation on the opening morning of the inquiry, such

costs to be assessed in the Senior Courts Cost Office if not agreed. The proceedings relate to those described in the heading of this decision.

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

Mark Yates

Inspector