



Costs Decision

Inquiry opened on 19 November 2016

by Peter Millman BA

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

Decision date: 2 February 2017

Costs application in relation to Order Ref: FPS/B3600/7/110

- The 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 by Mr T Ward of Counsel, on behalf of Surrey County Council, for a full award of costs against Mr P Warner and Mr H Robbie, represented by Mr D Stedman-Jones of Counsel, objectors to the confirmation of the Surrey County Council Footpath No. 604 (Haslemere) Definitive Map Modification Order 2015.
- The inquiry was in connection with the above Order.

Summary of Decision: The application is allowed in the terms set out below.

Reasons

Preliminary

1. Defra Circular 1/09 advises that in rights of way cases where an inquiry or hearing has been held, the Planning Inspectorate may order that one party pay the costs of another where that party had behaved unreasonably and the unreasonable behaviour has caused the other party to incur unnecessary costs that they would not otherwise have incurred.

The Order

2. The Order, which has been confirmed, proposed to add a footpath to Surrey County Council's Definitive Map of rights of way. The objectors' case hinged on the interpretation of two notices, neither of which had been erected by them. The issue was whether the wording of those notices rendered public use of the path contentious or permissive, and whether it amounted to sufficient evidence, on the part of Lloyds Bank (which was assumed to have erected the notices) that it had not intended to dedicate a right of way to the public during a 20 year period between 1995 and 2015. There was only one objection to the Order, from Mr Robbie and Mr Warner, owners since 2014 of part of the land crossed by the path, who asked to be heard by an inspector.

Arguments of the parties

3. The gist of Mr Ward's argument for the County Council was that the objection had no hope of succeeding and should not have been pursued to inquiry. There was a right to object, but that right had not been exercised reasonably. The objectors had been legally represented throughout and it should have been obvious to their solicitor and barrister that the objection could not succeed.
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4. The gist of Mr D Stedman-Jones' argument for the objectors was that they had a strong case, based on the signs and the physical surroundings of the path. It was perfectly reasonable, in fact essential, to seek to have the evidence tested at an inquiry. Relevant evidence, about the locking of a gate in particular, might have turned up. Questions of interpretation in this area of law were not easy and the quantity of case law was voluminous. There was no reasonable basis for any costs award.

Discussion

5. I set out the full wording of the two notices which were at the heart of this case in my Order Decision. They were placed either side of a gate through which the path passed, facing in one direction. One was headed 'Private Property' and was concerned with the regulation of parking in a car park adjacent to the Order route. The other was headed 'Private Car Park' and stated that parking was at the driver's risk. The path passed through two gateways. No evidence was produced, either before the inquiry or during it, that the gates had ever been locked shut.
6. It is clear from the relevant case law that use of a path despite visible notices forbidding it may be contentious. The objectors' view, though tempered somewhat by Mr Stedman-Jones at the inquiry, was that, as they put it, 'private means private'. Case law indicates that a much more nuanced approach to the interpretation of notices is called for, necessitating a contextual assessment of what they would naturally convey to an ordinary and reasonable speaker of English. Interpretation may not always be easy, but in my view it would have been impossible in this case to conclude other than that the notices had no bearing upon the pedestrian use of the Order route (see paragraphs 19 to 30 of the Order Decision).
7. In my view it was a hopeless task to try to show that the notices in this case prohibited use of the path and so rendered its use contentious.
8. Notices may also, even if they do not give explicit permission for the use of a route, imply a permission. In this case, I consider, it was a hopeless task to try to show that the notices, if they did not render use contentious, nevertheless rendered it permissive.
9. Likewise I consider that the objectors had a hopeless task in trying to show that the notices provided sufficient evidence of a lack of intention to dedicate a pedestrian right of way to the public.
10. In my opening remarks at the inquiry I drew to the attention of the parties the case law I was aware of which was relevant to the interpretation of notices, since I was concerned that the objectors, in their statement of case, had made no mention of any of it, and they seemed content to maintain the 'private means private' position. The case law in this area is not voluminous. I mentioned five judgments, and there may have been one or two more that were relevant.
11. Mr Stedman-Jones incorporated into his closing submissions the assertion from the objectors' Statement of Case that *Signs indicating the private nature of the site, including specific reference to the lack of any footpath rights, have been in position on site for many years...* It was quite clear that none of the signs mentioned the word 'footpath' at all.

- 12.Despite the fact that the interpretation of notices erected by or on behalf of Lloyds Bank was central to the objectors' case, I saw no evidence that any attempt had been made by the objectors or their legal representatives to contact Lloyds to get its view on what message they might have conveyed.
- 13.Furthermore, it was quite wrong, in my view, for the objectors to ask for an inquiry on the basis that an unknown person might 'turn up' (paragraph 4 above) and give evidence which supported their case. Mr Ward warned Mr Stedman-Jones during the course of the inquiry that he intended making an application for an award costs. Mr Stedman-Jones nevertheless continued to advance the case of the objectors.

Conclusions

- 14.For these reasons I conclude that unreasonable behaviour resulting in unnecessary or wasted expense has been demonstrated and that a full award of costs is justified.

Costs Order

- 15.In exercise of the powers under section 250(5) of the Local Government Act 1972, the Wildlife and Countryside Act 1981, Schedule 15 (as amended) and all other powers enabling me in that behalf, IT IS HEREBY ORDERED that Mr Peter Warner and Mr Hamish Robbie shall pay to Surrey County Council the costs of the inquiry proceedings described in the heading of this decision; such costs to be assessed in the Senior Courts Costs Office if not agreed.
- 16.The applicant is now invited to submit to Messrs Warner and Robbie, to whom a copy of this decision has been sent, details of those costs with a view to reaching agreement as to the amount.

Peter Millman

Inspector