



Costs Decision

Hearing held on 24 October 2017 and 27 February 2018

by Helen Slade MA FIPROW

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

Decision date: 28 March 2018

Costs application in relation to Order Ref: ROW/3172660

- The application is made under the Highways Act 1980, Schedule 6 (as amended) and the Local Government Act 1972, section 250 (5).
 - The application is made by Mrs Y Anderson for a full award of costs against Derbyshire County Council ('the County Council').
 - The Hearing was held in connection with The Derbyshire County Council (Public Footpath No 56 (Parts) – Alfreton (now in the Parish of Somercotes) Public Path Diversion Order 2016.
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Summary of Decision

1. A full award of costs is made

The submissions for Mrs Yvonne Anderson

2. Costs and compensation are claimed for the unreasonable necessary costs, the loss of leisure time and the stress connected with dealing with the objections to the Order. The main reasons are:
 - The lack of proper details, including land ownership;
 - The incomplete and inaccurate application form completed by EP Industries Ltd;
 - The inaccurate and invalid Order dated 9 June 2016;
 - The inaccurate and biased statement submitted by the County Council which contained falsehoods and failed to deal with the legal rights of Pye Bridge House and its owners and occupiers;
 - The failure to take account of objections made prior to the making of the Order, particularly in relation to the repeated complaints about the obstruction of the definitive line of the footpath.
3. It is contended that the Order is flawed as it does not accurately show the Definitive line of the existing route and it is misleading as it erroneously refers to the path being in the parish of Alfreton. It is in fact in Somercotes. The title of the Order makes no mention of Pye Bridge. The Order makes no reference to the fact that other parties own some of the land involved, and Mrs Anderson herself has a legal interest in the land in the form of private access rights. There is no evidence that the County Council, as landowner, has agreed to this proposal.

4. The information on which the decision to make the Order was based was incomplete and inaccurate. The application from EP Industries Ltd did not identify all the landowners, and no title deeds have been submitted to the County Council except those of Mrs Anderson. The County Council should have identified the lack of details from the beginning of the process. It is not acceptable that forms which are not completed properly are then used as the basis for making an order.
5. Mrs Anderson also wishes to claim compensation for the probable damage and disturbance and the impact on her enjoyment of her land during the creation of the new public right of way and all that that entails, and the loss of her legal rights.
6. The authority had full knowledge of all the details and, for reasons best known to themselves, they decided to cause stress, loss of leisure time and unnecessary expense by forcing Mrs Anderson to object to the Order. This involved having to do extensive research; travelling to the library to obtain photocopies; the cost of sending letters by special delivery in order to ensure receipt; and the time, effort and costs of doing that.
7. As a pensioner on a limited income, Mrs Anderson could not afford legal expenses and, by pursuing the Order, the County Council has caused all this trouble.

The response by Derbyshire County Council

8. Costs may be awarded where one party in the proceedings has behaved unreasonably, and the unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense in the Hearing process. Unreasonable behaviour can include actions that unreasonably cause the Hearing to be extended or delayed; or if the Hearing has to be adjourned because of a failure to comply with the timetable.
9. The County Council acknowledges that on this occasion it did not fully comply with the timetable in that it omitted to place notice of the Hearing date on site as required by the Rights of Way (Hearing and Inquiries Procedure)(England) Rules 2007. The County Council has apologised for this omission and does so again.
10. It is therefore understandable that Mrs Anderson has made an application for costs. However she is only able to claim for unnecessary or wasted costs that are related to the Hearing process and not for indirect losses.
11. Mrs Anderson sent a letter to the Council dated 22 February 2018 in which she set out her reasons for making a costs application for 'unreasonably necessary costs – loss of leisure time – stress – etc. etc. etc.' and in which she refers to her statement of reasons for not confirming the Order.
12. In her statement of reasons Mrs Anderson questions whether the Council was correct to make the Diversion Order and suggests that because (in her view) it was wrong to make the Order, the Council acted unreasonably. The Council considers that the decision to make the Order was not unreasonable, even if the Inspector ultimately determines not to confirm it. The legal process of making and publicising an order allows it to be tested. Application forms are frequently somewhat incomplete or inaccurate and the defects are remedied later during the investigation procedure. It is also possible for the situation to

- change after an application has been submitted. The County Council carries out its own searches to establish land ownership and although on this occasion it did not pick up the discrepancies relating to thin slivers of unregistered land, it did identify that the County Council owned the land over which the proposed route would run. The appropriate department was consulted, both informally and formally. It is acknowledged that the searches did not reveal that Mrs Anderson had any legal interest in the land.
13. The County Council does not agree that the Order was defective and contests that its statement was biased. Mrs Anderson may not agree with it but it contains no falsehoods as far the County Council is aware. It is the understanding of the County Council, and set out in previous correspondence, that private rights are unaffected by the confirmation of a diversion or extinguishment order.
 14. The title of the Order refers to the parish of Alfreton because the original Definitive Map and Statement have not legally been updated, and the area was within the parish of Alfreton in the 1950s. The change in the parish boundary is reflected in the title of the Order. It would not have been normal practice to refer to Pye Bridge in the title of the Order. It is however referred to in the description of the route.
 15. Amber Valley Borough Council ('the Borough Council') was consulted about the Order and made no response. It is not unusual for statutory consultees not to respond if they have no comment to make.
 16. As far as the County Council is concerned the Order plan is accurate and it does show the Definitive line of Footpath 56 as the existing route to be diverted.
 17. With regard to the complaints about the obstruction to the Definitive line of the footpath, a diversion order is one power that the Council has to deal with obstructions. It is not obliged in every case to seek the removal of the obstruction.
 18. It is anticipated that Mrs Anderson would have objected to any diversion order that was made, and had there not been an error about publicising notice of the Hearing she would have had no grounds for seeking the costs incurred in preparing for the Hearing, as it is usual for each party to bear their own costs.
 19. The County Council would therefore contend that the costs Mrs Anderson incurred in time, copying etc. in connection with maintaining her objection to the Order and preparing for the Hearing should not be paid by the County Council. This is in contrast to her costs in attending the resumed Hearing which would not have been necessary had the notice of the Hearing been properly published.
 20. The Borough Council published its draft new Local Plan in November which substantially changed the County Council's view of the Diversion Order. The existence of the Local Plan was brought to the County Council's attention in January and, as soon as possible after receiving revised instructions from the relevant department, the County Council wrote to the Planning Inspectorate requesting that the Order be not confirmed. It is not unreasonable for the County Council to decide that it would no longer seek confirmation of the Order in the light of its inconsistency with the Borough Council's revised Local Plan, albeit still in draft form.

21. In her letter of 22 February Mrs Anderson goes on to seek compensation for the effects of the Order on the legal right of passage to Pye Bridge House, probable damage, and disturbance to the enjoyment of land during the creation of the new right of way and all it entails.
22. Section 121 of the Highways Act 1980 provides that the compensation provisions set out in Section 28 also apply to diversion orders. Section 28(1) provides that *"if... it is shown that the value of an interest of a person in land is depreciated, or that a person has suffered damage by being disturbed in his enjoyment of land, in consequence of the coming into operation of a public path [diversion] order, the authority by whom the order was made shall pay to that person compensation equal to the amount of depreciation or damage."*
23. Section 28(4) goes on to say that *"Nothing in this section confers on any person, in respect of a footpath created by a [diversion] order, a right to compensation for depreciation of the value of an interest in the land, or for disturbance in his enjoyment of land, not being in either case land over which the path or way was created or land held therewith, unless the creation of the path or way would have been actionable at his suit if it had been affected otherwise than in the exercise of statutory powers."*
24. The issue of compensation under Section 28 is not one that can be determined by a Planning Inspector but, in cases of dispute, should be referred to the Lands Tribunal. In any event, Mrs Anderson would have no claim for compensation in respect of this Order if it were confirmed.
25. The extinguishment of public footpath rights over the land adjacent to Pye Bridge House would have no effect on whatever private rights of way exist to that property. The County Council does not know what those rights are, and it would not be appropriate for them to become involved in determining those rights, but one way or another they must exist and allow Mrs Anderson and visitors to her property access to and from Main Road and footpath 56. If the Order were to be confirmed, Mrs Anderson would still be able to access the new route of the footpath from her property, and Main Road.
26. In addition, Mrs Anderson does not own the land that would be crossed by any new path and therefore is not entitled to compensation under Section 28.
27. Finally the County Council has requested that the Order be not confirmed. Unlike orders under the Wildlife and Countryside Act 1981 the Inspector is not required to consider the merits of the Order regardless of the stance taken by the Order Making Authority ('OMA'). If the Order is not confirmed, the new path will not come into being and the provisions of Section 28 will not come into play.
28. In conclusion, such costs as Mrs Anderson may be entitled to should be restricted to the reasonable costs she incurred as a result of the adjournment of the Hearing on 24 October 2017 as that was necessitated by the County Council's actions. The County Council further contends that no liability to pay compensation arises for the reasons set out above.

Reasons

29. 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.
30. I cannot address any issues relating to the County Council's procedures in assessing or determining applications, or any matter unrelated to the Order I am considering. These are matters of internal policy and any complaints in this regard need to be raised with the County Council itself, using its own complaints procedure, or via the relevant Ombudsman. There have clearly been longstanding issues with regard to the land over which the existing footpath runs, and with the footpath itself, but these matters are not relevant to any costs application in respect of the procedures connected with the current Order.
31. The naming of Orders is a matter for the relevant Order Making Authority and the wording of the Order and the Schedule clearly describes the location of the path. Mrs Anderson was unhappy with the description of the route as being in Alfreton but I accept the County Council's explanation of how and why this is written in that particular way. I do not consider it to be unreasonable.
32. Although Mrs Anderson considers that the Definitive line of the existing route is not shown correctly, I consider that the Order map shows the line of the existing route as shown on the Definitive Map and Statement, as accurately as the limitations of scale allow. The Order itself describes the width of the existing route to be extinguished as 'the whole width'. This allows for the width of the path up to Mrs Anderson's property boundary to be included in the Order, and I am satisfied that it could not be shown or described more accurately. I am satisfied that the Order itself is valid in terms of its drafting. I do not consider it unreasonable.
33. The County Council's statement submitted in connection with this Order set out the facts of the case which were necessary to explain their position in regard to it. Mrs Anderson submitted a large amount of material relating to issues concerning the land going back to 1985. I accept that there is a lot of background history to this application, but although it may help to set the Order in context, it is not necessarily all relevant for the purposes of determining the Order. I am satisfied that the information provided by the County Council was sufficient for its purpose. Mrs Anderson may disagree with the contents of the statement, but that does not make it unreasonable.
34. Since I have not confirmed the Order, the issue of compensation will not arise, but it is in any case not relevant to the question of costs which I have to determine.
35. I accept the County Council's view that the Order making process provides for the proposal to be tested and that there is a legal framework which governs the procedures. If the Hearing had been properly advertised at the due time, I am confident that the matter could have been dealt with within the normal time frame for a Hearing (i.e. less than one day) and it is normal practice for the parties to bear their own expense, including the costs incurred in the research and preparation of their evidence.

36. The failure to correctly advertise was not discovered until it was too late to postpone the opening of the Hearing and thus it was necessary to adjourn. In order to make the best use of the time, I carried out the accompanied site visit on the original date of the Hearing; a visit which Mrs Anderson attended although she refused to walk any part of the existing available route which did not form part of the Definitive line of Footpath 56.
37. During the adjournment, the County Council changed its stance on the Order and requested that it be not confirmed. The County Council stated that this was based on a policy in the emerging new Local Plan, prepared by the Borough Council, which identified the Cromford Canal as a restoration project which it was supporting. The implications of that policy would have involved Derbyshire County Council in considerable extra expense if the diversion of the footpath had gone ahead since it would have been required to construct two substantial bridges over the canal.
38. However I note from the papers submitted by the County Council itself that in 2013, when undertaking informal consultations in respect of the proposed diversion, the issue of the long term plans by the The Friends of Cromford Canal for the restoration of the Canal was raised by their own Countryside Project Officer, who was responding on behalf of the landowning department of the County Council. The potential need for at least one bridge was identified in the response, dated 2 August 2013, by Chris Monk.
39. I also note that the statement submitted at the opening of the Hearing on 24 October 2017 by The Friends of Cromford Canal referred to the support for the project in principle by Amber Valley Borough Council who had protected the route for planning purposes. No documents were submitted in support of that contention, so I do not know if the comments referred to policies in the emerging local plan or the existing local plan current at that time.
40. Nevertheless it seems to me that the County Council had sufficient information prior to making the Order to suggest that there was a risk that its proposed diversion would potentially result in the need for two bridges in the future. That does not necessarily mean that it was unreasonable to make the Order, as the potential costs of the bridges could have been factored in, but I do consider that it was unreasonable of the County Council to then change its view based on information of which it was already aware; and on proposed development which it already knew was a distinct possibility at some time in the future.
41. The County Council asked for the resumed Hearing to be cancelled as it considered it was no longer necessary. Since by that point in time there was no party supporting the confirmation of the Order, it was open to me to close the Hearing in writing to avoid the need to re-assemble. However Mrs Anderson, as the sole statutory objector, had the right to be heard and maintained her position on that. I accept that she had that right, and that since she wished to make a costs application it was more appropriate to do that at an oral hearing.
42. The time spent at the resumed inquiry on 27 February 2018 was taken up with issues of clarification with regard to the revised stance of the OMA, and matters relating to Mrs Anderson's costs application. Mrs Anderson had written to the County Council on 24 April 2017¹ (shortly after the original submission of the

¹ Contained as an attachment to Mrs Anderson's Statement of Case dated 24 September 2017

matter to The Planning Inspectorate) and had indicated in that letter that she considered that the County Council had acted unreasonably, and that she intended to apply for costs.

43. I note that the County Council accepts that it behaved unreasonably by failing to advertise correctly the original Hearing date, thereby causing the adjournment. However, had the adjournment not arisen, the County Council might then have found itself in the position of being liable for considerable potential expenditure as a result of a confirmed Order, that it now does not want.
44. It is clear from the papers provided by Mrs Anderson (and also from amongst the County Council's own submissions) that this site has caused considerable problems over the years, and that the County Council has made several abortive attempts to resolve the obstruction to the footpath. I find that the County Council has acted unreasonably in changing its mind about the efficacy of the Order in question, based on information it already had. Having made and published the Order, Mrs Anderson was then forced to undertake considerable work to support her objection, which is now rendered unnecessary because of the County Council's unreasonable behaviour. It is immaterial as to whether or not Mrs Anderson's objection would have been successful. Although some of her comments may have proved to be irrelevant, there were other aspects of her objection which were clearly relevant.
45. I therefore conclude that Mrs Anderson has incurred costs in preparing for a Hearing caused by the publication of an Order now abandoned by the County Council, based on information which was already in its possession before it made the Order. I consider that the behaviour of the County Council has been unreasonable, and has given rise to unnecessary expense on the part of Mrs Anderson.

Costs Order

46. In exercise of the powers under section 250(5) of the Local Government Act 1972 and the Highways Act 1980, Schedule 6 (as amended) and all other enabling powers in that behalf, IT IS HEREBY ORDERED that Derbyshire County Council shall pay to Mrs Yvonne Anderson the costs of the appeal proceedings described in the heading of this decision; such costs to be assessed in the Senior Courts Costs Office if not agreed.
47. The applicant is now invited to submit to Derbyshire 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.

Helen Slade

Inspector