



Costs Decision

Inquiry opened on 1 May 2018

by Alan Beckett BA MSc MIPROW

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

Decision date: 30 July 2018

Costs application in relation to Appeal Refs: FPS/T0355/7/4 - 17

- 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 Council of the Royal Borough of Windsor and Maidenhead for a partial award of costs against Mr Michael Kenneth Busbridge, the Director of Worby Estate Sales Limited ('WESL') and against Mr Frank McDonagh.
 - The inquiry was held in connection with fourteen Definitive Map Modification Orders made under section 53 of the Wildlife and Countryside Act 1981 which sought to record in the definitive map and statement a number of public footpaths over land at Thamesfield, Wraysbury and to which Mr Busbridge and Mr McDonagh had objected.
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Decision

The submissions made on behalf of the Council of the Royal Borough of Windsor and Maidenhead

1. The Council fully accepted the need for the inquiry and costs were not being sought in respect of the entirety of the inquiry but only in relation to part of the afternoon sitting of the third day which could have been avoided. A claim was being made in relation to the cost of Counsel's fees for this part of the inquiry.
2. The request made by the objectors at the start of the second day for more time to be allowed for them to prepare for the presentation of their cases and for their evidence to be presented on the third day and not on the second day meant that at least 2 hours and 35 minutes of inquiry time had been lost. It would have been possible to sit slightly later on the second day, say until 17:30 by which time the bulk, if not all, the objectors' evidence could have been dealt with. This would have resulted in closing submissions being made on the morning of the third day with the inquiry being closed by lunchtime.
3. Due to the unreasonable request made by the objectors, the Council had incurred unnecessary or wasted expense. Had the objectors been fully prepared the whole of the second day would have been given over to the consideration of the parties' cases and the site visit could have been conducted on the third day and Counsel's fees for part of the third day could have been avoided.

The response by Mr Busbridge, the Director of WESL

4. The inquiry had been scheduled to run over four days having opened on the 1 May. The inquiry had been completed by the end of the third day and was therefore well within the projected programme. An offer had been made to

commence proceedings early in order to make up time but this had not been taken up. The approach taken by the Council in seeking costs in such circumstances was unreasonable and should be rejected.

The response by Mr McDonagh

5. No inquiry time had been lost as a result of hearing his case on the third day as opposed to the second day; a site visit had been made on the Wednesday afternoon which would otherwise have taken place on Thursday afternoon. All matters that had to be dealt with within the projected duration of the inquiry and no time had been lost. The suggestion that 2 hours and 35 minutes of inquiry time had been wasted was incorrect; the Council's claim for costs was unreasonable and should be rejected.

Reasons

6. At the inquiry, the Council did not call residents to appear as witnesses of fact to their usage of the claimed paths, but there were a number of individuals who wished to give evidence of use. Of those individual witnesses, some were only available on the Wednesday of the inquiry, and of those some were only available at or after specific times due to other commitments. I had been aware of these limitations at the commencement of the inquiry and had noted that to make the best use of inquiry time it may have been necessary to intersperse the evidence of those individual witnesses with that of the case of the objectors.
7. After outlining the projected running order for the day, and other housekeeping matters on the Wednesday morning, and having heard from Mr Hughes who wished to clarify certain dates in his evidence by reference to photographs and other documents he had sourced overnight, the objectors made a request for additional preparation time to be allowed so that they could present their cases on the third day. In response to this request, Mr Ward indicated that an application for costs may be made as a result.
8. It is not my position to direct or instruct the parties how to conduct their cases. However, I did note that a request for additional time was a surprise given that the parties had been aware of the inquiry process for some time and that WESL had complied fully with the timetable for the submission of statements of case and proofs of evidence. The Notice of Order sets out that the Start Date for the Order is 28 November 2017; it follows that by the time the inquiry opened on 1 May 2018 the parties had had 22 weeks in which to prepare. In such circumstances, I consider it highly likely that the parties would have had sufficient time to prepare their cases and be ready to engage fully with the inquiry on the date it opened.
9. My notebook demonstrates that on Wednesday 2nd May the inquiry adjourned at 12:30 as the next user witnesses were not available until after 14:00. The giving of evidence resumed at 14:25 as the next witness had arrived. The taking of evidence and cross-examination then continued until 15:00 when a 20 minute adjournment was taken due to witness unavailability. Evidence resumed at 15:20 and was completed by 15:45. In the light of the objectors' request I made arrangements for an accompanied site visit to be undertaken during Wednesday afternoon.

10. The inquiry's normal sitting time would have been until 17:00 or thereabouts. Given that the lunch adjournment would normally be taken at or around 13:00, there was a period of 1hr 45 minutes during the course of the Wednesday sitting in which some evidence could have been taken. As it was not possible to deal with user evidence in this time due to witness unavailability, it should have been possible to interweave the objector's evidence in this unused time.
11. My notebook shows that when Mr McDonagh came to make his case and be cross-examined on the third day, this took up 45 minutes of inquiry time. Mr Busbridge's evidence-in-chief took 2 hours and cross-examination by Mr Ward and others took a further 2 hours. Closing submissions accounted for 1 hour of inquiry time. The objectors' cases and closing submissions by the parties occupied the whole of the third day.
12. Looking at these issues retrospectively, it would have been possible to hear Mr McDonagh's case on the Wednesday afternoon between 12:30 and 13:15 (allowing for lunch to be taken slightly later than normal) and for part of Mr Busbridge's evidence-in-chief to have been heard between 15:45 and 17:00 with the remainder being heard from 10:00 on Thursday. Cross-examination of Mr Busbridge would have been completed by 13:00 with closing submissions being heard between 14:00 and 15:00.
13. Had the objectors been fully prepared at the start of the second day, the inquiry may have been concluded by 15:00 on the Thursday. The point made by the objectors is that the inquiry was scheduled for four days but only took three days and the time spent on the accompanied site visit on Wednesday afternoon was not time wasted as an accompanied site visit was required; undertaking such a visit on Wednesday afternoon was therefore a legitimate and productive use of inquiry time.
14. The point made by Mr Ward is that his client will face a bill for his time which would be greater than it otherwise would have been if the inquiry had been concluded earlier; there was no requirement for Mr Ward to attend the site visit which could have taken place on Thursday afternoon and not on the Wednesday. The Council had therefore been put to additional, unnecessary expense for which it sought recompense.
15. Although the objectors had suggested that the third day of the inquiry could have commenced earlier, starting earlier on the Thursday would not have regained the 1 hour and 45 minutes on the Wednesday which were lost to adjournments. The Council's claim is that it has been put to additional expense in retaining Mr Ward's services over and above what would have otherwise been necessary. The Council's case is that this was the result of the objectors claiming to have not been sufficiently prepared by the second day of the inquiry and requesting additional time.
16. As noted above, the start date for the order had given the parties 22 weeks' notice of the inquiry. Neither of the objectors indicated at the opening of the inquiry that they required additional time, and this matter was not raised until the morning of the second day. I consider that 22 weeks' notice to be adequate time in which the parties could get their tackle in order prior to the inquiry. Given that both parties had submitted their statements of case and proofs of evidence in accordance with the timetable set out in the Notice of Order, to all intents and purposes, the objectors were fully prepared for the inquiry by the

time it opened. To claim otherwise at the beginning of the second day was therefore unreasonable.

17. Although the duration of the inquiry had been estimated at four days, that was only an estimate and it is in the interests of all parties to expedite matters as quickly as possible without unduly fettering any party in the way they seek to present their case. Although the objectors were content for the inquiry to run for a full three days, my analysis above suggests that had the objectors cases been heard partly on the second day and partly on the third day, the inquiry would have been concluded by 15:00 on the third day and not at 17:00 as occurred. In requesting additional preparation time prior to presenting their cases, the objectors unduly prolonged the inquiry by 2 hours and put the Council to unnecessary expense.
18. I find that the objectors request for additional preparation time during the course of the inquiry was unreasonable which resulted in the Council incurring unnecessary expense during the course of the inquiry.

Conclusions

19. For these reasons I conclude that unreasonable behaviour resulting in unnecessary expense has been demonstrated.

Formal Decision and Costs Order for the Council of the Royal Borough of Windsor and Maidenhead

20. 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 powers enabling me in that behalf, I HEREBY ORDER that Mr Michael Kenneth Busbridge, Director of Worby Estate Sales Limited of 58 Baring Road, Beaconsfield, Buckinghamshire HP9 2NE and Mr Frank McDonagh of 12 Hill Bottom Close, Whitchurch Hill, Reading, Berkshire RG8 7PX will pay to the Council of the Royal Borough of Windsor and Maidenhead, the costs of the order inquiry which commenced on 1 May 2018 limited to the costs of two hours of Mr Ward's time; such costs to be assessed in the Senior Courts Costs Office if not agreed. The proceedings concerned the orders detailed above.

Alan Beckett

Inspector