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| **Costs Decision** |
| Inquiry opened on 2 November 2021 |
| **by Sue Arnott fiprow** |
| **an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 5 September 2022** |

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| |  | | --- | | **Costs application in relation to Order ref: ROW/3253077** | | * 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 Network Rail (Infrastructure) Ltd for a partial award of costs against Mr N Thorne. | | * The inquiry was held in connection with the Cumbria County Council (Unrecorded Footpath at Bailey Lane Parish of Grange over Sands) Public Path Diversion and Definitive Map and Statement Modification Order 2019. | | **Summary of Decision: That the application for an award of costs be dismissed.** | |

Submissions by Mr Lopez on behalf of Network Rail (Infrastructure) Ltd

1. The application was made orally before the close of the inquiry on 13 January 2022 by Mr Lopez on behalf of the applicant for the Order, Network Rail (Infrastructure) Ltd (NR). It was submitted in the context of protecting public funds, with a degree of reticence and only because NR considered the circumstances of the unreasonable behaviour to be exceptional in terms of wasting public resources.
2. Mr Lopez submitted that Mr Thorne had behaved unreasonably insofar as he chose to make and maintain a misconceived legal argument throughout the inquiry, despite being invited several times to withdraw his proposition. As a consequence, his client NR had been required to expend resources unnecessarily so as to address NT’s spurious argument.
3. In his statement of case NT criticised the Order, arguing that it was not capable of confirmation as a diversion since the whole of the proposed new route is already used by the public as of right (although not recorded on the definitive map). On the basis of the judgement in the case of *R v Lake District Special Planning Board, ex parte Bernstein*, The Times, February 3 [1982] (*Bernstein*), he had submitted that a public path cannot be diverted wholly onto another existing right of way and that any such a proposal would effectively constitute an extinguishment.
4. On the first day of the inquiry NR made clear that it viewed the *Bernstein* argument as misconceived and warned Mr Thorne that consequential matters might follow if the proposition was maintained.
5. The Inspector made clear that (a) she did not have the capacity to make decisive findings as to the existence of a public right of way over any part of the diversionary route, and (b) Mr Thorne could use the inquiry window to review his position and communicate this to the inquiry.
6. NT declined to re-consider his position on this matter and therefore it remained live throughout the inquiry and needed to be addressed by NR, but as a would-be prejudiced party.
7. Government Guidance offers examples of the type of behaviour that may give rise to an award of costs in the Planning Practice Guidance (PPG) Section 16. These may be procedural or substantive. By analogy, examples (in paragraph 52) that are applicable here include:

* *Resistance to, or lack of co-operation with, the other party or parties in providing information, discussing the application or appeal, or in responding to a planning contravention notice*
* *prolonging the proceedings by introducing a new ground of appeal or issue*
* *providing information that is shown to be manifestly inaccurate or untrue*
* *withdrawal of an appeal without good reason.*

1. Further, paragraph 54 confirms that an award of costs may be made “*if the appeal is withdrawn without good reason. Appellants are encouraged to withdraw their appeal at the earliest opportunity if there is good reason to do so, for example, as soon as they become aware that it stands little prospect of success*.”
2. Other examples appear in Defra Circular 1/09v2:

* *Withdrawing an objection at the ’last minute’, resulting in late cancellation of an inquiry or hearing arranged after the objector(s) asked to be heard.*
* *Pursuing an objection that the Secretary of State has advised, in writing, is not legally relevant*.

1. Mr Thorne did not in any way amend his statement of case or proof of evidence, or to signal in any way that he would be abandoning his *Bernstein* argument, despite the continued, repeated and courteous invitations to do so by NR during the first week, during the adjournment and once the inquiry resumed.
2. Unreasonable behaviour in the case relates to:
3. Mr Thorne raising this thoroughly misconceived (legal) argument, both substantively (as neither all nor part of the diversionary route is rationally capable of being argued to amount to a public right of way), and procedurally (as, in any event, the Inspector and NR were correct to proceed on the basis that the Inspector has no locus to make a finding on the status of the alternative route as a platform for the *Bernstein* proposition).
4. Mr Thorne maintaining his legal argument and failing to make his position clear as regards his ‘*Bernstein’* argument until 12 January 2022 (the 6th day of the inquiry) when he wrote and disseminated a short statement.
5. Even after this additional statement was submitted, Mr Thorne did not withdraw the relevant paragraphs of his statement of case (1.17 and 1.18). This did not occur until his oral address to the Inspector towards the end of the proceedings and only when others were proactive in seeking his final position on Inquiry Day 6.
6. Although Mr Thorne had every right to make a legal argument, he cannot then claim to not appreciate the consequences and hide behind a shield by suggesting he ‘lacks legal expertise’ or legal assistance. That is an incoherent and untenable position when he is an officer of a public authority of outwardly much experience in the field of public rights of way. With the argument still in play, other parties we required to respond.
7. In attending to NT’s *Bernstein* proposition, NR was required to research evidence of ownership, mapping and archived site records, to examine the issue of claimed usage ‘by right’, and to spend inquiry time addressing the matter.
8. In these particular, exceptional, circumstances, it is submitted that a partial award of costs in respect of abortive work undertaken by NR, and abortive costs unnecessarily incurred, directly caused by NT introducing and maintaining the *Bernstein* proposition, is fully justified. There has been unreasonable behaviour, direct causation of loss, and abortive expense from public funds.

**The response by Mr Thorne**

1. In response to Mr Lopez’ assertion that his behaviour had been unreasonable, Mr Thorne submitted that there was absolutely no basis for the claim.
2. He had legitimately raised the point about the status of the alternative route in his statement of case and referred to the ‘*Bernstein’* judgement in support of his position.
3. He contended that NR’s main issue with this was the impact it might have on the Inspector’s ability to confirm the Order, referred to by Mr Lopez as ‘procedural entanglement’.
4. However, at the start of the inquiry proceedings, the Inspector noted that the relevance of *Bernstein* was a valid submission, even though she made clear she would be unable to make a finding on the status of any part of the route at issue. Mr Thorne fully accepted that position and understood that to be the end of the matter.
5. He argued that he could not be considered to have acted unreasonably by making a submission in his statement which the Inspector considered to be valid and relevant. In any event, the question of the status of the alternative route being proposed could have been addressed by NR and CCC in the four years prior to the inquiry. The point was raised by Mr Thorne in his objection to the proposed diversion in 2017 so it could, and should, have been dealt with long before this inquiry. Yet it was only days before the inquiry was opened that NR responded to the point in any way, possibly prompted by the Inspector raising it at the pre-inquiry meeting.
6. Furthermore, CCC made this diversion order over a route for which (in part) they have held for 9 years an application for a definitive map modification order and over a route which they knew was alleged to be a public path.
7. It is perfectly proper that the status of the alternative route should have been discussed at an inquiry of this nature. However, because of the doubt over sections of the route, it is also perfectly proper that the Inspector should advise that it would be impossible to make a finding without a full definitive map modification order process. That does not make the matter irrelevant or require the point to be withdrawn.
8. Mr Thorne also strongly rejects the accusation that he created additional work for NR through late submissions. He had submitted both his full statement of case and proof of evidence on time and in accordance with the statutory timetable.
9. At the pre-inquiry meeting, and as provided by Section 18 of the Rights of Way (Hearings and Inquiries Procedure)(England) Rules 2007, the Inspector had asked for information about the status of the present and proposed routes.
10. In addition to providing to CCC relevant material in relation to the modification order application (which it should have already held), Mr Thorne had offered to discuss with CCC a statement of common ground in relation to the interpretation of that evidence, yet there was no positive response.
11. Subsequently NR had submitted that land ownership and the status of the alternative route were not relevant factors for the Inspector to consider and invited Mr Thorne to explain the relevance of the material provided. NR cannot now criticise his explanation as being a late submission when it had been specifically invited by them.
12. Mr Thorne now accepts he probably provided more information that was strictly necessary to answer the Inspector’s questions but at the time thought he was being helpful. He would not have submitted it at all had he not been asked to do so.
13. The only ‘new’ information he submitted was an email containing two photographs from 2010 and 2017 showing the underpass. This was in response to questions from the Inspector concerning the position of the signs which had been in place there. Mr Thorne drew attention to the 9 documents NR submitted after the start of the inquiry.
14. In response to NR’s claim that extra costs were incurred in researching evidence of ownership, mapping and archived site records, and examining the issue of claimed usage, all of this research should have been done by NR even before it submitted its statement of case. The *Bernstein* issue has relevance, and the point was not misconceived. No additional resources have actually been expended by NR – it is work that was required regardless.
15. In reply to Mr Lopez’ assertion that he refused to withdraw his submission on the *Bernstein* point when requested to do so by NR, Mr Thorne argued that even if the issue were wholly irrelevant, there is no requirement at all, in any procedural notes, rules, or guidance, for a party to have to effectively re-write their original statement. Mr Lopez had acknowledged that NR clearly understood that the Inspector had ‘closed the door’ on the status issue on the first morning of the inquiry. Mr Thorne had also accepted this as soon as the Inspector had explained that she could not make a determination on the status of the alternative route and did not raise the argument again at the inquiry to any substantive degree. However, this did not mean he no longer believed that it was already a public right of way, yet Mr Lopez wanted him to withdraw paragraphs from his statement of case, many of which were purely factual, but which only NR deemed to be irrelevant.
16. All inquiries have elements which eventually turn out not to be wholly relevant. Ultimately that is a matter for the Inspector to decide, not necessarily for the parties to precipitate by withdrawing parts of their case. Mr Thorne submitted it was not unreasonable to take the position he did in relation the *Bernstein* argument within his statement of case.
17. Mr Lopez’ approach to questioning had been to use legalese, prefaced with a threat of costs, rather than using simple easily understood language. Mr Thorne explained he was not legally trained and was initially confused by Mr Lopez’ request. It was irrational for him to be badgered and threatened with ‘consequences’ to force him to do something which wasn’t actually necessary.
18. Mr Thorne did not request the inquiry. He himself did not spend a significant amount of inquiry time pursuing the *Bernstein* issue. NR had not approached him with any attempt to agree common ground in relation to the matter. In any event, research into the status of the alternative route should have been addressed by NR and CCC long before the inquiry. Even if the *Bernstein* point is judged to be irrelevant, it was not unreasonable to raise it and there was no requirement for him to formally withdraw this one element of his objection.
19. In Mr Thorne’s submission, there is no basis for an award of costs.

Inspector’s Comments

1. I held an inquiry into the Order in question over a total of 7 days: 2-5 November 2021 and 11-13 January 2022 with a short pre-inquiry meeting held (virtually) on 19 October 2021. The application for a partial award of costs against Mr Thorne was made on the final day of the inquiry by Mr Lopez on behalf of NR.
2. Department for Environment, Food and Rural Affairs Rights of Way Circular 1/09 Version 2 (October 2009) and the relevant Planning Practice Guidance advise that costs may be awarded against a party who has behaved unreasonably and thereby directly caused the party applying for costs to incur unnecessary or wasted expense in this process.
3. In both sources of guidance, the principles of costs applications and awards, and the examples given, are applicable, by analogy, to rights of way cases. A claim may relate to the substance of the Order and/or to procedural matters.
4. In terms of substantive grounds, NR submits that no part of the alternative (diversionary) route is rationally capable of being argued to amount to a public right of way. I reject that assertion.
5. I stated several times that the determination of an order of this type does not facilitate a detailed examination of the status of any part of the way at issue. That is essentially a matter for the surveying authority, particularly in this case where CCC is still to determine the definitive map modification application made in relation to the promenade. Nevertheless, no unassailable evidence was put before this inquiry that would render any part of the alternative route incapable of being reasonably alleged to be a public path.
6. As regards procedural matters, NR contends that it was not until 12 January that NT produced a written statement clarifying his position in relation to his ‘*Bernstein’* argument, and that until this point, paragraphs 1.17 and 1.18 of his statement of case had remained live matters to which NR had to respond.
7. Understandably NR considered it necessary to address the point. However, I consider Mr Thorne to have made his position sufficiently clear at an early stage in the proceedings. He did not withdraw his contention that the alternative route was already a public right of way, but in my view it was not necessary that he did so. He stated that he did not intend to pursue the point given my advice that it was not my role to adjudicate on the question of status.
8. Either Cumbria County Council (the order-making authority), or the applicant (NR) on its behalf, would have been required to investigate the question of ownership of the land crossed by the alternative route before making the Order, not least so as to satisfy the statutory requirements for the service of notice. CCC were already in possession of an application for a definitive map modification order for part of the route and the evidence to support it. It can have been no surprise to NR that the point arose in relation to this Order when the *Bernstein* issue had been raised by Mr Thorne prior to the Order being made although it appears not to have been addressed until the inquiry.
9. Mr Lopez draws an analogy between two of the examples in Defra Circular 1/09 and four that are listed in Section 16 of the PPG. I will consider each one in turn.

*Pursuing an objection that the Secretary of State has advised, in writing, is not legally relevant*

1. Although I made clear, both before and at the inquiry, that I would not be in a position to make a determination on the status of either the Order route or the proposed alternative, I did not state, in writing or otherwise, that the matter *was not legally relevant*. The legislation under which this Order was made requires that the decision-maker takes into consideration *“all the circumstances*”.

*Withdrawing an objection at the ’last minute’, resulting in late cancellation of an inquiry or hearing arranged after the objector(s) asked to be heard.*

1. The inquiry was not cancelled. Inquiry time was indeed spent on dealing with the ‘*Bernstein’* issue, primarily through Mr Lopez’ cross-examination of Mr Thorne. Mr Thorne himself has stated that he did not specifically withdraw the two paragraphs of his statement referring to the ‘*Bernstein’* point although NR had a different interpretation of his responses. As I have noted above, I considered Mr Thorne to have made his position sufficiently clear at an early stage in the proceedings.

*Resistance to, or lack of co-operation with the other party or parties in providing information, discussing the application or appeal, or in responding to a planning contravention notice*

1. Despite being asked numerous times during the inquiry, Mr Thorne declined to formally withdraw the two key paragraphs of his statement as requested by NR. In my view, he was not required to do so. He made clear his view but, responding to my advice, he did not actively pursue the point and little inquiry time was taken by it other than when raised by NR.

*Prolonging the proceedings by introducing a new ground of appeal or issue*

1. I do not consider this to be a relevant ground in this case. No ‘new’ information was introduced other than to clarify matters that arose during the inquiry and no new grounds for objection were introduced.

*Providing information that is shown to be manifestly inaccurate or untrue*

1. None of the information provided by Mr Thorne as his own evidence has been shown to be manifestly inaccurate or untrue. He made submissions with which NR profoundly disagreed, but he was entitled to make those submissions.

*Withdrawal of an appeal without good reason*

1. Mr Lopez construed Mr Thorne’s response to a question put to him towards the end of the inquiry as having stated that he had finally abandoned, vacated or withdrawn his *Bernstein* proposition. Mr Thorne himself clarified his position as being somewhat different. My understand of his position was not that he had withdrawn the argument but had accepted the issue could not be resolved through these proceedings and had decided not to actively pursue it.
2. In conclusion, having considered the types of behaviour identified in Circular 1/09 v2 and PPN 16 that might justify an award of costs, I consider there to be nothing unreasonable about the actions of Mr Thorne in relation to the Order or the inquiry. Whilst I recognise that NR incurred expense in addressing land ownership issues and the status of the paths in question, I do not agree that this work was unnecessary.
3. In these circumstances, and on the information available, it is my conclusion that a partial award of costs would not be justified in this case.

Recommendation

1. I recommend the application for a partial award of costs is dismissed.

Sue Arnott

**Inspector**