
Appeal Reference:	2023/E0025
Appeal against:	Enforcement notice alleging unauthorised construction of retaining wall and timber fencing adjacent to a watercourse
Location:	13C Cloghs Road, Cushendall, BT44 OSP
Claim by:	Mr. John Eugene McAuley
Claim against:	Causeway Coast and Glens Borough Council
Decision by:	Commissioner Trudy Harbinson, dated 5 th June 2024.

Decision

1. A partial award of costs is allowed.

Reasoning

2. In accordance with the Commission's publication 'Costs Awards Guidance', costs will normally only be awarded where all four of the following conditions are met:
 - the claim relates to a relevant type of appeal;
 - the claim is timely;
 - the party against whom the award is sought has acted unreasonably; and
 - the unreasonable behaviour has caused the party claiming costs to incur unnecessary or wasted expense.

Eligibility

3. An appeal against an enforcement notice (EN) was made in accordance with section 143 of the Planning Act (NI) 2011 (the Act). The Commission therefore has the power to make an order as to the costs of parties in accordance with sections 205 and 206 of the Planning Act.

Timeliness

4. Paragraph 20 of the Costs Awards Guidance states that where an appeal is withdrawn, or a hearing was arranged but did not take place, any costs claim must be submitted in writing to reach the Commission no later than 10 working days after the date on which the Commission sent notification to the claiming party that the appeal had been withdrawn or the hearing cancelled. The Council withdrew the EN on April 15th 2024 and the hearing scheduled to take place the following day was cancelled. The Commission received the Appellant's claim for costs on 18th April 2024. Accordingly, the claim for costs was made in a timely manner.

Unreasonable Behaviour

5. Paragraph 13 of the Costs Awards Guidance states that unreasonable behaviour can be substantive (relating to the essence of a party's case) or procedural (relating to how a party pursued its case). The claimant refers to both. With respect to procedural they reference the failure by the respondent to submit a Statement of Case prior to the Commission's deadline and to the withdrawal of the EN on the afternoon prior to the hearing. With respect to substantive they consider that the Council failed to carry out any due diligence before serving the EN.
6. Paragraph 10 of the Costs Awards Guidance states that cost awards will encourage all those involved in the appeals process to behave in a responsible, cost conscious manner and to follow good practice by carefully assessing at the outset whether they have a reasonable prospect of success, reacting in a timely fashion to changing circumstances and presenting credible evidence to support their case.
7. Paragraph 14 of the guidance sets out examples of behaviour which may be found to be unreasonable. It states that one of these, the withdrawal of an appeal by the appellant or of an enforcement or similar notice by the planning authority, resulting in the entire proceedings being abandoned, may be judged to be unreasonable, unless it was prompted by a significant change in circumstances which was outside the control of the party concerned.
8. The claimant points to an aerial photograph of the appeal site dated 5th April 2018 on a website 'Wayback When' which they state showed the retaining wall complete and immune from enforcement. They also consider that there was a failure by the Council to check planning permissions on the appeal site which they state would have indicated that a proportion of the retaining wall had planning permission and was within the red line of various permissions on site.
9. The Council state that an administrative oversight resulted in their failure to submit a Statement of Case and that whilst they acknowledge it is good practice to do so, it is not compelled to do so, and that they could have elaborated on their position at the hearing. They state that they withdrew the EN having reviewed the grounds of appeal in advance of the hearing. They considered that on the grounds of probability the retaining wall was immune from enforcement (and hence lawful) by the date of the EN and that the timber fencing, if not also immune, would be mostly permitted development. They say that to have continued with the hearing would have been unreasonable behaviour.
10. Whilst I appreciate that parties will review information in advance of a hearing in this particular case the Council has failed to indicate if there has been any change in circumstances between the investigations that they had undertaken at the time of the EN being served and those undertaken on the day prior to the hearing. Whilst the respondent is not compelled to submit a Statement of Case, its absence is unhelpful and further compounds the lack of any detail on what information was before the Council at the time the decision to serve the EN was taken. Given the repercussions on the claimant of being served an EN I find the failure of the Council to fully engage and provide a Statement of Case which set out clearly for the Appellant the reasons as to why the EN had been served represented unreasonable behaviour.

11. The Council rightly withdrew the EN in advance of the hearing rather than participate in an appeal where it would have known there was no prospect of success. However I have not been presented with any information that the EN was withdrawn as a result of a significant change in circumstances outside of the Council's control. As such I find that the withdrawal of the EN by the Council resulting in the entire proceedings being abandoned amounts to unreasonable behaviour on the part of the Council.

Unnecessary Expenses

12. In claiming for an award of costs, the claimant provided a list of expenses incurred in preparation for the hearing: -

- Professional consideration of the Enforcement Notice and prospects of success at planning enforcement notice appeal;
- Preparation and submission of an unnecessary appeal;
- Submission of PAC planning appeal fee;
- Employment of an architect to prepare drawings and source previous drawings of the retaining wall;
- Employment of a Solicitor to advise on legal implications of the Enforcement Notice;
- Preparation and submission of Statement of Case; and
- Withdrawal of the Enforcement Notice on the afternoon before the scheduled hearing ensured it was too late to schedule other meetings within that time frame.

13. Paragraph 21 of the Commission's Costs Awards Guidance states that a claim for costs needs to provide all the information listed within Annex 2 which includes the nature of the expenses and the reasons why those expenses were originally incurred.

14. The Claimant does not explain why they employed an architect to prepare and source drawings. Drawings of the wall were not necessary for the enforcement appeal given that the wall subject to the EN was in situ. I am not persuaded that it was reasonable to have incurred that expense and that it has occurred as a result of the respondent's unreasonable behaviour.

15. Whilst the Claimant may have secured the availability of professional advisors for the day of the hearing, the late notice of the withdrawal of the EN and cancellation of the hearing, would not have precluded them from undertaking other work on that day given their attendance was no longer required.

16. I do not agree that the unreasonable behaviour of the respondent necessarily incurred the expenses of the architect, nor would it have prevented other work being undertaken in lieu of attendance at the hearing. However, given my reasoning above, with respect to the lack of any evidence as to any significant change in circumstances outside of the Council's control, I agree that the unreasonable behaviour did result in the remaining unnecessary expenses.

Order

It is hereby ordered that Causeway Coast and Glens Borough Council shall pay to Mr John Eugene McAuley the partial costs of the appeal proceedings incurred in:

- Professional consideration of the Enforcement Notice and prospects of success at planning enforcement notice appeal;
- Preparation and submission of appeal;
- Submission of PAC planning appeal fee;
- Employment of a Solicitor to advise on legal implications of the Enforcement Notice; and
- Preparation and submission of Statement of Case.

On receipt of this order Mr John Eugene McAuley may submit details of those costs to Causeway Coast and Glens Borough Council with a view to reaching agreement on the amount. If the parties are unable to agree, the claimant may refer the matter to the Taxing Master of the High Court for a detailed assessment.

COMMISSIONER TRUDY HARBINSON

List of Documents

Claimant: Costs claim (MKA Planning)

Respondent: Response to Costs Claim (Causeway Coast and Glens Borough Council)