Neutral Citation Number: [2024] UKUT 303 (LC)

Case No: LC-2023-148

IN THE UPPER TRIBUNAL (LANDS CHAMBER)
IN THE MATTER OF AN APPEAL UNDER
SECTION 18 OF THE LAND COMPENSATION ACT 1961

Royal Courts of Justice
24 October 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

COMPENSATION - COSTS – Certificate of Appropriate Alternative Development – Tribunal cancelling Authority's 'nil' certificate and substituting positive certificate – Respondent claiming its costs – whether Appellant the successful party – whether conduct justified award of costs in Respondent's favour - rule10(6)(aa), Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010

BETWEEN:

MR MOHAMMED BASHIR

Appellant

-and-

THE LONDON BOROUGH OF NEWHAM

Respondent

117, 119-121 High Street
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DECISION ON WRITTEN REPRESENTATIONS

Her Honour Judge Alice Robinson and Mr Peter D McCrea OBE FRICS FCIArb

James Pereira KC and *Mark O'Brien O'Reilly*, instructed by Holmes & Hill LLP for the appellant
Neil Cameron KC and Nick Grant, instructed by DLA Piper LLP for the respondent

The following cases are referred to in this decision:

Bashir v London Borough of Newham [2024] UKUT 00146 (LC)

Leech Homes Limited v Northumberland County Council [2021] EWCA Civ 198

Pigot v The Environment Agency [2020] 1444 (Ch)

R. (Viridor Waste Management Limited) v Commissioners for HM Revenue and Customs [2016] EWHC 2502 (Admin)

Summit Property Limited v Pitmans [2001] EWCA Civ 2020

Introduction

1. On 5 June 2024, the Tribunal published its decision (*Bashir v London Borough of Newham* [2024] UKUT 00146 (LC)) in respect of Mr Bashir's appeal against the 'nil' certificate issued by the London Borough of Newham ('Newham') under section 18 of the Land Compensation Act 1961, in which we cancelled Newham's certificate and determined the broad extent of appropriate alternative development. We shall call that our substantive decision. Following further written submissions, on 15 July 2024 we issued an alternative Certificate ('the Tribunal's CAAD'), in which we certified that 8,214 sqm of mixed-use development would be appropriate alternative development.

2. We have also now received the parties' submissions on costs. This is the first time the Tribunal has been asked to determine costs under rule10(6)(aa) of the Tribunal's Procedure Rules, which were amended following the decision of the Court of Appeal in *Leech Homes Limited v Northumberland County Council* [2021] EWCA Civ 198.

Statutory Provisions

3. As regards Mr Bashir's costs, section 17(10) of the 1961 Act provides that:

> "In assessing any compensation payable to any person in respect of any compulsory acquisition, there must be taken into account any expenses reasonably incurred by the person in connection with the issue of a certificate under this section (including expenses incurred in connection with an appeal under section 18 where any of the issues are determined in the person's favour)."

4. Consequently, as the Tribunal's 2024 Practice Directions explain at paragraph 13.7, costs reasonably incurred by the appellant in an appeal under s.18 (assuming the appellant is the party claiming compensation) are taken into account at the point the Tribunal assesses the amount of compensation payable to them in respect of the compulsory acquisition of their land. Accordingly, it is not Mr Bashir's costs that are in issue before us, at least for the moment, and Newham reserves its position on that point. What is disputed is whether Newham should recover any of <u>its</u> costs of Mr Bashir's appeal against Newham's 'nil' certificate.

5. Section 29 of the Tribunals, Courts and Enforcement Act 2007 provides:

> "29(1) The costs of and incidental to –
>
> …
>
> (b) all proceedings in the Upper Tribunal,
>
> shall be in the discretion of the Tribunal in which the proceedings take place.
>
> (2) The relevant Tribunal shall have full power to determine by whom and to what extent the costs are to be paid.
>
> (3) Subsections (1) and (2) have effect subject to Tribunal Procedure Rules."

6. The relevant Tribunal Procedure Rules, to which the powers in section 29 are made subject, are the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 ("the Rules") rule 2(1) of which states that:

> "[the] overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly".

7. Rule 2(3) requires the Tribunal to:

> "give effect to the overriding objective when it …
>
> (a) exercises any power under these Rules …"

8. As amended, Rule 10 provides, so far as relevant:

> "Orders for costs
>
> 10. – (1) The Tribunal may make an order for costs on an application or on its own initiative.
>
> (2) Any order under paragraph (1) –
>
> (a) may only be made in accordance with the conditions or in the circumstances referred to in paragraphs (3) to (6);
>
> …
>
> (3) The Tribunal may in any proceedings make an order for costs –
>
> (a) under section 29(4) of the 2007 Act (wasted costs) and for costs incurred in applying for an order for such costs;
>
> (b) if the Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings;
>
> (c) in the circumstances to which paragraph (14) refers.
>
> …
>
> (6) The Tribunal may make an order for costs in proceedings –
>
> …
>
> (aa) under section 18 of the [Land Compensation Act 1961];
>
> …
>
> (8) In proceedings to which paragraph (6) applies, the Tribunal must have regard to the size and nature of the matters in dispute.
>
> …"

The parties' positions

9. For Newham, Mr Cameron KC and Mr Grant submit that overall, it has been the successful party to the appeal. It claims its costs of the appeal, under three broad heads of claim:

a) All costs incurred by Newham from 16 November 2023, being the date it amended its statement of case to allow for some AAD – to which we referred [para 34] in the substantive decision as 'Newham's version'.

b) In the alternative, Newham claims its costs, again from 16 November 2023, incurred contesting the issues of land use, tall building, height and scale, harm to heritage assets, enhancement to the local environment and landscape, planning balance, and s.106 contributions.

c) Thirdly, and in any event, Newham seeks its costs arising from dealing with the tallest tower element of 58m above ground where Mr Bashir had decided to reduce that height but had not clearly told Newham.

10. Mr Bashir's position is that the Tribunal should make no order for the Respondent's costs, and that his costs should be addressed in due course under s.17(10) of the 1961 Act.

11. Mr Pereira KC and Mr O'Brien O'Reilly submit that there is a general caution against issues-based awards of costs, which are far from routine, and there is a need to step back and consider the justice of the situation. There is an important distinction to be drawn between an order that deprives a party of its costs on an issue, and an order that goes further and requires that party to pay the other side's costs of the issue.

12. They submit that while we must have regard to the case law on costs discretion generally, regard must be had the context of these proceedings, which is that the claimant has been put to expense by his land being compulsorily acquired, and by a negative CAAD being issued. Parliament has conferred a right upon a landowner to claim costs as disturbance expenses under s.17(10). Different principles apply to disturbance expenses to those applicable to inter-partes general litigation costs.

13. Landowners, they submit, are not blessed with a foresight that enables them to predict the Tribunal's decision. Planning issues are notoriously judgment-laden and prone to disagreement. That is particularly so in cases such as these where the cancellation assumption and the need for judgments to be pinned to a past valuation date makes assessment even more challenging and prone to uncertainty. And while claimants for compensation are entitled as a matter of principle to press for the full market value of their land, they undertake huge cost risk in simply meeting their own expenses of doing so while acting against a public authority of superior resources which in many cases (and this is one) will have the additional security of an agreement with the developer of the scheme which underwrites the authority's expenses.

14. They submit that our approach to costs should acknowledge these points, and that we should be slow to make costs decisions which could have a chilling effect on a claimant's ability to seek full compensation. Claimants, they submit, face considerable resource imbalance and cost hurdles already.

Discussion

15. In conventional proceedings in any[1] of the other categories in rule 10(6), costs ordinarily would follow the event, with the successful party being entitled to receive their costs unless there was some reason for the Tribunal to make a different order. Our starting point

[1] Applications under s.84 of the Law of Property Act 1925 having a slightly different regime

is that Mr Bashir was the winning party, since until its change of position in November 2023, shortly before evidence was due to be submitted, Newham were offering nothing by way of AAD, and because as a result of our decision something approaching 90,000 sq ft of mixed-use development has been certified which was a more favourable outcome for Mr Bashir than Newham belatedly allowed for in its proposed certificate.

16. An application for costs by the unsuccessful party in proceedings is exceptional; in civil litigation the usual way in which a court would reflect the fact that the party who was unsuccessful overall had nevertheless succeeded on some issues would be by means of a reduction in the costs it was required to pay to the successful party; even then, such orders are not routinely made. If section 17(10) had not been enacted and we had been dealing with a conventional application by Mr Bashir for his costs, we would therefore have needed to consider whether Mr Bashir's entitlement to costs, as the successful party, should be reduced for any of the reasons that Newham now relies on in support of its own application.

17. But section 17(10) means that we are not required to determine Mr Bashir's entitlement to his costs at this stage. Nor does section 17(1) allow the compensation payable to a claimant whose land has been acquired to be reduced to reflect the fact that the compensating authority has had some success in a section 18 appeal. Someone whose land has been taken from them is entitled to be compensated in respect of "any expenses reasonably incurred" by them in connection with the issue of a certificate. If some part of Mr Bashir's costs were not reasonably incurred, he will not be entitled to recover them, and Newham have given no assurance that they will not seek to argue for a reduction in compensation on that basis. But neither have the parties asked us to defer consideration of Newham's costs application so that it can be dealt with at the same time as, or after, the compensation issues. So it is necessary for us to take the unusual step in this case of determining whether the unsuccessful party, Newham, should receive some of its costs from the successful party, Mr Bashir.

The height of the tall tower being reduced

18. We can deal first and relatively shortly with Mr Cameron and Mr Grant's third submission – the discrete point of Newham's costs arising from dealing with the tallest tower element of 58m above ground where Mr Bashir had decided to reduce that height but had not clearly told Newham.

19. The decision to reduce the height of the taller building from 58m to 52m so as to avoid generating potential heritage harm to the Three Mills Conservation Area and the listed Tide Mill, was not communicated until 8 December 2023 – when expert reports were exchanged. Dr Miele's work in dealing with these impacts was wasted. On that aspect, had we been dealing with a conventional costs application by Mr Bashir we would have made some reduction in the amount of costs he was entitled to recover to reflect the fact that the failure of his advisors to communicate a significant change in their case to Newham's team resulted in wasted expenditure in their preparations to meet a case which was no longer being advanced. In our judgment it is appropriate that Mr Bashir shall make a contribution towards Newham's costs of Dr Miele dealing with the Heritage Harm to the Three Mills Conservation Area and the listed Tide Mill. In order to avoid complicated argument about how much those costs should be, we will assume that they represented 20% of the costs of Dr Miele's evidence. We are satisfied that these costs can be isolated and were demonstrably incurred needlessly.

20. We should make it clear, however, that we should not be taken to have decided that some part of the costs incurred by Mr Bashir in preparing his original case was not "reasonably incurred" for the purpose of section 17(10). We have not considered that question and the recoupment of part of the cost of Dr Miele's work is because of the failure to communicate, not because we have decided that it was unreasonable to advance a case for a higher building from the outset.

Newham's claim for all its costs from November 2023

21. We have little difficulty in rejecting Newham's first submission, claiming all of its costs from 16 November 2023. For the reasons we have already given in paragraph 15 above, Newham was not the successful party.

Newham's claim for an issues-based order from November 2023

22. Newham's second submission, claiming in the alternative some of its costs on an issues basis from that date, requires more nuanced consideration.

23. Both sides claim a degree of success, taking different parts of our decision in support of their submissions. On the one hand, as we have said, Mr Bashir has succeeded in being granted a substantive CAAD, where Newham's position was initially to offer nothing, but he had to litigate to secure it. Our certificate provided higher buildings than Newham, on its revised position, was prepared to grant, and of a greater floor area. And we agreed with Mr Bashir as regards the all-movements junction.

24. But as Mr Cameron and Mr Grant submit, our AAD was similar to Newham's version in many ways, in that it featured Newham's floorplates and in separate blocks and was a variation of Newham's blocks A1, A2 and A3. Newham also claim success on the issues of land use; on whether the notional scheme or the options were a 'tall building'; on whether they would have complied with policy BN.10 or other design policies; on the harm to heritage assets; on whether there would have been enhancement to townscape and benefit to the local economy and employment; and the overall planning balance. They submit that Newham should receive its costs of contesting the issues on which it was predominantly successful.

25. The Tribunal's discretion under Rule 10(6)(aa) must be exercised in the light of case law on costs discretions generally. CPR Rule 44.2 provides that the court may make a different order from the general rule that the unsuccessful party will be ordered to pay the costs of the successful party, and in deciding what order, if any, to make, the court will have regard to all the circumstances including whether a party has succeeded on part of its case, even if not wholly successful. Such a different order might include requiring a party to pay costs 'relating only to a distinct part of the proceedings' (r.44.2(6)(f)).

26. Mr Pereira and Mr O'Brien O'Reilly relied on the High Court's decision in *Pigot v The Environment Agency* [2020] 1444 (Ch), in which the Deputy High Court Judge, Stephen Jourdan QC, having considered the numerous authorities summarised the principles of whether to make an issues-based costs order as follows [6]:

"(1) The mere fact that the successful party was not successful on every issue does not, of itself, justify an issue-based cost order. In any litigation, there are likely to be issues which involve reviewing the same, or overlapping, sets of facts, and where it is therefore difficult to disentangle the costs of one issue from another. The mere fact that the successful party has lost on one or more issues does not by itself normally make it appropriate to deprive them of their costs.

(2) Such an order may be appropriate if there is a discrete or distinct issue, the raising of which caused additional costs to be incurred. Such an order may also be appropriate if the overall costs were materially increased by the unreasonable raising of one or more issues on which the successful party failed.

(3) Where there is a discrete issue which caused additional costs to be incurred, if the issue was raised reasonably, the successful party is likely to be deprived of its costs of the issue. If the issue was raised unreasonably, the successful party is likely also to be ordered to pay the costs of the issue incurred by the unsuccessful party. An issue may be treated as having been raised unreasonably if it is hopeless and ought never to have been pursued.

(4) Where an issue based costs order is appropriate, the court should attempt to reflect it by ordering payment of a proportion of the receiving party's costs if that is practicable.

(5) An issue based costs order should reflect the extent to which the costs were increased by the raising of the issue; costs which would have been incurred even if the issue had not been raised should be paid by the unsuccessful party.

(6) Before making an issue-based costs order, it is important to stand back and ask whether, applying the principles set out in CPR r.44.2, it is in all the circumstances of the case the right result. The aim must always be to make an order that reflects the overall justice of the case."

27. In response, Mr Cameron submitted that this is not a case in which Mr Bashir was unsuccessful on issues which involved the same, or overlapping, sets of facts, making it difficult to disentangle the costs of each; residential use was a distinct issue on which Mr Bashir lost, as was whether a residential tower above 50m would be acceptable. Mr Cameron submitted that in a CAAD case it is not appropriate to restrict awards to issues which it was unreasonable to take; alternatively, he submitted, it was unreasonable for Mr Bashir to put forward an application proposal for a tower of over 50m in a conservation area, and/or to put forward residential use in a designated Locally Significant Industrial Site. While we did not find in Mr Bashir's favour, we do not agree that it was unreasonable for him to advance those propositions.

28. Here, Newham as the unsuccessful party applies for its costs of part of the proceedings on some issues. As the White Book explains (para 44.2.10) (without our emphasis in bold):

"…in summary, the position is that, where a party successful overall has been unsuccessful on an issue (or issues), being an issue which that party raised,

> pursued or contested, a court (1) should consider adopting an issue-based approach and (2) in deciding what order to make in relation to that issue or issues may decide (a) that party should be deprived of his costs of that issue, or a proportion of those costs, or those costs from or until a certain date; or **even** (b) that that party should pay the costs of the otherwise unsuccessful party on that issue, or a proportion of those costs, or those costs from a certain date. Perhaps inevitably, given the width of the costs discretion and the enormous range of circumstances that may be relevant to its exercise, it is not easy to discern from the authorities clear guidance as to whether the case merits depriving the successful party of his costs of an issue, but does not merit taking the further step of making him pay the unsuccessful parties costs of that issue (*R. (Viridor Waste Management Limited) v Commissioners for HM Revenue and Customs* [2016] EWHC 2502 (Admin) (Nugee J) at [11])."

29. In *Summit Property Limited v Pitmans* [2001] EWCA Civ 2020, Longmore LJ said at [17]:

> "It is thus a matter of ordinary common sense that if it is appropriate to consider costs on an issue basis at all, it may be appropriate, **in a suitably exceptional case**, to make an order which not only deprives a successful party of his costs of a particular issue but also an order which requires him to pay the otherwise unsuccessful party's costs of that issue, without it being necessary for the court to decide that allegations have been made improperly or unreasonably."

30. The civil courts therefore recognise that there is a difference between reducing the amount of costs an otherwise successful party can claim (and in this decision upon which we express no view), and the more dramatic step of directing that the successful party will pay the otherwise unsuccessful party's costs on one or more issues. It follows from our emphasis in the above paragraphs that an order of that kind will only properly be made in "a suitably exceptional case".

31. In *Viridor*, Nugee J departed from the general rule, directing that HMRC, as the successful party in an application for judicial review, should recover 85% of its costs from the applicant, but that it was not appropriate to order HMRC to pay the claimant's costs of the issue upon with it failed:

> "19. The second question is whether I should go further and order HMRC to pay Viridor's costs of the cards face up issue. I have decided not to do so. I have not found that HMRC acted unreasonably in raising the issue. That, as I have said, does not preclude the court from going further, but in *Summit* Longmore LJ said at para 17 that it may be appropriate "in a suitably exceptional case" to make an order which not only deprives a successful party of his costs of a particular issue but also an order which requires him to pay the otherwise unsuccessful party's costs of that issue. That suggests that to make such an order is to be regarded as far from routine, and this case is not in my judgment a suitably exceptional one."

32. Mr Cameron submitted that in *Viridor*, Nugee J distinguished between cases where neither party had been wholly successful, and those where one party is wholly successful –

HMRC having been wholly successful in having the claim for judicial review dismissed [6]:

> '…the claimants have brought a claim which the defendants have succeeded in having dismissed. So far as the result is concerned, therefore, the defendants have been wholly successful and the claimants have achieved nothing—it is not a case of partial success for both sides but of complete success for the defendants.'

33. That could be contrasted with [5]:

> "…cases [that] are therefore mostly concerned with the difficult questions that can arise where neither party has been wholly successful, the claimant achieving something but losing on certain aspects of his case, and the defendant defeating parts of the claim but not all of it. That can lead both to questions as to which party is really to be regarded as the successful party (something which has been described as often in itself a contentious inquiry, and a surprisingly elusive process) and how to reflect in an order for costs the fact that both parties have had some measure of success."

34. The 'exceptional circumstances' test, Mr Cameron submitted, applied where a party had been wholly successful and here, he submitted, Mr Bashir had not. We do not think that is right – Mr Bashir achieved a substantial CAAD where Newham's position, before the appeal, was to offer nothing. Mr Bashir has not obtained as favourable a CAAD as he asked for, but what he has achieved has been more favourable than Newham was prepared to concede at any stage. There is no doubt in our minds about who is "really to be regarded as the successful party", notwithstanding that the certificate we have granted is for development less than Mr Bashir sought.

35. As the White Book, paragraph 44.2.10, notes, the courts recognise that in any litigation, especially complex commercial litigation any winning party is likely to fail on one or more issues in the case.

36. While we rejected Mr Bashir's case on land use, and on other issues, we are not persuaded that there is anything suitably exceptional about this appeal that would cause us to order Mr Bashir to pay a proportion of Newham's costs, aside from the discrete issue of Dr Miele's evidence prepared on the basis of the case that was up to that point being advanced by Mr Bashir.

37. In order to avoid protracted assessment of those costs at this stage, we order that 20% of the costs of Dr Miele's evidence shall be payable by Mr Bashir, to be taken into account at the stage of assessing compensation in accordance with s.17(10) of the 1961 Act.

Her Honour Judge Alice Robinson Mr Peter D McCrea OBE FRICS FCIArb

24 October 2024

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.