ID 012

PRINCES PARADE, HYTHE, KENT

Application proposing the stopping-up and diversion of part of the highway known as Princes Parade, Hythe, Kent: made by Folkestone & Hythe District Council to the Secretary of State for Transport

Town and Country Planning Act 1990, ss. 247 & 252

Ref: NATTRAN/SE/S247/3254

SAVE PRINCES PARADE'S RESPONSE TO THE APPLICANT'S WASTED COSTS APPLICATION

INTRODUCTION

1. This is the response and resistance of Save Princes Parade (or "SPP") to the written application made by Folkestone & Hythe District Council ("the Council") dated 10 October 2021, seeking a partial award of costs concerning two related alleged instances of procedural unreasonable behaviour said to have caused the Council to incur unnecessary costs.

2. The application is resisted on two grounds. First, with regard to jurisdiction and, secondly, on the merits.

3. SPP is a non-political community group of concerned, volunteer, local residents formed in 2012 to campaign to protect Princes Parade and the adjacent land on either side of the Royal Military Canal as public open space, saving it from being developed upon.

Its purpose has evolved over time, culminating in it being afforded main party status at the public local inquiry into the unresolved objections to the proposed Order.

THE BACKGROUND CONTEXT

4. Because the Secretary of State's costs jurisdiction affords considerable discretionary flexibility it is both necessary and important to appreciate the context when deciding whether SPP has behaved unreasonably causing wasted costs to be incurred and, if so, the party against whom an order should be made.

5. The Council's stopping-up and diversion Order application was made in 2018 before the planning permission existed. SPP – together with various statutory consultees and individuals – submitted a considerable body of objections to it.

6. In response to Buckles' May 2021 Response to Statutory Consultation on behalf of the Council, SPP submitted a further Comments document maintaining a number of objections under identified topics on behalf of its then circa. 623 members.

7. On 18 August 2021 the Secretary of State gave notification of the public inquiry into the proposed Order, to commence on 19 October 2021. On 19 August, SPP sought an adjournment to afford it time to fully prepare its case. On 23 August the National Casework Team confirmed that the Inquiry would not be delayed and that written statements were required by 21 September, and the Inquiry would commence, as scheduled, on 19 October. On 28 August the pre-Inquiry meeting for 21 September was confirmed.

8. The time for completion of SPP's statement of case was extended at the pre-Inquiry meeting as, by that time, SPP had decided to appear at the Inquiry through Counsel who had, by then, been instructed under the Bar Council's Public Access arrangements.

9. The Council's chronological recitation of events headed: *The subsequent conduct of SPPC* [paras. 14-22] is accepted as correct.

ASSESSING WHETHER CONDUCT IS UNREASONABLE

10. SPP accepts that the Local Government Act 1972, s. 250(5) gives the legal basis and power to the Secretary of State to make an order as to the costs of parties at public inquiries generally, and this includes opposed highways or public rights of way orders under the Town and Country Planning Act 1990 Pt X – such as ss. 247, 252 & 253.

11. The test of reasonableness to be applied by an inspector means considering "unreasonable" in the ordinary sense of that word in English usage.[1] The aim of the costs regime is to instil discipline but not to deter people from participating in either planning decisions generally, or the proposed stopping-up and diversion Order in particular, which would have the effect of extinguishing a long established and treasured public right of way, including its replacement with a vehicular right of way over a road to be constructed in the future.

12. The National Planning Practice Guidance (para 028) explains that:

> "… All parties are expected to behave reasonably to support an efficient and timely process, for example in providing all the required evidence and ensuring that timetables are met."

[1] R. v. Secretary of State for the Environment ex p. North Norfolk DC [1994] 2 PLR 78

13. Save Princes Parade is, essentially, a community group of local people drawn together for the common purpose expressed in its name. It is comprised of volunteers. It is one thing to be advised about the sheer hard work and discipline involved in preparing for, and then appearing at, a section 247 Inquiry with main party or Rule 6 status. It is another thing altogether then to actually experience that process in practice. The same point applies to the witnesses called by SPP - who had volunteered to submit themselves to the discipline of preparing written evidence, giving oral evidence and having their evidence tested.

14. In an ideal world each SPP witness would have drafted their written evidence with as complete and accurate a grasp and understanding of the scope of the Inquiry as was possible. Unfortunately, the timing of the unfolding of events conspired against that being the case.

15. Nevertheless, as the leading case Vasiliou v. Secretary of State for Transport and Another[2] (Nicholls LJ) emphasised there is, inherently, an inevitable element of overlap between the decision to grant planning permission and the decision whether or not to stop-up and divert part of a highway.

16. Because in the face of unresolved objections the Secretary of State needs to be satisfied that the balance of the public interest justifies his exercising his discretionary power when deciding whether or not to make the Order, to the extent that some of the written evidence initially prepared by witnesses on behalf of SPP strayed outside of the inevitable areas of overlap - and into territory beyond the confines of s. 247 - that is understandable and not unreasonable conduct.

[2] (1991) 61 P & CR 507

17. As explained in R. v. Secretary of State for the Environment, Transport and the Regions ex p. Batchelor Enterprises Ltd[3] (Sullivan J) the Secretary of State was entitled to consider the highway safety aspects of the proposed order notwithstanding the fact that they were, or should have been, considered at the planning application stage. That decision was affirmed by the Court of Appeal:[4]

"Road safety is a matter of central importance to the exercise of the Secretary of State's functions under section 247 and he must, in my judgment, be able to take it into account when considering such an application, irrespective of the views taken by the local highway authority or the local planning authority. The minister is, after all, dealing with the consequences of his making the stopping-up order, not the consequences of the grant of planning permission. There may be some overlap between the matters relevant to planning control and those relevant to the section 247 orders but that is legitimate as was recognised in Vasiliou."

18. Accordingly the views of, say, Kent County Council about the highway, transport and traffic ramifications of the proposed development as expressed when the planning application was being considered, are to be considered again but through the eyes, or from the perspective of, the Secretary of State for Transport.

19. Because the Inquiry is into the unresolved objections concerning the consequences which would flow from making the Order - involving a consideration of both the "necessity" and "merits" test – it is understandable, and not unreasonable, if some of the original written evidence strayed into concerns about the merits beyond the Secretary of State for Transport's remit.

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[3] [2001] EWHC Admin 383

[4] [2001] EWCA Civ 1293, per Keene LJ, para. 9

20. In truth, there is no clear bright line delineating the precise scope of the matters which the Secretary of State for Transport should have regard to when balancing the respective public interests which are in conflict. In other words, the conflict between planning permission Y17/1042/SH and the continued existence along its present line of a public vehicular right of way over Princes Parade.

THE ROLE OF THIRD PARTIES

21. A considerable body of unresolved objections were made by both statutory consultees and third parties who are independent of SPP. To the extent that the Council complains about having to incur wasted time and tax payers' money in addressing such matters beyond the inevitable overlap and outside the s. 247 jurisdiction, it may well have had to do so in any event to fully explain its case to all participants at the public Inquiry.

22. The Inspector, together with the Secretary of State, is duty bound to consider issues raised by third parties which may be at variance with the agreed stance of the main parties. For example, whilst the Council and SPP agree that the necessity test is met, Councillor Rory Love – amongst other – raises as an issue the contention that it is not met in the case of the hybrid planning permission in this case.

THE COUNCIL'S CASE

23. The Buckles' May 2021 Response to Statutory Consultation on behalf of the Council, in effect the Council's case, provided a limited articulation of it (albeit as at May 2021) compared to the extensive written evidence adduced on behalf of the Council by four professional witnesses on 6 October 2021. The question of SPP's conduct falls to be considered against that backdrop.

THE PUBLIC INTEREST

24. The s. 247 inquiry is, obviously, not a section 78 planning appeal from a refusal or non-determination. Were that to be the case, then there would be reasons for refusal (or putative reasons) which would then provide the focus and frame the issues for the inquiry.

25. In contrast, the s.247 jurisdiction in this inquiry concerns the extinguishment or loss of a public vehicular right of way over a significant part of the way known as Princes Parade, together with the proposed re-provision of such a right over a new way yet to be constructed. The words used, "stopping-up" and "diversion" appear, at first blush, to introduce physical elements into the merits balance when considering the direct consequences which would flow from making the Order.

26. On 4 October, SPP confirmed that it wished to make it clear that it was not seeking to invite the Secretary of States to: (1) Reconsider whether or not planning permission should have been granted. (2) Consider alternative development proposals. (3) Consider the engineering or construction aspects of the proposed re-aligned Princes Parade. In sum, it understood and accepted the limits of the s.247 jurisdiction. However, it is easier to state those principles than it is to actually apply them to the specific facts of this Inquiry.

27. For example, to assess the impact of the proposed realigned public vehicular right of way upon the setting of the Royal Military Canal, or the tranquillity of it – together with that of the 3 public rights of way on its southern and northern banks – one has, inevitably, to consider the actual location, height and mitigation screening of the proposed new way over which it is intended the vehicular right will, in the future, be exercised.

28. Again, in an ideal world SPP witnesses would have had the opportunity to carefully consider the ramifications of this in the light of their written evidence. But we do not live in an ideal world. We live in the real world with all the manifest imperfections that come with it.

29. It may be the case that it was only when SPP, together with its witnesses, had the opportunity to read and digest the Council's witness evidence that a fuller and more complete understanding of the s. 247 jurisdiction dawned.

CONCLUSION ON CONDUCT

30. The conduct of SPP must be judged in context. The Council had a professional team, SPP did not. Whilst it is true that Save Princes Parade appeared at the Inquiry through Counsel, SPP, together with the witnesses it called (including professionals), were all volunteers giving freely of their time and experience and doing the best they could in difficult circumstances.

31. Judged in the above context, SPP are not guilty of indulging in unreasonable conduct.

32. The Inspector is invited to adopt a benevolent approach to his report and recommendation on this issue and to decline to make the partial wasted costs order sought by the Council.

PARTIES TO THE APPEAL

33. Schedule 6 to the Town and Country Planning Act 1990 provides:

"The Secretary of State causing an inquiry to be held … may make an order as to the costs of the parties at the inquiry and as to the parties by whom the costs are to be paid, and every such order may be made a rule of the High Court".

34. The primary legislation is silent about the exercise of the discretion to make costs orders.

35. As expressed in R. v. The Secretary of State for the Environment, ex p. Westminster City Council:[5]

"The power to award costs in these inquiries is in very wide terms. The relevant subsection (ss. 5) of section 250 Local Government Act 1972, provides ...

So, there is little restriction on the power that the Secretary of State has ... he has issued circulars ... have set out the basis upon which he makes such awards ... Circular 2 of 1987 ... That states [para. 5] "In planning proceedings the parties are normally expected to meet their own expenses and costs are awarded only on the grounds of unreasonable behaviour."

36. It is therefore clear that the jurisdiction to make a costs award is limited to "the parties". At this inquiry, the Council and Save Princes Parade are, together, the main parties.

37. The Council's "Person against whom the costs award should be made" [para. 28] is not accepted. The Council may not have known the names of the members and officers of Save Princes Parade on 11 October – but it does now as they have been provided to it.

[5] [1989] 1 PLR 23, at 27, per Farquharson J.

38. If the Inspector is persuaded that Save Princes Parade has engaged in unreasonable conduct which has caused the Council to incur wasted tax payers' money, then it is Save Princes Parade that is the party against whom such an order should be made.

39. That Mrs Elaine Martin currently holds two of the four offices of SPP – that of Membership Secretary and Treasurer, is because she stepped-up to take on one vacant post *pro tem*.

40. The fact that the legal form of Save Princes Parade is that of an unincorporated association does not alter the fundamental basic principle that the costs jurisdiction only includes "parties" appearing at an Inquiry. It does not extend to their officers or members.

41. The principle may be illustrated by a counter factual scenario. Assume the Council did not own the site and was not the applicant for planning permission. Assume a third party applicant/developer was and did, but was refused planning permission by the Council, as local planning authority, and appealed. Assume that on appeal the Council failed to adduce evidence to support one of its reasons for refusal and a partial wasted costs order was made against the Council.

42. In such a scenario, the costs jurisdiction would not include the possibility of making the costs order against, say, the Chairman of the planning committee – or the case officer who drafted the report and the reasons for refusal – because they are not "parties", whereas the Council is.

43. By parity of reasoning the same principle applies at this Inquiry. Mrs Elaine Martin is not a party to the Inquiry. That Mrs Martin is an office holder and thereby a member of

SPP is not denied, but that does not vest the Secretary of State with jurisdiction to make a costs order against Mrs Martin personally.

44. The Council cite no authority in support of their proposition that: "it is apparent that Mrs Martin is the appropriate legal person against whom a costs award should be made for SPPC's unreasonable behaviour …"

45. The Secretary of State's jurisdiction is limited to making an Order against Save Princes Parade as an unincorporated association, which has existed since 2012 - has a written constitution - and enjoys a substantial existence as distinct from the mere sum of those who are, for the time being, its officers or members. That SPP has been treated by those who deal with it as having such an existence is reflected by it seeking, and achieving, main party status at this Inquiry.

46. It would be wrong and contrary to principle to target one single officer or member of Save Princes Parade as a person to be made personally liable for a wasted costs order as an individual.

47. It is clear that a cost order against an unincorporated association can be enforced against a bank account in the association's name by a third party debt order. An appeal by London Animal Liberation, arguing that an order can only be enforced against persons with legal identity was rejected in Huntingdon Life Sciences Group plc v. Cass.[6]

CONCLUSION

48. For the reasons stated above, Save Princes Parade first resists the Council's partial wasted costs application on the basis that, in all the circumstances, it is not guilty of

[6] [2005] EWHC 2233 (QB)

unreasonable conduct. Secondly, if the Inspector concludes otherwise, then his jurisdiction extends only to making such order against Save Princes Parade as a main party to the inquiry. There is no jurisdiction to make a wasted costs order against Mrs Elaine Martin personally.

CLIVE MOYS

Instructed under Public Access by Save Princes Parade

Radcliffe Chambers
11 New Square
Lincoln's Inn
London WC2A 3QB.

28th October 2021

England and Wales High Court (Queen's Bench Division) Decisions

Neutral Citation Number: [2005] EWHC 2233 (QB)
Case No: H003X01149

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London WC2A 2LL
21st October 2005

B e f o r e :

MR JUSTICE MACKAY

Between:

(1) HUNTINGDON LIFE SCIENCES GROUP PLC
HUNTINGDON LIFE SCIENCES LIMITED **Claimants**
(2) BRIAN CASS (for and on behalf of the Employees of the First Claimant pursuant to CPR part 19.6)

- and -

(1) STOP HUNTINGDON ANIMAL CRUELTY ("SHAC")
(2) GREG AVERY
(3) NATASHA AVERY (aka Dellamagne)
(4) HEATHER JAMES (aka Avery)
(5) LYNNE SAWYER
(6) JOSEPH DAWSON (aka Dziurzynski)
(7) SARAH MARGARET BROWN
(8) DONALD CURRIE
(9) CLAIRE PERSEY
(10) SARAH GISBOURNE
(11) LONDON ANIMAL ACTION
(12) ANIMAL LIBERATION FRONT .
(13) DRMAX GASTONE **Defendants**

Mr. Lawson-Cruttenden for the Claimants
Mr. Dally for the Defendants

HTML VERSION OF JUDGMENT

MR JUSTICE MACKAY:

1. This is an appeal by permission of the Single Judge by the 11th Defendant London Animal Action against the Order of Master Yoxall dated 151 March 2005, in which he made a final third party debt Order against the Cooperative Bank PLC for £6,721.23. I must explain the circumstances in which this Order was made.

2. This action has a long and complicated history. The Claimants operate a laboratory which uses animals for testing and research in the pharmaceutical and allied industries. The Defendants are said to have been involved in. harassment of the Claimants' employees and premises. Interim injunctions have been obtained from time to time culminating in an Order of 25th June 2003 by Gibbs J made at a hearing in which the parties were represented. He made a detailed Order, the terms of which are not relevant to this appeal, restraining the Defendants in their activities.

3. Earlier on 9th April 2003, Davies J had ordered the 1st Defendant Stop Huntingdon Animal Cruelty ("SHAC") to represent the interest of protestors generally. I made a further Order on 26th May 2004 continuing the injunction, giving leave to defend to certain defendants, and making a default judgment for a final injunction against the 5th, 6th, 7th , 8th , 10th, 11th and 12th Defendants none of whom had acknowledged service. My Order was made on the basis of Mr. Justice Davies' earlier Order that SHAC represent the interests of;

> "all animal rights Protestors and all groups who are concerned with conducting protests or other activities against the Claimants".

Protestors were defined in the Order as:

> "The defendants whether by themselves, their servants or agents or otherwise and any other person who is acting in concert with any of the defendants and who has notice of the terms of this Order whether by himself, his servants or agents or otherwise and by any other person who has been given notice in writing of the terms of this Order, whether by himself, his servants or agents or otherwise".

All "protestors" were then subject to the restraints set out in paragraphs 1 and 2 of my Order. The Order continued in this way:

> "3. The Claimants have permission to enforce the Order herein as against the members. of London Animal Action, Animal Liberation Front, and the Protestors as defined in this Order pursuant to CPR 19.6 (4)(b) and to the Protection from Harassment Act 1997.....
>
> 8. That the 5th, 6th 7th, 8th, 10th 11th and 12th Defendants do pay the Claimants' costs of these proceedings on the standard basis to be subject to a detailed assessment if not agreed".

4. It came to the notice of the Claimants that there was a bank account in the Cooperative Bank in the

name of the 11th Defendant London Animal Action. They obtained an Interim Order in respect of that account on 18th January and a final Order on 1st March, which is the Order against which the 11th Defendants now appeal.

5. The 11th Defendants were represented at the appeal by Mr. Dally who conducted the appeal with great skill. He is not a solicitor or barrister but I gave him permission to represent the Appellants' interests. I asked him the source of his authority to act and he said he was instructed by the 9th Defendant Claire Persey. Her witness statement in this appeal said that she is "part of the group London Animal Action" which campaigns for animal rights and part of whose activities has involved protesting against the Claimant. She says that it does not have any formal membership or elected officers or spokespersons and is not incorporated, but does have a website and bank account and has monthly meetings at which lawful protest activity is discussed. She attends the meetings, as she puts it. The bank account with its six thousand odd pounds is in the name of the association. Mr. Dally has had no contact with any other member of LAA. Miss Persey does not give any information as to what, if any, authority she had to instruct Mr. Dally to launch this appeal. Likewise she does not state were the money has come from. Mr. Lawson-Cruttenden for the Claimants asks me in effect to take judicial notice of the fact that to open a bank account on behalf of an association there will have to be formalities complied with, an appointed officer, usually a mandate or resolution from the members of the association and a signatory or signatories to the account. There is no explanation as to who has contributed what part of the funds which amount to the sum the subject of the order appealed against, the basis on which it is held, and whether some of those persons knew of the Order and some did not. Mr. Lawson-Cruttenden's first line of attack therefore is that there is nobody with authority to come to this Court to prosecute this appeal.

6. Leaving that point for one moment, the main ground of the appeal is that it is not appropriate or lawful to enforce a Costs Order against LAA as an unincorporated association, but an application of this nature can only be made against named individual members. SHAC were appointed by the Court to represent LAA but SHAC itself was an unincorporated association at the time of the Order and it is only since then that a named individual has been appointed to represent SHAC. The main thrust of the appeal therefore is that it is not possible to make a Costs Order against the 11th Defendant but only against the members it represents if they can be identified and named:

7. As Mr. Dally realistically recognised this submission is really therefore an appeal against my Order of 26th May 2004 and not the Master's Order of 1st March 2005. He accepts that read literally on the face of my Order, against which no appeal was lodged, there is authority for the Claimant to enforce a Costs Order against anyone within the definition of "Protestor", which definition includes any person acting in concert with any of the Defendants and who has notice of the terms of this Order. But he says it would be wrong to construe it so as to make those who have contributed to the funds in the account liable for the costs of the activity if they were not involved in it. He accepts that the wide definition of Protestor in the relevant Orders is acceptable as a necessary device under the "just and convenient" principle enacted by S.37 of the Supreme Court Act 1981 and serves to bring any person within that definition within the grip of the injunctive relief which is at the heart of the Order. But he does not accept that that should apply to liability for costs which he describes as a greater liability and a more serious matter.

8. There are really therefore three main submissions he makes. The first is his bold submission as he accepts that I should now set aside my Order as one which should not have been made, albeit it is very late to do so and he can only invoke the wider interests of justice in making this application. The second is to set aside the Master's Order of 1st March on the basis that, as part of his Order he should have given consideration to the question of whether the anonymous and unknown members of the 11th Defendant had sufficient knowledge of the terms of the Order to qualify them as Protestors under the second limb of the definition of that word. His third, and alternative route to success is to invite me to construe my Order of 26th May so that the permission to enforce

contained in paragraph 3 did not include a permission to enforce the Costs Order in paragraph 8, since to do so would render liable for costs any person upon whom the Order was served and those persons might not deserve to have costs liabilities imposed upon them on the merits of the case.

9. He points to the fact that there is a judicial conflict as to whether unincorporated associations are capable of being treated as defendants in the way this Order does. At paragraph 27 and following of his judgment, having heard argument on this point Gibbs J said this:

> "There is evidence in relation to several of the individual defendants, some of them indeed from those defendants themselves, that SHAC .... exists as a group. However the nature of SHAC and the extent of involvement in it on the part of these defendants are to an extent in dispute. None of the individual defendants seeks or is willing to represent SHAC. I do not consider it either necessary or just or convenient to direct that any individual defendant should do so. SHAC as outlined is a sufficiently identifiable group to justify its being jointed as a defendant".

He then referred to the cases of Michaels Furriers Limited v Askew and Others Times 25th June 1983 and EMI Records v Kevin Cudel and Others [1983] Commercial Law Reports 280. He was urged to take this approach and indeed to adopt the definition of Protester by the Claimants in response to the particular dangerous and anonymous and shadowy form of aggression from which, on the evidence presented to him, these Claimants had been suffering. The opposite view was taken by Gross J in Edo MBM Technology Limited [2005] EWHC 837 (QB) at paragraphs 42 to 45. He took a more classical view of the problem, namely that it was not possible to sue a group such as the Defendants in that case unless at the least there were before the Court individuals capable of being sued as representatives of the associations in question.

10. Mr. Lawson-Cruttenden stresses the novel, serious and difficult nature of the attack that his clients say they face from these Defendants and from others. The nature of these attacks is that they come from the shadows, that the groups, while taking full advantage of the media when it suits their purpose, and being astute in the manipulation of publicity, are slow to reveal their supporters and subscribers for reasons that are all too obvious. He acknowledges that these proceedings are unconventional in the way that the problems of the unincorporated association have been addressed but submits that the law should adapt itself to new problems and new ways and that the width of the underlying jurisdiction under 8.37 is sufficient to achieve that purpose. That apart, the specific reference to CPR 19.6(4)(b) in clause three of my Order is sufficient to bring within the grip of the Costs Order members of LAA who will not and have not disclosed themselves. He points out that Ms. Persey was herself represented by counsel before Gibbs J, before he made his Order and had .opportunities to take advice on appealing against or seeking to set· that Order aside and chose not to. The funds in this bank account must be assumed to be the funds of the "members of LAA" even though no formal constitution or membership structure appears to exist. There is no warrant for excluding the Order for costs in paragraph 8 from the permission of the Court to enforce the Order in paragraph 3 and that is what the reference to CPR 19 in paragraph 3 made clear.

11. I am prepared with a little reluctance, to accept not only that Mr. Dally had authority to act as advocate on this occasion (which he did with conspicuous skill, restraint and ability) but that Claire Persey also had authority to instruct him to appear for the 11th Defendant. I am assuming despite the absence of its formality that it is an unincorporated association, that it has members, that its members must know of these proceedings by virtue of the regular meetings which are held, that they have variously contributed to the funds of the association in the bank, and that none of them has come forward to protest that he or she ought not to be liable to have his or her contribution put at risk by this Order. The novelty of the form of order in this case is plain and the need for it is obvious. This is really an attack upon my Order of May last year and as such comes far too late, and I should also say, comes to the wrong person since I cannot entertain an appeal against my own Order. Therefore when treated as what it is, namely an appeal against the Master's Order of 1st March, the attack on that Order fails. The Master was entitled to act on the basis that my Order

meant what it said and was not under any obligation to consider the position of the hidden or anonymous members of the 11th Defendant in the absence of any representations by any of them to that effect or to the effect that some part of the funds should be protected from the grip of this Order. I am therefore unable to accede to this appeal and it is dismissed.
