HIGH COURT GIVES GUIDANCE ON COSTS OF DEFENDING S.289 TOWN AND COUNTRY PLANNING ACT PROCEEDINGS

ELGHANIAN V. SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT

In *Elghanian v Secretary of State for Housing, Communities and Local Government (heard on 18 April 2018) Mrs Justice Lang considered the costs regime for defending challenges to the validity to enforcement notices.*

Background:

The London Borough of Brent (represented by Dr Ashley Bowes of Prospect Law) had succeeded in resisting a challenge by Mr Elghanian, under s. 174 of the Town and Country Planning Act 1990, against two enforcement notices which had been issued against him by the London Borough of Brent ("Brent"). Those appeals were dismissed by an Inspector following an Inquiry and Mr Elghanian applied to appeal the Inspector's decision under s. 289. Following an oral hearing on 18 April 2018, Mrs Justice Lang refused permission to appeal.

Brent sought the costs it had incurred preparing and filing a skeleton argument, on the basis that the costs of preparing and filing an acknowledgment of service are recoverable from all parties to a judicial review, and, in the absence of such a procedure in s.289 proceedings, the skeleton argument performs the same function. Brent relied upon *R (Mount Cook Land Ltd) v Westminster CC* [2017] PTSR 1166.

Costs regime for appeals under s.289 proceedings:

The Appellant opposed this application, relying on the rule derived from *Bolton MDC v SSE* [1995] 1 WLR 1176 that a second respondent in s. 288 planning appeals would "*not normally be entitled to his costs unless he can show that there was likely to be a separate issue on which he was entitled to be heard, that is to say an issue not covered by counsel for the Secretary of State; or unless he has an interest which requires separate representation*". No such issue or interest was identified by Brent.

Mrs Justice Lang held that "*the permission and costs regime for appeals under s. 289 is separate and distinct from judicial reviews and other appeals*". The Court ruled that the *Mount Cook* costs principle does not apply in such cases. In particular, the Judge held that *Bolton* remains good law in the specific context of a permission hearing for a s. 289 appeal.

As there was no separate issue which required Brent to be represented at the permission hearing, the Appellant was not ordered to pay Brent's costs of attendance. However, Mrs Justice Lang also held that Brent was not entitled to the costs it had incurred preparing a skeleton argument.

Appeals under s.288 of the 1990 Act:

A similar procedure applies in the case of appeals under s. 288 of the 1990 Act, which are usually concerned with the grant or dismissal of planning permission. There, any person served with the claim form that wishes to take part in the planning statutory review must also file an AoS. This is

followed by consideration of permission on the papers and an oral renewal hearing, where it is also rare to award second respondents their costs.

In contrast, in s. 289 appeals there is an obligatory permission hearing which respondents are entitled, but not required, to attend. There is no provision in the rules for a local planning authority or any other person served with the application to file any pleading.

Harmonisation of s.288 and s.289 regimes:

Mrs Justice Lang considered that it would be desirable to harmonise these different regimes, but that the appropriate means of doing so was by way of amendment to the CPR rather than by piecemeal judicial decision-making. She concluded:

> "*A skeleton argument is not analogous to an* acknowledgment *of service, in my view. It is part of the preparation for an oral hearing. In an application for permission under section 289 TCPA 1990, it is envisaged that respondents and other persons served will attend the permission hearing, and if successful, a costs award will be made in their favour, unless the Bolton principles apply. To that extent, the regime is more favourable to respondents than* judicial *review or statutory review under section 288 TCPA 1990. I acknowledge that it is less favourable for local planning authorities who are excluded from a costs award in respect of their written response to the application, as well as attendance at the hearing, by the Bolton principles*." (paragraph 20) .

About the Author:

Ashley Bowes is a specialist planning barrister who frequently represents clients in planning inquiries and onto litigation in the courts, including up to the Supreme Court. He is a member of the Attorney General's C Panel of Junior Counsel to the Crown, in which capacity he represents the UK Government in planning matters. He is also the General Editor of Sweet & Maxwell's Journal of Planning & Environment Law and the Author of Oxford University Press' 'A Practical Approach to Planning Law' (14th. Ed.).

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