Case No: CO/928/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 April 2018

Before :

MRS JUSTICE LANG DBE

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Between :

IRAJ ELGHANIAN	**Applicant**
- and -	
(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	
(2) LONDON BOROUGH OF BRENT	**Respondents**

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James Findlay QC and Tara O'Leary (instructed by **Sharpe Pritchard LLP**) for the **Applicant**
Jack Parker (instructed by the **Government Legal Department**) for the **First Respondent**
Ashley Bowes (instructed by **Prospect Law**) for the **Second Respondent**

Hearing date: 18 April 2018

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RULING ON COSTS

1. At an oral permission hearing on 18 April 2018, I refused the Applicant permission to appeal, under section 289 Town and Country Planning Act 1990 ("TCPA 1990"), against the First Respondent's dismissal of his appeal against enforcement notices served by the Second Respondent.

2. The First Respondent applied for an order that the Applicant pay his costs in the sum of £4,734.00, incurred in preparation of his response to the appeal, including a skeleton argument, and attendance at the hearing. The Applicant did not resist this application.

3. The Second Respondent applied for an order that the Applicant pay its costs in the sum of £11,880, incurred in preparation of its response to the appeal, including a skeleton argument, and attendance at the hearing.

4. The Applicant opposed the Second Respondent's application, submitting that the Applicant ought not to pay a second set of costs, applying the principle established in *Bolton MDC v Secretary of State for the Environment* [1995] 1 WLR 1176.

5. In *Bolton* the House of Lords criticised the practice which had developed in planning appeals under section 288 TCPA 1990 of awarding costs to both the Secretary of State and the developer, where the Secretary of State successfully defending his decision to grant planning permission to the developer. Lord Lloyd said, at 1178F-H, that although costs were always in the discretion of the court, generally the Secretary of State was entitled to the whole of his costs when he successfully defended his decision, but the developer 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".

6. The principle in *Bolton* remains good law, and is regularly applied in planning appeals. The same principle was expressed *obiter* by the Court of Appeal in *R v Secretary of State for Wales ex parte Rohzon*, 27 April 1993, in the context of an application for permission to appeal under section 289 TCPA 1990. Dr Bowes, on behalf of the Second Respondent, very properly accepted that in this case there was no separate issue which required the Second Respondent to be represented at the hearing. In those circumstances, I have concluded that the Applicant ought not to be ordered to pay the Second Respondent's costs, in addition to the First Respondent's costs.

7. The Second Respondent applied, in the alternative, for an order that the Applicant pay its costs of preparation of the skeleton argument, in the sum of £5,400. Dr Bowes invited me to apply, by analogy, the practice in judicial review proceedings of awarding defendants and interested parties the costs of preparation of the acknowledgment of service where an application for permission was unsuccessful. The Applicant submitted that no such analogy could properly be drawn.

8. After taking time to consider, I have concluded that the Applicant is correct. The permission and costs regime for appeals under section 289 TCPA 1990 is separate and distinct from judicial review and other appeals.

9. Appeals under section 289 TCPA 1990 are made to the High Court on a point of law only. By subsection (6), the leave of the court must be obtained. They are statutory appeals, governed by CPR Part 52. In Practice Direction 52D, paragraph 26 sets out

the procedure to be followed in an appeal under section 289 TCPA. So far as is relevant for this ruling, the procedure is as follows:

a) The application for permission to appeal must be made in writing by the applicant.

b) The applicant must serve the application on the persons listed in sub-paragraph (12), which include the local planning authority who served the enforcement notice.

c) The application for permission to appeal will be heard by a single judge. There is no power for permission to be decided without a hearing.

d) Any person served with the application is entitled to appear and be heard.

e) Any respondent who intends to use a witness statement at the hearing must file and serve it.

f) Neither persons served nor respondents are required to file any response to the application.

10. There are no provisions as to costs at the permission hearing in paragraph 26. In e*x parte Rohzon*, the Court of Appeal held that, where a respondent successfully resisted the grant of leave to appeal under section 289 TCPA 1990 and RSC Order 94 r.12 at a hearing, costs should normally follow the event and so the applicant should pay the respondent's costs. The reason was that there was an obligatory hearing which respondents were entitled to attend. However, Rose LJ observed that it might be inappropriate to order the unsuccessful applicant to bear more than one set of costs, if for example, the Secretary of State and the local planning authority both appeared at the oral hearing and advanced duplicated arguments.

11. Rose LJ distinguished the section 289 TCPA 1990 procedure from the procedure for judicial review under RSC Order 53 where the leave application could be dealt with on paper, without an oral hearing, and the respondent need not be notified of the ex parte application for leave.

12. Although *ex parte Rohzon* pre-dated the CPR, it was cited with approval by Hickinbottom J. in *Williams v Secretary of State for Communities and Local Government* [2009] EWHC 475 (Admin), and the distinctions between judicial review claims and section 289 TCPA 1990 appeals were referred to in argument.

13. In claims for judicial review, governed by CPR Part 54, a claimant must serve the application on the decision maker and interested parties. Any person who is served with the claim form who wishes to take part in the proceedings must file an acknowledgment of service. Permission will generally be determined on the papers without a hearing in the first instance, but a claimant may request reconsideration of a refusal at a hearing. Practice Direction 54A provides that neither the defendant nor any other person need attend a hearing on the question of permission unless the court directs otherwise. Where they do attend, the court will not generally make an order for costs against the claimant (paragraphs 8.5, 8.6).

14. In *R (on the application of Mount Cook Land Ltd) v Westminster City Council* [2003] EWCA Civ 1346, the Court of Appeal endorsed the guidance in the Judicial Review Practice Direction (now repeated in Practice Direction 54A) that neither the defendant nor an interested party need attend a permission hearing unless the court directs otherwise. Where they do so, the court will not generally make an order for costs against the claimant, save in exceptional circumstances: per Auld LJ at [72], [76]. Auld LJ expressly distinguished *ex parte Rohzon* which applied to the different regime under section 289 TCPA 1990 (at [70]).

15. The Court of Appeal in *Mount Cook* also confirmed that any defendant or interested party who has filed an acknowledgment of service should generally be able to recover the costs of doing so from a claimant whose application for permission is unsuccessful, whether or not he attends a permission hearing (per Auld LJ at [76]). In practice, an unsuccessful claimant is ordered to pay the costs of preparation of the acknowledgment of service of both the defendant and the interested party when permission is refused, even if, at a later stage, the *Bolton* principle might apply so as to limit any award of costs to one party only.

16. Applications for statutory review under section 288 TCPA 1990 are governed by CPR Part 8. Practice Direction 8C is headed 'Alternative procedure for statutory review for certain planning matters'. The current procedure is modelled on the judicial review regime. The claimant must serve the application on the decision maker and 'persons aggrieved'. Any person who is served with the claim form who wishes to take part in the planning statutory review must file an acknowledgment of service. Permission will be considered on the papers without a hearing in the first instance, but an applicant may request reconsideration of a refusal at a hearing. Neither the defendant nor any other person need attend a hearing on the question of permission unless the court directs otherwise. Where they do attend, the court will not generally make an order for costs against the claimant (paragraphs 8.1, 8.2). In practice, when making costs orders at permission stage, the court applies the principles confirmed in *Mount Cook*, awarding the costs of preparation of the acknowledgment of service to successful defendants and other persons served, but only exceptionally ordering the claimant to pay the costs of attending the hearing.

17. As section 289 TCPA 1990 is a statutory appeal, not a review, it is governed by CPR Part 52. But even within Part 52, there are significant differences, depending upon the nature of the appeal.

18. Practice Direction 52B (which applies to appeals within the County Court, appeals from the County Court to the High Court and appeals within the High Court). Under Practice Direction 52B, applications for permission may be determined with or without a hearing. Where permission is refused on the papers, the applicant may request reconsideration at a hearing. By paragraph 8.1, where a respondent attends the hearing of an application for permission to appeal, costs will not be awarded to the respondent unless the court has ordered or requested attendance by the respondent; the court has listed other applications or the substantive appeal, or the court considers it just in all the circumstances to do so. Practice Direction 52B makes no provision for costs to be awarded to a respondent for the preparation of any skeleton argument or other document for use at a permission hearing.

19. Practice Direction 52C (which applies to appeals to the Court of Appeal) provides that a respondent is not expected to attend a permission hearing unless the court so directs (paragraph 16) and there will normally be no order for costs in favour of a respondent for attendance at a permission hearing or filing a written statement (paragraph 20(1)). By paragraph 20(2), if the court directs the respondent to file submissions or attend a hearing, it will normally award costs to the respondent if permission is refused. The implication is that where the respondent attends and files a skeleton argument voluntarily, he will not be awarded costs if successful.

20. Although it may be desirable for these different regimes to be harmonised, I consider that reform would be more appropriately carried out by amending the CPR rather than by piecemeal judicial decision-making. Of course, the court always retains a general discretion in relation to costs, which can be exercised to achieve a just result in the individual case, but I cannot find any reason to depart from the general position in this case. Generally, as the regime for section 289 TCPA 1990 appeals is separate and distinct from judicial review and statutory review under section 288 TCPA 1990, I do not consider that this court can apply the *Mount Cook* principles to this application, by analogy. Despite Dr Bowes' persuasive argument that a local planning authority needs to protect its position by filing a written response to a section 289 TCPA 1990 appeal, in case the Secretary of State does not contest it, fully or at all, there is no provision in the rules for a local planning authority or any other person served to file any pleading. In contrast, a defendant or interested party must file an acknowledgment of service in order to take part in judicial review, or section 288 TCPA 1990, proceedings. 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.

21. For these reasons, the Second Respondent's application for costs is refused.