Application for costs - Circular 73/65 - criteria for award of costs

Case Comment

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Manchester City Council v Secretary of State for the Environment [1988] J.P.L. 774; [1988] 1 WLUK 266 (QBD)

***J.P.L. 774** Mercury Communications Ltd. wishing to provide microwave radio facilities applied for planning permission to replace a radio mast on the Sunley Building in Manchester. In October 1983 the application was considered by the City Council's Planning Committee. At the meeting a letter objection was received from the British Telecommunications Union referring to the potential hazards of microwaves. The City Planning Officer reported that the Health and Safety Executive had, on consultation, considered there was no public danger. The decision was deferred until the meeting of the Planning Committee in December 1983 at which the planning officers report again stated that safety requirements were coupled with. The Committee expressed unease into the lack of research into the effects of microwaves, and recommended refusal of the application. In January 1984 the full city council formally refused the application on health and safety grounds.

***J.P.L. 775** Mercury applied to the Secretary of State. An inquiry was held at which numerous experts gave evidence on the safety issue. The Secretary of State allowed the appeal and costs were awarded against Manchester City Council. The Council appealed to the High Court for an order to quash the cost's order.

KENNEDY J. said that it was common ground that the Secretary of State had power to award costs, and in circular 73/65 the then Minister of Housing and Local Government set out the practice which he proposed to follow, and which in the present case the Secretary of State purported to follow, when dealing with the application for costs.

In deciding whether to order Manchester to pay costs the Secretary of State was not bound to apply the policy set out in circular 73/65, but, as was apparent from paragraph 4 of his decision letter in relation to the issue of costs, he purported to do so, and accordingly, as was said by Sir Douglas Franks, Q.C., in *Niarchos (London) Ltd.* v. *Secretary of State for the Environment and Another* (1977) 76 L.G.R. 480, the particular passage in question being at p.485:

"(If the Secretary of State) expresses himself to be deciding a case under a stated policy, it must follow that if he decides the case other than in accordance with that policy he misdirects himself."

Thus far there seemed to be no dispute between the parties as to the approach which should have been adopted by the Secretary of State once Mercury made its application for costs, but Mr. Henderson did submit that the Secretary of State should not have found the behaviour of Manchester to be unreasonable unless it was behaviour which no reasonable local

authority would adopt. By way of analogy he pointed to the power in the Rules of the Supreme Court to strike out pleadings which disclosed no reasonable cause of action, and, adopting a phrase used by Sir John Donaldson in *J. H. Smith Ltd.* v. *Smith* (1974) *Industrial Court Reports* 156, in the National Industrial Relations Court, submitted that in accordance with the Ministerial policy before Manchester could be ordered to pay costs the Secretary of State had to be satisfied that the city council adopted a position which was "obviously wholly unarguable."

For the purposes of the present case it was necessary to say more about standards of reasonable behaviour than was said in paragraphs 26 and 27(ii) of the Report of the Council on Tribunals because the Secretary of State found Manchester to have been unable to support its decision by any substantial evidence. If on the facts he was entitled to come to that conclusion then, he was entitled to find that Manchester had acted unreasonably within the meaning of paragraph 9 of the circular so as to justify an award of costs.

The first ground relied upon was that the Secretary of State failed to consider whether the reason given for refusing planning permission was one which no reasonable planning authority could have given. Here Mr. Henderson's submission, was that Manchester should be entitled to have some credit for choosing, when refusing planning permission, a form of words which could be appropriate as a ground for refusal if there was substantial evidence available to justify that conclusion. That could not be right. When it came to deciding whether or not to award costs what mattered was the evidence, if any, which led to the decision, and the Secretary of State was under no obligation to ask himself whether, standing alone and without regard to the evidence, the reason given for ***J.P.L. 776*** refusing planning permission was one which no reasonable planning authority could have given. In the context of the available evidence he had concluded, as he was entitled to, that the council had acted unreasonably in refusing planning permission for the reason it gave, and that it had failed to support its refusal with substantial evidence.

In ground 2(*a*) it was alleged that when considering whether Manchester had been unable to support its decision by any substantial evidence the Secretary of State had failed to consider the evidence adduced by the city council and whether it was substantial. It seemed to be clear from the Inspector's report and from the decision letter of the Secretary of State in relation to the issue of costs that he had considered the evidence produced by the city council and he found, as he was entitled to find, that it was insubstantial. As Mr. Barnes pointed out, it was always necessary to bear in mind that planning laws were fetters on the liberty of the individual, and the proper approach which ought to be adopted by any planning authority in relation to a proposed development was that which found an echo in paragraph 3.8 of the Inspector's report--namely that it was not for the developer to prove why he ought to be granted planning permission. He had a right to it unless there was shown to be a good reason why he should not have it. Here the reason for refusal given by the city council was that the proposed development would be a threat to the health and safety of the general public in the city and particularly to those people who would be in close and frequent proximity to the installation. Mr. Barnes submitted and he (Kennedy J.) accepted, that the Secretary of State was entitled to find that even at the inquiry there was a lack of substantial evidence to support that positive assertion, made with at least some knowledge of the weight of the evidence to the opposite effect.

Grounds 2(*b*) and (*c*) were allegations of the Secretary of State having had regard to what were alleged to have been irrelevant considerations, namely the use by British Telecommunications of a microwave system, and the council's failure to attempt to remove existing rights to use microwave equipment. Returning for a moment to paragraph 9 of circular 73/65 it would be remembered that the basic allegation being investigated by the Secretary of State when considering whether or not to award costs was that Manchester had acted unreasonably in that it had been unable to support its decision by any substantial evidence. It was its case that, both at the time when it had rejected the proposal, and at the time of the inquiry, it had available evidence to support its conclusion that the proposed development would be a threat to health and safety. In order to decide whether that evidence was substantial the Secretary of State was entitled to have regard to the known existence of a comparable system of microwave transmission, and in order to decide whether Manchester had acted unreasonably the Secretary of State was entitled to have regard to the failure of the city council to make any attempt to inhibit other transmitters of microwaves. Of course Mr. Henderson was entitled to say that there was a world of difference between refusing to authorise a new transmitter and taking from an existing transmitter the right to transmit. No doubt the Secretary of State had that well in mind. And nothing turned on the point that some of the statutory provisions to which the Secretary of State referred gave only limited powers of revocation. In paragraph 7 of the decision letter the references to those powers were all gathered together in one sentence.

Ground 2(*d*) was merely a repetition of the allegation that in making his decision as to the question of costs the Secretary of

State should have looked only at the evidence ***J.P.L. 777*** called by the city council to support its decision, and not at the picture as a whole. As indicated, it seemed that in order to decide whether a party had acted unreasonably, and whether the evidence on which it had relied should be regarded as substantial it would nearly always be necessary to have regard to the picture as a whole.

Application dismissed.

Comment. The new policy on the award of costs (contained in circular 2/87) has already resulted in costs being awarded more readily. Correspondingly, there is likely to be more judicial challenges to such awards. The determination of an application for costs involves the exercise of an statutory discretion and such is subject to the normal administrative law principles. The decision in *R.* v. *Secretary of State for the Environment, ex p. Reinisch* (1971) 22 P. & C.R. 1022 established that the Minister is entitled to have a general policy on costs but was not bound to and should not apply that policy inflexibly. Since then the case law on policy has further developed and Kennedy J. indicates in the present decision, the courts have arrogated to themselves the final say as to the meaning of policy. This is based on the argument that if the Minister purports to apply a policy, he must not misdirect himself. In this way policy documents take on a life and meaning of their own separate from the hand that actually drafted the document.

The general policy set out in Circular 73/65 (and which is still the basic policy in Circular 2/87) is that costs should be awarded for "unreasonable behaviour" where that behaviour has caused the other party to incur unnecessary expense. The vagueness and subjectivity of the term "unreasonable behaviour" means that the detailed examples which are given in the new Circular take on a crucial importance. In this case, the local planning authority argued that behaviour could only be considered "unreasonable" if the Secretary of State had adopted a position which was "obviously wholly unarguable." Kennedy J. declined to make an express finding as to what were the standards by which reasonable behaviour had to be judged. Nevertheless, he clearly rejected a *Wednesbury* standard of the behaviour which no reasonable local authority would have adopted and accepted that behaviour would be unreasonable if the refusal by planning permission could not be supported by substantial evidence. This would suggest that the courts will not interfere with the Secretary of State's views as to what amounts to unreasonable behaviour.

