Case No: SC-2020-BTP-001385

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
Strand, London WC2A 2LL

Date: 7/12/2021

Before:

COSTS JUDGE LEONARD

- -

Between:

Powerrapid Ltd	**Claimant**
- and -	
Harlow District Council	**Defendant**

- -
- -

Nick Grant (instructed by **BDB Pitmans LLP**) for the **Claimant**
Rupert Cohen (instructed by **Trowers and Hamlins LLP**) for the **Defendant**

Hearing dates: 5 and 6 October 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

Costs Judge Leonard:

1. I am assessing the costs of the Claimant pursuant to an order of the Administrative Court dated 3 March 2020. That order incorporated an award of costs by the Secretary of State for Communities and Local Government, made under section 5(4) of the Acquisition of Land Act 1981 and section 250(5) of the Local Government Act 1972, following the Claimant's successful objection to a compulsory purchase order ("CPO") made by the Defendant.

2. The question to be addressed by this judgment is the scope of the costs recoverable under the Administrative Court's order. I should record my gratitude to both parties' counsel for their thorough and cogent submissions on the issue.

The Law and Published Guidance

3. Section 51 of the Senior Courts Act 1981 provides that:

> "(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in—
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> (a) the civil division of the Court of Appeal;
>
> (b) the High Court; and
>
> (ba) the family court;
>
> (c) the county court,
>
> shall be in the discretion of the court."

4. Section 250 of the 1972 Act, at subparagraphs (1), (4) and (5), provides that:

> (1) "Where any Minister is authorised by this Act to determine any difference, to make or confirm any order, to frame any scheme, or to give any consent, confirmation, sanction or approval to any matter, or otherwise to act under this Act, and where the Secretary of State is authorised to hold an inquiry, either under this Act or under any other enactment relating to the functions of a local authority, he may cause a local inquiry to be held…
>
> (4) Where a Minister causes an inquiry to be held under this section, the costs incurred by him in relation to the inquiry shall be paid by such local authority or party to the inquiry as he may direct, and the Minister may cause the amount of the costs so incurred to be certified, and any amount so certified and directed to be paid by any authority or person shall be recoverable from that authority or person by the Minister summarily as a civil debt.
>
> (5) The Secretary of State may make orders 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 on the application of any party named in the order."

5. Section 5 of the Acquisition of Land Act 1981, at subsections (1), (3) and (4) provides that:

(1) "For the purposes of the execution of his powers and duties under this Act, a Minister may cause to be held such public local inquiries as are directed by this Act and such other public local inquiries as he may think fit…

(3) In relation to—

(a) a proposed acquisition of land by an authority other than a Minister…

subsections (4) and (5) of…" (*section 250 of the Local Government Act 1972*) "…shall apply to a public local inquiry held in pursuance of this Act.

(4) In relation to each of the matters mentioned in paragraphs (a)… of subsection (3), section 250(5) of the Local Government Act 1972 also applies—

(a) where arrangements are made for a public local inquiry to be held in England in pursuance of this Act but the inquiry does not take place;

(b) to the costs of a party to a public local inquiry held in England in pursuance of this Act who does not attend the inquiry."

6. The Secretary of State has the discretion to adopt a costs policy, and Planning Inspectors must (subject to certain considerations which I will address below) apply it: *Swale Borough Council v Secretary of State for Housing Communities and Local Government & Anor* [2020] EWHC 3482 (Admin). I have been referred to guidance published on behalf of the Secretary of State which embodies that policy.

7. First, the Secretary of State's published Planning Practice Guidance ("PPG"): "Award of costs incurred in planning and other proceedings":

"What is a full award of costs?

A full award of appeal costs means the party's whole costs for the statutory process, including the preparation of the appeal statement and supporting documentation. It also includes the expense of making the costs application.

Where the process concerns a called-in planning application, the eligible costs start from the date of the letter notifying the applicant of the decision to call-in the application.

In other non-appeal cases, the eligible costs start from the date of the notification or statutory publication of, for example, the relevant order. This

is the point at which the applicant for costs begins to incur expense in the ensuing statutory process.

Paragraph: 040 Reference ID: 16-040-20140306

Revision date: 06 03 2014

What is a partial award of costs?

Some cases do not justify a full award of costs, for example where the appeal is one of several joint appeals with evidence in common. Where the application for costs relates to one or some of the grounds of refusal but not all of them, an award might relate to the attendance of only particular witnesses. In these circumstances, a partial award may be made. The partial award may also be limited to a part of the appeal process. For example, where an unnecessary adjournment is caused by the unreasonable conduct of one of the parties, the award of costs may be limited to the abortive costs of attending the event on the day of the adjournment. A partial award may result from an application for either a full or a partial award.

Paragraph: 041 Reference ID: 16-041-20140306

Revision date: 06 03 2014

The award of costs and compulsory purchase and analogous orders

How does the award of costs apply in the case of compulsory purchase and analogous orders?

Compulsory purchase and analogous orders seek to take away a party's rights or interest in land. Further information on compulsory purchase orders can be found in the Guidance on compulsory purchase process and the Crichel Down Rules for the disposal of surplus land acquired by, or under the threat of, compulsion. Where objectors are defending their rights, or protecting their interests, which are the subject of a compulsory purchase or analogous order, they may have costs awarded in their favour if the order does not proceed or is not confirmed.

For the purposes of this Part, "remaining objector" means a person who is defending their rights, or protecting their interests, which are the subject of a compulsory purchase or analogous order, and who has made a "remaining objection" within the meaning of section 13A(1) of the Acquisition of Land Act 1981.

Costs will be awarded in favour of a successful remaining objector unless there are exceptional reasons for not making an award. The award will be made by the Secretary of State against the authority which made the order.

Normally, the following conditions must be met for an award to be made on the basis of a successful objection:

(a) the claimant must have made a remaining objection and have either:

• attended (or been represented at) an inquiry (or, if applicable, a hearing at which the objection was heard); or

• submitted a written representation which was considered as part of the written procedure; and

(b) the objection must have been sustained by the confirming authority's refusal to confirm the order or by its decision to exclude the whole or part of the claimant's property from the order.

In addition, a remaining objection will be successful and an award of costs may be made in the claimant's favour if an inquiry is cancelled because the acquiring authority have decided not to proceed with the order, or a claimant has not appeared at an inquiry having made an arrangement for their land to be excluded from the order. For more detail see section 5(4) of the Acquisition of Land Act 1981 as inserted by section 3 of the Growth and Infrastructure Act 2013.

Paragraph: 057 Reference ID: 16-057-20140306

Revision date: 06 03 2014"

8. The Secretary of State also publishes the Compulsory Purchase and Compensation Booklet 1: Procedure (2004), of which the following paragraphs are pertinent:

> "3.68 A remaining objector who is successful following an inquiry or the written representations procedure will be awarded costs unless there are exceptional reasons for not doing so. A successful remaining objector is one whose objection was sustained, such that the CPO was not confirmed or the objector's land was excluded from the CPO. You may be partially successful, i.e. part of your land may be excluded from the CPO.
>
> 3.69 The award would cover reasonable costs including professional fees incurred in pursuing the objection and attending the inquiry or in following the written representations procedure. If you are partly successful, you will usually receive a partial award of costs."

The Costs Award and The Costs Order

9. The Secretary of State's costs award of 16 October 2019 reads, insofar as pertinent:

> "THE SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT in exercise of his powers under section 5(4) of the Acquisition of Land Act 1981, section 250(5) of the Local Government Act 1972 and of all other enabling powers.
>
> HEREBY ORDERS that Harlow District Council shall pay to Powerrapid Limited their costs of the Inquiry, such costs to be taxed in default of agreement as to the amount thereof.
>
> **Subject of the Inquiry**: The Harlow District Council (London Road North) Compulsory Purchase Order 2018 made by Harlow District Council under

section 226(1)(a) of the Town and Country Planning Act 1990 (as amended) …"

10. The Administrative Court's order of 3 March 2020 was made by M.P. Cowling, ACO Lawyer, exercising powers delegated by the President of the Queen's Bench Division under CPR 54.1A. It reads:

> "**UPON READING** the Order of the Secretary of State for Communities and Local Government dated the 16th October 2019 in exercise of his powers under Section 250 (5) of the Local Government Act 1972 and Section 5 (4) of the Acquisition of Land Act 1981 and all other powers enabling him in that behalf, ordering that Harlow District Council shall pay to Powerrapid Ltd their costs of the Inquiry, such costs to be taxed in default of agreement as to the amount thereof.
>
> **IT IS ORDERED THAT** the said Order of the Secretary of State for Communities and Local Government as to costs be made an Order of this Honourable Court and that Harlow District Council shall pay to Powerrapid Ltd such costs as therein ordered to be assessed."

The Background

11. This is a brief summary of the history that led to the making of the Administrative Court's order. It is largely taken from the narrative to the Claimant's bill of costs, with which the Defendant's Points of Dispute do not appear to take issue.

12. The Claimant is the proprietor of a piece of land ("the Land") which is part of the Nortel Complex at London Road in Harlow. The Nortel Complex was purchased in 1995 by BNR Europe Ltd from the New Town Commission ("NTC"), which in 2008 was replaced by the Homes and Communities Agency, which now trades under the name of Homes England ("HE").

13. The Land was subject to a Deed of Covenant dating from the 1995 purchase. The covenant embodies what is commonly referred to (and to which I shall refer) as an "overage clause". The Nortel Complex was purchased at a price reflecting its then current use. The overage clause addressed the possibility that at some point in the future the Land would be suitable for different use, with an attendant higher value. It provided a mechanism for the NTC (now HE) to receive an additional payment as and when development for such use commenced.

14. The Claimant and HE disagreed as to the effect of the overage clause. On its face, it required the Claimant to pay to HE a sum equal to 51% of the uplift in the value of the Land, subject to a reduction of 5% for every year since 2015. That was the Claimant's interpretation. HE argued that the clause specifying the 51% figure contained a typographical error and that the figure should be 100%. The Defendant adopted HE's position on the interpretation of the overage clause.

15. The issue of the correct interpretation of the overage clause had an obvious bearing on the value of the Land. If the Defendant were to acquire the Land through a CPO, the Claimant would be entitled to compensation for the value of its freehold interest,

subject to the overage clause, at open market value (without a CPO). If not agreed, the value would fall to be determined by the Upper Tribunal (Lands Chamber).

16. The parties have for some years (including throughout the CPO process briefly described below) engaged in negotiations for the use and development of the land, including I understand discussions about a possible "friendly" CPO and leaseback arrangement, but they have foundered in particular on the overage clause issue (I understand that access issues may also have had some bearing).

17. On 22 June 2017, the Defendant presented a report to Cabinet supporting the acquisition of the Land through a CPO, with a view to developing it as a continuation of the Harlow Science Park, currently being developed to the north of the Land.

18. On the same date, the Defendant delegated authority to its Head of Governance to commence CPO proceedings to acquire the Land. Valuers for the parties sought to agree a value for the Land, an obstacle to agreement being their difference on the correct application of the overage clause. At a meeting on 17 January 2018, the Defendant confirmed that it would pursue a contested CPO.

19. The Defendant authorised the making of a CPO on 25 January 2018. The order itself was made on 24 September 2018 and formal notice given on 27 September 2018. The Claimant submitted a detailed objection to the Secretary of State, who held a public inquiry to decide whether to confirm the CPO.

20. The public inquiry was held over three days between 8 and 10 May 2019, with a site visit on 10 May. In a decision dated 18 June 2019 the Planning Inspector found that a compelling case for acquisition of the Land had not been demonstrated and that the CPO should not be confirmed. Following representations from both parties the Secretary of State's costs award to the Claimant was made on 16 October 2019.

The Claimant's Bill and the Defendant's Points of Dispute

21. The Claimant's bill of costs totals £468,069.65. Costs are claimed from 22 June 2017, being the date upon which the Claimant says that it was on notice of the Defendant's intention to make a CPO.

22. Those parts of the Defendant's Points of Dispute that are pertinent for the purposes of this decision are as follows. It seems to me that they are in parts unclear and slightly inaccurate, but nothing turns on that and I will summarise them as they are put.

23. The Defendant argues that the Claimant's entitlement to costs arises from the Secretary of State's award of 16 October 2019, which specifically states that the Defendant's entitlement to costs is limited to the "costs of the Inquiry". The Court Order of 3 March 2020 "cements" this award thereby providing the Claimant with authority to have those costs assessed.

24. There is no provision in either the Secretary of State's award or the Administrative Court's order for "costs in contemplation of" or "costs occasioned by" the inquiry. Accordingly, any costs incurred prior to the issuing of the CPO notice on 27 September 2018 and any costs occasioned by/caused by the CPO inquiry proceedings are irrecoverable.

25. The "costs of the Inquiry" end at the date of the order of the Secretary of State in October 2019. All costs incurred after 16 October 2019 relate to the work undertaken to obtain and secure an authority to assess those costs in the SCCO. The Administrative Court's order is silent as to costs, so that pursuant to CPR 44.10(1), there is no entitlement to recover from the Defendant the costs of obtaining it.

26. On the same grounds, the Defendant maintains that the costs incurred and claimed pertaining to work upon the valuation of the Land, particularly legal advice received upon the overage clause and access issues, are irrecoverable as part of the CPO process. If the CPO had been confirmed, the overage clause would have fallen away (I take this to mean that the overage clause would have ceased to have effect on the making of a CPO, although it had as I have observed an obvious effect on the value of the land for CPO purposes). Any costs incurred addressing these issues were irrelevant to the inquiry and therefore, outside the scope of the costs order.

27. Issues of valuation would be addressed and determined by the Upper Tribunal (Lands Chamber) in cases where the sale is agreed in principle, but the parties are unable to agree a price. Compulsory purchase therefore "transcends valuation" and will have been undertaken prior to CPO proceedings in any event.

The Defendant's Submissions

28. Mr Cohen for the Defendant argues, in line with the Points of Dispute, that the temporal extent of the March 2020 Order (or the October 2019 award, insofar as relevant) is from the point at which the CPO Order dated 24 September 2018 was notified to the Claimant on 27 September 2018, to the date of the October 2019 award.

29. The March 2020 Order reflects the October 2019 award, so both refer to the "costs of the inquiry". The question for the Court is the meaning of those words.

30. In *Sans Souci Limited v VRL Services Limited* [2012] UKPC 6 Lord Sumption, at paragraph 13, said:

> "The construction of a judicial order, like that of any other legal instrument, is a single coherent process. It depends on what the language of the order would convey, in the circumstances which the court made it, so far as those circumstances were before the court and patent to the parties. The reasons for making the order which are given by the court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order. In particular the interpretation of an order may be critically effected by knowing what the court considered to be the issue which its order was supposed to resolve".

31. This approach was adopted in *Re A (a child)* [2014] EWCA Civ 871 (at paragraph 32) and *Davidson v Davidson* [2015] EWCA Civ 587 (at paragraph 38).

32. In *The Secretary of State for Business, Innovation and Skills v Feld* [2014] EWHC 1383 (Ch) Mr Recorder Edward Murray (sitting as a Deputy Judge in the Chancery Division) stated:

> "The interpretation of a court order cannot be entirely assimilated to the exercise of interpreting a contract nor can it be entirely assimilated to the exercise of interpreting a statute. In all three cases, however, the common starting point is the natural and ordinary meaning of the words used in light of the syntax, context and background in which those words were used. What additional principles and factors come into play as part of the court's exercise of interpretation will depend on the nature of the writing to be interpreted (contract, court order or statute) and, of course, will be highly dependent on the facts of the specific case."

33. The words "costs of the inquiry" are to be understood in light of the Secretary of State's PPG. Paragraph 040 (reproduced above) specifically provides that a full award of appeal costs means the party's whole costs for the statutory process, including the preparation of the appeal statement and supporting documentation; that it also includes the expense of making the costs application; that where the process concerns a called-in planning application, the eligible costs start from the date of the letter notifying the applicant of the decision to call-in the application; and that in other, non-appeal cases, the eligible costs start from the date of the notification or statutory publication of, for example, the relevant CPO.

34. In *R (on the application of Flintshire CC) v National Assembly for Wales* [2006] EWHC 1858, HHJ Wyn Williams QC (as he was then), sitting as a Judge of the High Court, addressed circular 8/93 ("Award of Costs incurred in Planning and Other (including Compulsory Purchase Order) Proceedings", the immediate predecessor to the current PPG. He found that paragraph 1 of Annex 2 to the circular, which provided that "… once an inquiry or hearing has been formally notified, the principal parties will be at risk of an award of costs if their conduct in the proceedings is unreasonable" meant that the scope of a costs award was limited to periods after the receiving party had been "formally notified" of the inquiry, so that costs incurred before the formal notification were irrecoverable.

35. In *R (Bedford Land Investments Ltd) v Secretary of State for Transport and Another* [2015] 6 Costs LR 937 Mrs Justice Patterson considered whether an award of costs could be made under section 250 of the Local Government Act 1972, in conjunction with section 5 of with the Acquisition of Land Act 1981, before section 5(4) (providing for costs to be awarded where an arranged public inquiry did not take place) had been implemented, and concluded that it could not. Before section 5(4) took effect, the Secretary of State's discretionary power to award costs only arose when an inquiry was actually held.

36. In her judgment Patterson J emphasised the difference between section 250(5), which refers to "the costs of the parties at the inquiry", and section 250(4), which provides for the costs of the inspectorate to be recovered from the parties, which refers to "costs incurred… in relation to the inquiry". She observed:

> "The draftsman appears to have made a deliberate distinction in wording between the two subsections. Had he intended parties involved in the inquiry to have had the ability to recover all of their costs "in relation to the inquiry" which would cover the current circumstances he would have said so. He must, therefore, have intended something different."

37. Mr Cohen submits that the Defendant's position on the period from which costs can be recovered by the Claimant is consistent with the natural meaning of the words "costs of the inquiry" (as there is no inquiry absent a CPO); with 040 of the Secretary of State's PPG; with the words used in section 250(5), as compared with section 250(4); and with *R. (on the application of Flintshire CC) v National Assembly for Wales* and *R (Bedford Land Investments Ltd) v Secretary of State for Transport and Another.*

38. It is not open, says Mr Cohen, to a Planning Inspector to award costs from a point before the date of notification of the CPO. To do so would be to depart from the costs policy incorporated in the PPG, in particular paragraph 040 (Mr Cohen referred me to other guidance notes that clearly set out the discrete stages of the CPO process, distinguishing clearly between formulation, resolution, recording, making the order, notification, objections etc.) In departing from the Secretary of State's costs policy the Inspector would be acting unlawfully.

39. Mr Cohen emphasised the difference between the exercise of the Court's power under section 51(1) of the 1981 Act, which (incorporating as it does costs incidental to proceedings, as well as the costs of proceedings) can provide for the recovery of costs incurred pre-issue, and the award and order made in the present case, to which section 51 does not apply. In any case, as *Friston on Costs* (third edition) at 49.148 expressly notes, "Care should be taken to read the order, because different words used therein may have wholly different meanings" (*Newall v Lewis* [2008] EWHC 910).

40. As for the costs incurred by the Claimant after the date of the October 2019 Order, the same logic applies. Those costs are not "costs of the inquiry" for the simple reason that the inquiry has closed. The position is the same as costs- only proceedings pursuant to CPR 46.14. The costs of the costs only proceedings cannot be sought in the subsequent detailed assessment; rather the party seeking the order that costs be assessed has to ensure that in that order the costs of the costs-only proceedings are adequately addressed (*Friston* at 11.27). That is why the standard form of order made in the SCCO under CPR 46.14 includes a provision that "the costs of this application are costs in the assessment".

41. It follows that, in the absence of such a provision, such costs are not so captured. If the Claimant wanted its costs incurred from the date of the October 2019 Order to the date of the notice of commencement (save for costs which it is entitled to recover in the assessment pursuant to Part 47) then it should have asked for those costs when applying for the March 2020 Order.

42. With regard to the overage clause, the Claimant has included in its Bill costs incurred in respect of the meaning and valuation of the overage clause. The dispute with HE over the meaning of the overage clause made it more difficult for the Claimant and the Defendant to agree a sale of the Land prior to the CPO. The dispute however has, and had, nothing to do with the issues to be resolved in the inquiry. The Planning Inspector said plainly at paragraph 14 of his judgment that it was not for him to make any finding on the matter.

43. The overage position was referred to in the inquiry solely with regard to whether the Claimant had failed to develop the Land because it wanted to reduce the amount it would have to pay to Homes England or for other, unconnected, reasons. That had nothing to do with the proper construction of the overage clause, which falls to be resolved between the Claimant and HE. It made no material difference to the Defendant. Any issues of valuation would only have been addressed if the CPO had been confirmed, in which case the matter, if unresolved, would have been referred to the Upper Tribunal (Lands Chamber).

44. In fact the Claimant decided, for tactical reasons, to trigger a dispute resolution mechanism in the 1995 Deed of Covenant on the first day of the inquiry, so binding HE to third party expert determination and rendering any work or time spent on the overage clause entirely outwith the scope of the inquiry. The correct construction of the overage clause and its effect on valuation will now be determined in an entirely separate forum, in which the Defendant will play no part.

45. It follows that the costs associated with the overage clause are not “costs of the inquiry”. The product of those costs was not used in the inquiry. As the Planning Inspector stated in his decision, the inquiry was never going to address the issues of construction or valuation. The Claimant’s own actions in engaging the dispute resolution mechanism in the 1995 Deed ensured that.

The Claimant’s Submissions

46. Mr Grant for the Claimant submits that it is recognised in case law that a CPO is not like ordinary litigation. It is forced upon a landowner by the Acquiring Authority. The landowner is then placed in an unenviable position, being compelled to either accede to the acquisition or take the steps provided for in the legislation to oppose it. So, for example, if someone unsuccessfully opposes confirmation of the CPO, he is not ordinarily found liable for the expenses of the statutory procedures laid down for the hearing of his objection: *Purfleet Farms Ltd v Secretary of State* [2003] 1 P&CR 20, at paragraphs 24-26 and 40.

47. Mr Grant puts some emphasis upon the procedural steps that led up to the inquiry. First, the Acquiring Authority must decide whether to make a CPO. This will usually require a meeting or decision, the minutes of which will be publicly available under section 100C of the 1972 Act. Then the Acquiring Authority must actually make the CPO pursuant to a statutory power (in this case, under section 226 of the Town and Country Planning Act 1990). Once the CPO is made, notices must be published pursuant to sections 11-12 of the Acquisition of Land Act 1981, following which objections may be made to the Secretary of State. Thereafter the matter must come before a Planning Inspector appointed by the Secretary of State who will decide whether to confirm the CPO, the criterion being whether there is a compelling case in the public interest for doing so.

48. Importantly, throughout all stages of the process, Acquiring Authorities are required to negotiate with objectors. *Guidance on Compulsory purchase process and the Crichel Down Rules* (July 2019), paragraphs 2 and 34 refer:

> "The confirming authority will expect the acquiring authority to demonstrate that they have taken reasonable steps to acquire all of the land and rights included in the Order by agreement…
>
> Although all remaining objectors have a right to be heard at an inquiry, acquiring authorities are encouraged to continue to negotiate with both remaining and other objectors after submitting an order for confirmation, with a view to securing the withdrawal of objections. In line with the advice on alternative dispute resolution, this should include employing such alternative dispute resolution techniques as may be agreed between the parties."

49. As to the interpretation of Court Orders, Mr Grant has referred me to the helpful summary of the principles undertaken by Chief Master Marsh in *Coward v Phaestos Ltd* [2021] EWHC 9 (Ch) (paragraphs 50-51):

> "At the invitation of the court there was some discussion about the principles that apply to the construction of court orders. There is a helpful and interesting discussion of the subject in the judgment of Mr Edward Murray (as he then was) sitting as a Deputy Judge of the Chancery Division in *Feld v Secretary of State for Business, Innovation and Skills* [2014] EWHC 1383 (Ch) at 27-29. That decision does not appear to have been cited to Snowden J in *Brennan v Prior and others* [2015] EWHC 3082 (Ch) at [21]-[22]. I also have in mind Lord Sumption's remarks in the Privy Council in *Sans Souci Ltd v VRL Services Ltd*…
>
> These decisions establish that:
>
> (1) The exercise of construction is to establish what the judge would objectively be understood to have meant by the words used in the order.
>
> (2) The general approach to the construction of written instruments or documents is to be applied, with the necessary changes, acknowledging that construing the meaning of an order is distinctly different from constructing a contract or a statute.
>
> (3) Snowden J framed the test in *Brennan v Prior* at [21] as being:
>
> "The question is what a reasonable person having all the background knowledge, which would have been available at the time to the maker of the document would have understood [the judge] to be using the language in the document to mean …".
>
> (4) He went at [22] to set out the test to be found in the judgment of Lord Neuberger in *Arnold v Britton* [2015] 2 WLR 1593 at [15].
>
> (5) The subjective intentions of the parties are not admissible and strictly the subjective intention of the judge is not admissible unless it is sought to amend the order under the slip rule…

> It seems to me there are limits to the extent to which the court can apply by analogy the principles summarised by Lord Neuberger in *Arnold v Britton* and elsewhere. It is not clear from the authorities, for example, whether it is permissible to have regard to a transcript of discussions between the court and counsel before the order was finalised."

50. On the interpretation of planning decisions the Secretary of State is assumed to know of his own national policy (whether referred to or not), and generally excessive legalism is to be avoided*: St Modwen Developments Ltd v Secretary of State for Housing, Communities & Local Government* [2017] EWCA Civ 1643, paragraphs 6 and 7.

51. With regard to costs incurred prior to 27 September 2018, the Claimant is claiming costs from the date on which the Defendant made the decision to delegate authority to its Head of Governance to commence CPO proceedings. As the minutes of such decisions must be published under the LGA 1972, that is the first point at which the Claimant had notification, pursuant to statutory requirements, of the potential CPO to acquire its land.

52. Unlike a planning appeal, the CPO process is entirely at the control of the Acquiring Authority. It is therefore reasonable for a landowner who sees that the authority intends to acquire his land to begin taking action at that stage. This is the point at which the Claimant began incurring expense in the ensuing statutory process, in accordance with the definition of "Full Award of Costs" set out in the PPG.

53. This accords with the fact that, in ordinary civil proceedings, pre-action costs are recoverable: *Re Gibson's Settlement Trusts* [1981] Ch 179, 186-187 provided they are of use and service in the action; relevant to an issue; and attributable to the Defendant's conduct. In this case the Claimant argues that all of the pre-27 September 2018 costs satisfy those requirements.

54. The Defendant's blanket objection to the recovery of costs "occasioned by" or "caused by" the inquiry is, Mr Grant suggests, not entirely clear in its application, but appears to be an example of the excessive legalism to be avoided in interpreting planning awards. It is he suggests quite remarkable to maintain, where the costs of an inquiry have been awarded, that costs "caused by" that inquiry are not recoverable.

55. With regard to costs incurred after 16 October 2019, it is already established that the Claimant's costs of seeking an order for costs from the Secretary of State are recoverable: *Maiden London Ltd v Ruddick & Anor* [2018] EWHC 3684 (QB) at paragraphs 37-43. In the planning context, the substantive claim is not at an end until there is an order for costs, and there is no order for costs until the costs are made a rule of the High Court. The Secretary of State's costs award is not directly enforceable. It is only from the date of the High Court Order that the time for detailed assessment runs (*Brackenvale Limited & Anor v London Borough of Camden,* 20 May 1992, unreported). This is not a case where Part 8 proceedings need to be begun. One simply writes to the Administrative Court to obtain the order.

56. This also accords with the general principle that an order for costs will render recoverable the cost of work carried out after the date of the order for the purpose of carrying it out. That principle is stated in *Wallace and Wallace v Brian Gale &*

Associates (a firm) [1998] 2 Costs L.R. 53, CA and embodied in Practice Direction 47 para 5.12(1), which provides that a bill of costs may include attendances at court and upon counsel up to the date of the notice of commencement.

57. Mr Grant submits that the cost of advice on the overage clause clearly falls within the scope of the costs award. Valuation is key to any CPO. It is correct that, in the absence of agreement the Upper Tribunal (Lands Chamber) will determine compensation, but whether to oppose a CPO or accept acquisition by agreement will depend on whether the parties can agree on the valuation for land. The overage clause and its effect were central to that in this case. In any event, submits Mr Grant, the effect of the overage clause was a central issue in the inquiry. It related to why the land had not, so far, been developed. This was a constituent part of whether there was a compelling case in the public interest and the costs attendant upon it satisfy the three *Gibson* principles.

Authorities

58. Before I state my conclusions I need to refer to some of the relevant case law. I start with *Re Gibson's Settlement Trusts*. Much of the thrust of Mr Cohen's argument against allowing any costs before the date of formal notification of the Claimant's CPO seems to me to rest (a) upon the proposition that pre-action costs are only recoverable in court proceedings because section 51(1) of the 1981 Act (and its statutory predecessors) empower a court to award not only the costs of litigation, but the costs incidental to it, and (b) that section 250(5) does not mention incidental costs.

59. It seems to me however that *Gibson* (and of the authorities to which Sir Robert Megarry V-C, in *Gibson*, referred) established that pre-action costs which meet the three *Gibson* criteria are costs of the litigation, not costs incidental to it. The three criteria were distilled from judgments of the Court of Appeal, in particular Lord Hanworth MR, in *Pecheries Ostendaises v Merchants' Marine Insurance Co* [1928] 1 K.B. 750 and *Frankenburg v. Famous Lasky Film Service Ltd* [1931] 1 Ch. 428, which did not characterise pre-action costs as incidental to the litigation.

60. The words "and incidental to", in *Gibson*, were significant not because they create a right to recover pre-action costs but because it was necessary for Sir Robert Megarry V-C (at pages 184C to 185A of his judgment) to address the proposition that an order for the costs "of and incidental to" proceedings could, paradoxically, remove that right. As to that he said:

> "I find great difficulty in seeing on what basis it can be said that the addition of these words drives out the right to antecedent costs which the *Pecheries* and *Frankenburg* cases established. The words seem to me to be words of extension rather than words of restriction…"

61. Mr Justice Nugee's judgment, in *Hurst v Denton-Cox* [2014] EWHC 3948 (Ch), seems to me to support the conclusion that pre-action costs that meet the *Gibson* criteria are costs of, as opposed to incidental to, the litigation. At paragraphs 48 and 49 of his judgment he said:

> "… it seems to me quite plain that, although the Vice-Chancellor was dealing with an order which in that case did include the costs "of and

incidental to" the action, and although in that case he said the words do extend rather than reduce the ambit of the order, in the passages which I have referred to he is dealing with costs orders which do not include the words "of and incidental to" but are ordinary costs orders which refer to the payment in the *Pécheries* case of taxed costs, and in *Frankenburg's* case, solicitor and client costs. There is nothing to suggest that in either of those cases the words "and incidental to" were included in the order and those cases are cited by the Vice-Chancellor as authority for the proposition that even without the words "and incidental to", certain costs incurred before the writ has been issued, in both those cases it being the plaintiff's costs which were in issue, could be included within the ambit of an order for costs as being a matter for the taxing master as to whether they would have been sufficiently connected with the proceedings as ultimately constituted, and reasonably incurred.

I do not regard, therefore, that judgment as any authority for the proposition that, without the addition of the words "and incidental to", an order for the costs of an action is strictly limited to costs incurred prior to the writ being issued, indeed, it seems to me plainly inconsistent with any such proposition."

62. I should add as a footnote that Nugee J was, in the paragraphs quoted above, addressing a paying party's argument (referred to at paragraph 38 of his judgment) to the effect that an order for him to pay the costs of an action did not extend to costs incurred before the service of the proceedings on him. It would follow that Nugee J was rejecting the proposition that recoverable costs were limited to those incurred after (rather than, as he appeared to say, prior to) issue.

63. The scope of the extension conferred by the words "and incidental to" is another matter. In *Newall v Lewis* Mr Justice Briggs considered the effect of a consent order under the terms of which the receiving party was to receive the costs of proceedings, but the costs incidental to the proceedings were to be referred to a Chancery judge.

64. Briggs J accepted (at paragraph 16 of his judgment) as "beyond question" that a court's order for a party to receive the costs of litigation to be assessed on the standard basis in itself entitles a party to recover costs incidental to the litigation. He rejected however the proposition that, in the case before him, this simply left the receiving party in a position to recover all its costs, because that would have rendered the consent order's provisions for separate treatment of costs "incidental to" the litigation redundant.

65. Briggs J does appear to have accepted, at paragraph 17 and 18 of his judgment, this analysis of the law:

"Prior to 1986, one of the bases upon which costs could be ordered was the 'common fund' basis. In *Re Gibson's Settlement Trust*… a case about costs awarded on the common fund basis, Sir Robert Megarry V−C sitting with assessors, said, at page 185F to 186A:

'(3) The power to award "the costs of and incidental to all proceedings in the Supreme Court" is conferred by the Supreme Court of Judicature

> (Consolidation) Act 1925, section 50(1); and these words are echoed by R.S.C., Ord. 62, r 2 (4), which provides that the power is to be exercised "subject to and in accordance with this Order." By rule 28(2), on a party and party taxation there are to be allowed –
>
> "all such costs as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed."
>
> By rule 28(4), on a taxation on the common fund basis, "being a more generous basis than that provided for by paragraph (2)," there is to be allowed "a reasonable amount in respect of all costs reasonably incurred," and paragraph (2) does not apply. I think that from the setting in which this provision occurs, it is plain enough that the words "costs reasonably incurred" refer to "the costs of and incidental to" the proceedings in question.'

Costs on the standard basis were introduced in 1986 and, as now provided for in CPR 44.4, this permits recovery of costs provided that they have not been "unreasonably incurred or are unreasonable in amount". The CPR introduced the additional requirement that the court will "only allow costs which are proportionate to the matters in issue". It follows that, subject to the question of proportionality and burden of proof, the modern standard basis of assessment is broadly equivalent to the old common fund basis of taxation, so that, by parity of reasoning, an order for costs of proceedings on the standard basis picks up costs "of and incidental to" those proceedings."

66. Briggs J then left it to the Costs Judge to decide which were costs of the litigation, and which incidental to it "… by reference to the rather scanty authority on the point…" although, notably, he rejected the proposition that investigative or pre-action costs are necessarily costs incidental to, as opposed to costs of, the proceedings (paragraph 30).

67. There is some authority for the proposition that (depending on the facts of the case) the costs of complying with Pre-action Protocols can qualify as costs incidental to subsequent litigation: *McGlinn v Waltham Contractors Ltd* [2005] EWHC 1419 (TCC) and *Citation Plc v Ellis Whittam Ltd* [2012] EWHC 764 (QB), both referred to in *Hurst v Denton-Cox* at paragraphs 50-56.

68. In *Maiden London Ltd v Ruddick & Anor*, Mrs Justice Yip made (for the purposes of this judgment) two key findings. The first is that, where a costs award is made under section 250(5) of the 1972 Act which is subsequently embodied in an order of the Administrative Court, the Civil Procedure Rules, in particular CPR 44, apply to the assessment of the costs awarded. Yip J refused permission to appeal on an argument to the contrary, on the basis that it was without merit.

69. That particular part of the decision of Yip J, being on permission to appeal, is not strictly binding on me but it is of course highly persuasive as well as (to my mind, and with respect) obviously right. It has been the Defendant's position throughout that the CPR apply to this assessment, and the point has been conceded by the Claimant.

70. The second key finding is set out at paragraphs 39 to 40 of Yip J's judgment:

> "Section 250 of the Local Government Act 1972 provides for the minister to make orders as to the costs of the parties as at the inquiry and as to the parties by whom the costs are to be paid…
>
> In my judgment, that power does extend to the inclusion of costs reasonably incurred in seeking an order for costs. In the context of litigation, the costs of substantive proceedings are considered to include the point up to the disposal of the claim and determination of any liability for costs. Once there is an order for costs, the substantive claim is at an end and proceedings thereafter relate to the assessment of costs in respect of which a separate order for costs is required…"

71. Turning to *R (on the application of Flintshire CC) v National Assembly for Wales*, I find myself in disagreement with Mr Cohen as to the appropriate interpretation of the judgment of HHJ Wyn Williams QC. If the learned judge had made a finding to the effect that the costs of an inquiry could only be recovered from the date of formal notification, that would obviously have been a highly significant consideration for present purposes. To my mind, however, he made no such finding.

72. His judgment addressed the fact that, where an appellant had withdrawn its appeal eight days before a scheduled inquiry, the Planning Inspector had made an award of costs dating from three days after the Planning Inspector considered formal notification to have been given. The local planning authority, which had incurred considerable costs before that point, appealed.

73. The relevant guidelines indicated that an award of costs could be made, against an appellant who withdrew an appeal at a time which resulted in the Department's late cancellation of an inquiry or hearing:

> "If an appeal is withdrawn, without any material change in the planning authority's case, or any other material change in circumstances, relevant to the planning issues arising on the appeal, after the date on which the Secretary of State is subsequently satisfied that the principal parties had received formal notification of the arrangements for an inquiry or hearing, an award of costs may be made against the appellant, in accordance with section 322A of the 1990 Act. The date of receipt of the formal notification of the inquiry or hearing, after which the appellant will be at risk of an award of costs, will be taken as three working days after the date of posting of the Department's notification letter…"

74. Much of HHJ Wyn Williams QC's judgment was taken up with determining when "formal notification" had actually taken place. He found that the Planning Inspector had interpreted the relevant guidance correctly and had not acted unlawfully. He did not, however, find that costs could be awarded only from the point of formal notification. What he said on that point was:

> "That leaves the argument that common sense dictates that a party should not be left in a position whereby it can incur substantial expenditure and yet not recover the same even though a party may withdraw from the appeal

> process late in the day. In my judgment, that common sense approach should not lead to a different conclusion in terms of the interpretation of the circular to that which I have found to be correct. I say that for this reason: the circular is guidance and I stress that point. A decision-maker is to have regard to the guidance and will no doubt give it appropriate weight in the decision making process but, since it is guidance only, it does not follow that a decision-maker is bound to hold in any particular case that an order for costs should be made to run only from a date after the formal notification process of the inquiry has taken place. That may be the decision-maker's starting point but it need not necessarily be his or her end point. The decision-maker will no doubt take into account all the circumstances which are material before he or she makes his order, final conclusion or decision. It therefore does not follow in my judgment that the interpretation I have placed upon this circular, and that which I have found the National Assembly was entitled to place upon it, necessarily means the costs incurred before a formal notification has taken place of the inquiry arrangements will never be awarded. Whether or not they will be awarded will depend upon the particular circumstances of any particular case.…"

75. This seems to me to be quite inconsistent with the proposition that the Planning Inspector in this case would have acted unlawfully in making an order for costs which incorporated recovery of costs before the date of formal notification of the Defendant's CPO. It also seems to me to be in line with the warning of the Court of Appeal in *St Modwen Developments Ltd v Secretary of State for Housing, Communities & Local Government* (Lindblom LJ, at paragraphs 6 and 7) to avoid applying "excessive legalism" to planning cases.

76. Finally I need to mention the judgment of Mrs Justice Patterson DBE in *R (Bedford Land Investments Ltd) v Secretary of State for Transport and Another.* To my mind, her distinction between the wording of section 250(5) and section 250(4) was made to explain and support her conclusion that section 250(5) could not, on the facts of that particular case and the law as it stood at the time, extend to the costs of an inquiry that had not taken place. It is not an authority for a restrictive reading of section 250 generally. On the contrary, at paragraph 47 she said:

> "The discretionary power is to award the "costs of the parties at the inquiry". The "at the inquiry" refers to attendance or representation at the inquiry. There is no restriction on the amount of the award. It is clear… that a claimant who has incurred expense in objecting to the order and pursuing that objection would be entitled to his costs. There is thus no policy reason for restricting the amount claimed in an artificial way simply to costs of attendance at the inquiry. A bill would be submitted in the usual way and taxed accordingly."

Conclusions

77. From the statutory provisions and the above authorities I draw the following conclusions.

78. Under orders awarding the costs of court proceedings, pre-action costs (provided they meet the *Gibson* criteria) will be costs of (as opposed to incidental to) the proceedings.

79. A court's order for "the costs of" court proceedings, by virtue of section 51 of the 1981 Act and the provisions of the Civil Procedure Rules at CPR 44-48 for the assessment of costs, extends in any case to costs "incidental to" litigation without any requirement for specific wording to that effect.

80. Costs "incidental to" litigation may include compliance with Pre-action Protocols. It would seem to follow that the costs of negotiations (before and after issue), which are normally recovered although not of use and service in the litigation itself, are recovered as costs incidental to the proceedings.

81. Where the Administrative Court makes an order embodying a costs award made by the Secretary of State under section 250(5) of the 1972 Act, section 51(1) of the 1981 Act, which applies to proceedings "before the court", has no application.

82. The mechanism for quantifying costs is however (*Maiden London Ltd v Ruddick & Anor*) an assessment to which the Civil Procedure Rules, in particular CPR 44.4, apply. Applying CPR 44.4(a), subject to any express provision to the contrary, assessment will be (as in this case) on the standard basis.

83. The Civil Procedure Rules, as secondary legislation, have the force of law. Assessment on the standard basis (*Newall v Lewis*) in itself entitles a receiving party to recover costs "incidental to" proceedings. It would follow as a matter of law that an order of the Administrative Court, made under section 250(5), for the costs of an inquiry to be assessed on the standard basis, extends to costs incidental to the inquiry even if that is not expressly stated.

84. Applying *Gibson*, costs incurred before the inquiry process formally starts will (in principle, and subject to the established criteria) be recoverable under the Administrative Court's order as costs of the inquiry.

85. If the above conclusions are correct, then by reference to established law and principle the costs recoverable under the Administrative Court's March 2020 Order extend to pre-27 September 2018 costs and to costs that can properly be described as incidental to the inquiry.

86. If that is not correct, and the extent of the costs recoverable under the order turns upon the principles of construction outlined by counsel for both parties, the question will be whether an order for the costs of an inquiry, made under section 250(5) of the 1972 Act, should be construed more narrowly than an order of the court for the costs of proceedings, made under section 51(1) of the 1981 Act.

87. There seem to me to be several reasons why that should not be the case.

88. As Patterson J observed in *R (Bedford Land Investments Ltd) v Secretary of State for Transport and Another*, there is no limit on the Secretary of State's discretionary power to award the "costs of the parties at the inquiry". It would follow that the fact that section 51(1) of the 1981 Act mentions incidental costs, whereas section 250(5)

of the 1972 Act does not, has no real bearing on the construction of the Administrative Court's order.

89. The statutory mechanism prescribed by section 250(5) of the 1972 Act provides for a receiving party's costs to be assessed on the standard basis by reference to the Civil Procedure Rules. The narrow construction of section 250(5) contended for by the Defendant would be inconsistent with the court's established power, on a standard basis detailed assessment, to allow both pre-action costs and costs incidental to litigation.

90. With regard to pre-27 September 2018 costs, given that there is no limit on the Secretary of State's power to award the "costs of the parties at the inquiry", the Secretary of State has the power to award such costs from the moment they start to be incurred, so that there has to be something to support the proposition that the Secretary of State has excluded the recovery of their costs from before a particular point. The question is then whether the published guidelines relied upon by the Defendant have the effect, as the Defendant contends, of preventing the recovery of costs incurred before formal notification of the CPO. It seems to me that they do not, for these reasons.

91. HHJ Wyn Williams QC, in *R (on the application of Flintshire CC) v National Assembly for Wales*), addressed the immediate predecessor of the published guidance relied upon by the Defendant and concluded that those guidelines were not to be applied rigidly so as necessarily to exclude the recovery of costs from before the starting point indicated by the guidelines.

92. The emphasis in the current guidance is upon recovery of costs from the point at which a party will start to incur costs of the statutory process. As Mr Grant has pointed out, the statutory process that leads up to an inquiry starts before the CPO is formally notified.

93. It would be contrary (a) to the guidance of HHJ Wyn Williams QC, (b) to the Court of Appeal's warning against excessive legalism in *St Modwen Developments Ltd v Secretary of State for Housing, Communities & Local Government* and (c) to the court's duty under the overriding objective to deal with cases justly, to interpret a court order by reference to the published guidance of the Secretary of State in such a rigid fashion as to exclude entirely the recovery of reasonable and proportionate costs of and incidental to the inquiry simply because they were incurred before the date of formal notification of a CPO.

94. It would also be inconsistent with the conclusion of Patterson J, in *R (Bedford Land Investments Ltd) v Secretary of State for Transport and Another*, to the effect that there is no policy reason for restricting the amount claimed under section 250(5) in an artificial way and that "A bill would be submitted in the usual way and taxed accordingly".

95. For those reasons I have concluded that there are no good grounds for construing an order of the Administrative Court for the costs of an inquiry under section 250(5) of the 1972 Act more narrowly than an order of the court for the costs of court proceedings, and a number of good grounds for not doing so.

96. It would again follow that costs incurred before the formal notification of the CPO on 27 September 2018, and costs incidental to the inquiry, will, in principle and subject to the established criteria, be recoverable.

97. Whether items of costs are recoverable from 22 June 2017 will depend upon the items and any point taken against them, but there is no basis for the blanket disallowance contended for by the Defendant.

98. I regard as insupportable the proposition that the costs of obtaining the Administrative Court's order of March 2020 are irrecoverable, primarily because it runs directly contrary to *Maiden London Ltd v Ruddick & Anor*. With regard to the Points of Dispute, Practice Direction 44, paragraph 4.2 refers to a specific "no order as to costs" provision, which has no application here (nor does CPR 44.10, which applies to an order which does not mention costs). It would seem evident that the Administrative Court's order in *Maiden London Ltd* did not make any specific provision for the costs of the application for an order, or the issue of recoverability would never have arisen.

99. Mr Cohen's cross-reference to Part 8 costs-only proceedings seems to me to be rather artificial. It seems to me much more logical, as did Yip J, to treat the obtaining of the order of the Administrative Court (expressly provided for in section 250(5) of the 1972 Act) as the final order for costs of the inquiry, and as such part and parcel of the statutory inquiry process. Her decision is in any event binding upon me.

100. The statutory process leading up to the CPO imposed a duty upon the Defendant to negotiate with the Claimant with a view to possible removal of any objection to the CPO. It seems evident that both parties envisaged that a CPO might be made on terms satisfactory to both. Insofar as that negotiation process was informed by advice and representation by valuers or legal advisers, then it seems to me that in principle the Claimant is entitled to recover the costs of that representation and advice as costs incidental to the inquiry. The fact that, if a CPO had been made, the matter might have been referred to the Upper Tribunal seems to me to be irrelevant, not least because a CPO has not been made.