TWA/21/APP/O1/OBJ/8
TWA/23/APP/02

Transport and Works Act 1992

The Network Rail (Old Oak Common Great Western Mainline Track Access) Order

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BELLAVIEW PROPERTIES LIMITED'S REPLY TO NETWORK RAIL INFRASTRUCTURE LIMITED'S RESPONSE THE APPLICATION FOR A PARTIAL AWARD OF COSTS

Introduction

1. On 8 March 2024, Bellaview Properties Limited ("Bellaview") made, in writing, an application for a partial award of costs against Network Rail Infrastructure Limited ("NRIL").
2. NRIL responded to that application by submissions made on 18 March 2024.
3. Bellaview's reply is set out below. In its reply, Bellaview follows the same subheadings as were used in its application and in NRIL's response ('the Response'). Bellaview will not reply to each and every point raised in NRIL's Response. The reply will be confined to those points which are material to Bellaview's application for a partial award of costs and the Secretary of State's determination of it.
4. By way of summary, the basis of which Bellaview contends that NRIL has behaved unreasonably is a simple one, but is no less compelling for that. It is set out in Bellaview's application. Until day one of the public inquiry, NRIL persisted in seeking, through its application and its draft Order, powers to take temporary possession of Bellaview's land which, in terms of extent, were well in excess of what NRIL required for the purposes of delivery of the GWML Systems Project. Moreover, and as its costs

Response makes clear, NRIL was aware, well in advance of the start of the inquiry, that the powers it was seeking through the draft Order were excessive and unnecessary. Notwithstanding this, NRIL did not seek to modify the extent of powers it was seeking until day one of the inquiry when it made its opening statement. That was manifestly unreasonable. Bellaview was required, in evidence and in its preparation for the public inquiry, to address the application and draft Order as made and as pursued, until day one of the inquiry, by NRIL. Thus, unnecessary costs and expense were incurred.

5. NRIL in its Response has failed to explain why it was that it did not seek to modify its application and the extent of powers of temporary possession it was seeking through the draft Order until day one of the inquiry. Indeed, it offers no explanation at all for this failure.

6. The fact that NRIL in without prejudice discussions indicated that the extent of temporary possession which NRIL needed may be less than that set out in the draft Order does not excuse or explain NRIL's conduct. Indeed, the fact that NRIL approached without prejudice discussions in this way makes its failure to seek modifications to the draft Order well before it did all the more unreasonable. Moreover, at no point in those without prejudice discussions did NRIL advise Bellaview that it was proposing, let alone intending to seek modifications to the draft Order in relation to the extent of the powers sought.

7. The reason why NRIL did not seek modifications to the draft Order, and to its case in general, before day one of the inquiry was (quite possibly) in order to maintain pressure on Bellaview and, as such an advantage, in without prejudice discussions

becomes compelling; we note that no alternative explanation has been forthcoming from NRIL.

Relevant guidance

8. NRIL has referred to Department of Transport Circular 3/94. NRIL says that this guidance, rather than the PPG, is material for the determination of the application for a partial award of costs.
9. Bellaview has not been able to establish conclusively whether and if so to what extent DfT Circular 3/94 remains extant.
10. However, and to the extent that it does remain extant and to the extent that it is material, Circular 3/94 adds nothing of substance to what is set out in the PPG. It recognises that awards of costs arising from application for Transport and Works Act Orders are made when there has been unreasonable behaviour which leads to unnecessary expense. Bellaview considers that that is what has occurred, and this is the basis on which its application for a partial award of costs against NRIL was made.

Particulars of Unreasonable Behaviour

11. NRIL does not dispute the factual matters set out in Bellaview's costs application (see Response (3.3, 3.8, 3.9, 3.10-3.12).
12. In relation to the power within the draft Order (before modification) to allow NRIL to "remove buildings", NRIL claim (Response para.3.4) that it had no intention to remove the warehouse and that Bellaview knew this is unfounded. It is indeed the case that NRIL had indicated in without prejudice discussions an intention to occupy and use some part of the warehouse but at no stage, before day one of the inquiry, did NRIL

indicate or confirm that it was not persisting in its case to seek a power of (effective) demolition through the Order it was asking the Secretary of State to make. NRIL now state that the reference to "demolition" in the draft Order (prior to modification) referred to minor structures only, but that is not what the draft Order stated, and NRIL were requested in without prejudice discussions at a meeting on 2 May 2023 to explain what the reference demolition referred to, no response has ever been forthcoming. At the point in time when NRIL came to the conclusion that it did not need powers to demolish the warehouse or any part of it, it was incumbent on NRIL at that point to make it clear, formally, to the Inspector, to Bellaview, and generally, that it was no longer seeking such powers and would not be persisting with a case at the public inquiry to secure such powers. NRIL failed to do so until day one of the inquiry and this is unfathomable and was wholly unreasonable. It is no less unreasonable by reason of the fact that NRIL may have intimated informally and in without prejudice discussions that it was not intending to demolish the warehouse.

13. The same applies to NRIL's apparent decision to "step back" from seeking powers to take temporary possession of the entirety of Bellaview's land (Response para.3.5). The fact that NRIL may have intimated in without prejudice discussions that a lesser area than that set out in the draft Order may be required in terms of temporary possession does not excuse NRIL's failure before day one of the inquiry to make its position clear formally, to confirm that the extent of powers sought through the draft Order were not now sought and formed no part of its case, and to indicate that modifications were sought to the draft Order accordingly. The fact that NRIL concedes that it knew as early as July 2023 (if not even earlier) that its requirement was less extensive than that sought through the application and the draft Order compounds

the unreasonableness. Given that NRIL had agreed the wording of a condition on Bellaview's planning permission in July 2023, it is mystery why it did not then reflect that a request for modifications to the draft Order, which had been submitted with NRIL's application on 17 April 2023. The condition would of course provide Bellaview with no protection against the exercise of powers in a made Order. NRIL state in paragraph 3.5 of the Response that they knew as early as Summer 2022 that they would not require possession of the entirety of the site. It is therefore entirely unclear why the application for the draft Order made on 17 April 2023 included powers for the possession of the entirety of the site. Even if NRIL's position informally both before and after the making of the application for the Order was that they did not require possession of the entirety of the site, their formal position in this regard was not stated until day one of the inquiry. It was not unreasonable for Bellaview to prepare its case on the basis of NRIL's formal position, particularly as this was so at odds with its informal position.

14. With regard to para. 3.9 of its Response, if, as NRIL contends, its requirements had not crystalised when it submitted its Statement of Case, NRIL should have sought to amend its Statement of Case when its position had crystallised; this was well before the opening of the public inquiry, and well before the submission of evidence. It is of course for NRIL itself to decide what powers it needed and to make and pursue its application accordingly. If NRIL was satisfied that shared occupation of the site was acceptable, it should have made or amended its application accordingly. It is plain that NRIL was satisfied that the extent of powers of temporary possession sought by the application were not necessary. As such, it should have made this clear by a

formal request to amend the draft Order and by producing a unilateral undertaking (or draft thereof) well before it did.

15. NRIL at paras. 3.9 - 3.13 of its Response refers to indications it gave prior to the inquiry in without prejudice discussions with Bellaview, that the extent of temporary possession required was less than that sought through NRIL's application and through the draft Order, and that site sharing was acceptable. That NRIL did so intimate in without prejudice discussions is correct, as a generality at least. However, Bellaview's complaint is that NRIL, notwithstanding, persisted, until day one of the public inquiry, with its case in support of powers sought in the draft Order and that is the case therefore that Bellaview was required to address and answer in its evidence. It is not accepted as put in para. 3.15 of the Response that Bellaview "knew" that NRIL "would be" "revising the Order" "well in advance of the Inquiry's commencement". It is precisely because NRIL stated no intention nor did it provide any, suggestion, inference, or confirmation that it would seek to modify the Order that Bellaview was obliged to prepare and present its case as it did.

16. It is not accepted that Bellaview can or should be criticised for its engagement with the process of considering and addressing the various modifications to the draft Order or the draft undertakings or agreements submitted by NRIL during the inquiry. It plainly did fully engage, and often sought to provide to NRIL constructive feedback and to offer solutions. It is thus incorrect for NRIL to allege that Bellaview's engagement was not genuine and NRIL's assertion in this regard is wholly rejected. The fact that Bellaview continued to express criticism of NRIL's approach and of the Order as modified and the undertaking does not amount to unreasonable behaviour on Bellaview's part.

17. The assertion made by NRIL at para. 3.17 of its Response of unreasonable behaviour on the part of Bellaview is unworthy and rejected. It is of course the case that no application for costs has been made by NRIL against Bellaview (nor is there any basis for such an application). With regard to the details of those assertions, Bellaview makes the following points:

    a. that Bellaview "continually changed its requirement" during discussions on site sharing is rejected. Once Bellaview's planning application had secured a resolution to grant, and construction project management professionals were engaged, they met on site with representatives from NRIL and Colas Rail twice (22 September 2023 and 9 October 2023), as well as exchanging correspondence, drawings and plans. Necessarily the construction professionals looked at the constructability of Bellaview's scheme in a greater level of detail than had been looked at previously, but this close analysis should not be categorised as Bellaview changing its mind. It is agreed that there was constructive engagement by NRIL/Colas Rail with Bellaview's construction professionals, and this is specifically confirmed in Mr Aaronson's statutory declaration; this part of Mr. Aaronson's evidence was not challenged at the public inquiry. The Secretary of State of course, and properly, has no evidence about the detail of what occurred in those discussions. However, the position in fact is that NRIL's position throughout was muddled and inchoate and it was left to Bellaview to respond to NRIL's changing requirements and to suggest practical ways forward for all parties, and not the other way around;

b. it is the case that it was left to Bellaview to point out, in evidence, that NRIL's land plan did not accord with its position stated at the inquiry that the exercise of the powers of temporary possession which it sought would not prevent the construction of Belleview's proposed development. It is difficult to see how or why Bellaview should be criticised for doing so and for, in effect, doing NRIL's job for them; Bellaview's planning application was registered by LB Ealing on 1 December 2022, NRIL had the opportunity from that date to review Bellaview's proposed plans, and it is assumed that NRIL did as they submitted an objection to the application;

c. that Bellaview as required, exceptionally, to seek an order for specific disclosure is not a basis for criticism. The application was not "refused"; rather NRIL indicated that it was prepared to address the substance of that application by further correspondence. NRIL of course failed properly to do so and this has been addressed in Bellaview's submissions. That Bellaview was compelled to make its application was not unreasonable.

18. In conclusion, NRIL has not provided any substantive response to the basis of Bellaview's costs application, simple as it is. NRIL has offered no satisfactory explanation – indeed no explanation at all – as to why it did not, before day one of the public inquiry, indicate formally to the Inspector, to Bellaview, and publicly that it did not require the extent of powers it was seeking. Its failure to do so and its failure to provide any explanation or excuse amounts plainly to unreasonable behaviour.

'Unreasonable behaviour causing unnecessary expense'

19. NRIL's Response to this element of the claim frankly makes no sense.

20. Until day one of the inquiry, Bellaview was required to address a case in terms of the extent of powers sought which bore little resemblance to NRIL's case after its opening statement given on day one of the inquiry.

21. Bellaview in its evidence and in its preparation for the inquiry was required to and did address the case that NRIL was persisting with until day one of the inquiry, namely that the extent of powers it was seeking through the application and draft Order were necessary and that there was a compelling case in the public interest for those powers to be given.

22. Contrary to what is claimed by NRIL in its Response at para. 3.18, that is the basis on which Bellaview's evidence as a whole was prepared. Mr. Aaronson's evidence was required to and did address the effect on his businesses of the temporary loss of the whole of the Horn Lane site. Mr. Rhead's evidence as a whole was directed at the likely costs of the exercise of the powers sought by NRIL in the draft Order as it was submitted with the application. Mr. Rhead's evidence principally addressed the question of whether NRIL had sufficient funding, based on taking possession of the entirety of the site, and the likely extinguishment of a business, and whether NRIL's assessed much lower funding value was therefore an impediment to the making of the Order.

23. The fact that Bellaview persisted with its objection notwithstanding the substantial modifications to the Order introduced by NRIL on day one of the inquiry is nothing to the point. Bellaview was required to prepare its case on the basis of the application made and the powers sought by the draft Order as it was submitted with that application. That is what Bellaview did and, in large measure, that endeavour was

unnecessary given that NRIL substantially changed its case on day one of the inquiry. This caused wasted expense on the part of Bellaview.

24. It is denied as alleged in para. 3.20 of the Response that "Bellaview did not engage substantively with NRIL until the run up to the Inquiry", and that it was "primarily" NRIL's efforts that moved matters forwards. Almost every meeting (including virtual) held between the parties to move matters forward was arranged by Bellaview's professional team, including the site meetings with NRIL/Colas Rail referred to above, as well as two meetings in November 2022, a meeting in December 2022, and the meeting on 2 May 2023. NRIL's team have, however, principally relied on correspondence, and not consistently been timely in their responses. This is in stark contrast with the proactiveness exhibited by Bellaview.

25. The extent to which such expense is recoverable is of course a matter for detailed assessment by a costs judge, if a cost order is made.

Conclusion

26. For the reasons given in its application, Bellaview contends that NRIL has acted unreasonably leading to wasted expense. NRIL has not offered any substantive or credible response to this contention. A partial award of costs should be made.

NORTON ROSE FULBRIGHT and Douglas Edwards KC

28 March 2024