Transport and Works Act 1992, s.11(5). The Network Rail (Old Oak Common Great Western Mainline Track Access) Order

Network Rail's Response to Bellaview Properties Limited's application for a partial award of costs

1 Introduction

1.1 Network Rail Infrastructure Limited (**NRIL**) has applied to the Secretary of State for Transport for the Network Rail (Old Oak Common Great Western Mainline Track Access) Order [20xx] (**Order**). Bellaview Properties Limited (**BPL**) has made an application for a partial award of costs in respect of its opposition to the Order, and this document is NRIL's response to that application.

1.2 The public inquiry into the Order closed on 8 March 2024. At the closing submissions hearing, NRIL agreed to provide its response to the BPL Costs Application no later than 18 March 2024.

1.3 Paragraph 5 of the BPL costs application states that a partial award of costs is sought on the basis of "*unreasonable behaviour on the part of NR which has led to unnecessary expenditure on the part of BPL*". The accusation of unreasonable behaviour is strongly rejected, and the costs application strongly opposed.

2 Relevant guidance

2.1 Paragraphs 4 and 5 of the application state that it is made with regard to guidance in the "NPPG". NPPG refers to Government *Planning Practice Guidance*. Paragraph 057 of the PPG states that it applies to compulsory purchase and analogous orders. Analogous orders are described at paragraph 064 but the list of analogous orders does not include orders made under the Transport and Works Act.

2.2 The most recent Department for Transport Guidance on TWA Orders, *Transport and Works Act Orders: a brief guide* Updated July 2023, states in relation to costs:

> *Those who take part in an inquiry are normally expected to meet their own costs. However, there may be limited exceptions. Information is set out in a pamphlet – Transport and Works Act 1992 Public Inquiries and Hearings Cost Awards – A Guide for Applicants and Objectors*

2.3 The DfT pamphlet *Transport and Works Act 1992 Public Inquiries and Hearings Cost Awards – A Guide for Applicants and Objectors,* December 2007, states that it is "*intended mainly for applicants or objectors who are not professionally represented*". It adds "*a fuller statement of the Secretary of State's policy on awards of costs is given in the Department of Transport Circular on Awards of Costs in Applications Proceedings under Section 6 of the Transport and Works Act 1992"* (**Circular**).

2.4 Paragraph 1 of Annex 1 to the Circular States that "*All parties presenting evidence to an inquiry or hearing will bear risk of an award of costs against them if unreasonable behaviour by them causes other parties to incur expense unnecessarily*". Annex 2 provides examples of "*what may be regarded as unreasonable behaviour in inquiry or hearing cases*" as follows:

(a) failing to provide an adequate statement of case;

(b) causing an inquiry to be adjourned or unnecessarily prolonged by the late submission without good cause of a statement of case;

(c) causing a professional witness to attend unnecessarily – for example where a technical issue could have been resolved satisfactorily by prior discussion.

2.5 The Circular also refers, at Annex 1, to the case of *Manchester City Council v Secretary of State for the Environment and Mercury Communications* [1988] J.P.L. 774, in which the High Court held that "unreasonable" should be used in its ordinary meaning.

3 NRIL's response to the BPL Costs Application

3.1 NRIL rejects the application for costs. In particular, it disputes the principle of the application both as regards the allegation that its conduct was unreasonable, and also as regards the contention by BPL that NRIL's conduct was such that BPL incurred costs unnecessarily.

3.2 The following substantive response is drafted by reference to the Section headings and Paragraph numbers adopted by BPL in its application.

'Introduction'

3.3 Paragraphs 1-6 of BPL's application are noted. NRIL makes no comment in respect of these paragraphs save to note that, as stated above, the guidance identified in the application is not stated as having application to Inquiry proceedings under the 1992 Act.

'Particulars of unreasonable behaviour'

3.3 As regards the first five sentences of Paragraph 7, NRIL does not dispute the factual matters as stated.

3.4 As regards the sixth sentence in that paragraph and the discussion of Article 7(1)(b) of the Draft Order, NRIL rejects the position as represented by BPL. It has never been NRIL's intention to demolish the existing warehouse; indeed it was previously NRIL's intention to use that warehouse for the purposes of its scheme. Insofar as BPL is seeking to suggest that it did not understand this position, such suggestion is entirely rejected. From the very first discussions with BPL during 2022, NRIL and its representatives explained their proposed use of the Order Land (and the warehouse within it). The reference to "demolition" in the Draft Order was included on a reasonable and precautionary basis, and was intended to allow for demolition of any minor structure on the land should there prove to be any such structure which NRIL did in fact need to demolish.

3.5 Further, BPL was already aware that NRIL had publicly 'stepped back' from its initial requirement to take possession of the entirety of the Order Land. In this regard, and as BPL have at all times been fully aware, during July 2023 the local planning authority (London Borough of Ealing) asked that NRIL agree to the wording of a planning condition which it proposed to impose on the grant of permission for redevelopment of the Order Land. That condition provided, in terms, that BPL would be able to carry out works within the footprint of the warehouse, and that such works would not interfere with NRIL activities. The fact that NRIL agreed to the imposition of the condition was known to BPL. Even earlier, during Summer 2022, discussions took place between the parties with a view to reaching a voluntary agreement that recognised that NRIL would not require possession of the entirety of the Property and raised the possibility of site sharing. Due to the without prejudice nature of those discussions NRIL does not provide a copy of relevant correspondence or the draft heads of terms that passed between the parties.

3.6 As such, the position as regards the warehouse was, at all material times, not as BPL have stated. Rather, BPL knew that NRIL never intended to demolish the warehouse, and indeed they also knew that NRIL was open to the prospect of BPL retaining possession of the warehouse.

3.7 As regards the seventh and final sentence of Paragraph 7, NRIL agrees that the Draft Order would have the consequences stated, save that it reiterates its position as regards the position regarding supposed 'risk of demolition' to the warehouse.

3.8 NRIL does not dispute the matters stated at Paragraph 8 of the application.

3.9 NRIL does not dispute the matters stated at Paragraph 9 of the application. However it notes that at the time that its Statement of Case was drafted, there was not yet any sufficient understanding as to how site sharing between the parties might work, and as such it was necessary that NRIL essentially reserve its position in respect of the extent of the land over which it needed to seek compulsory purchase powers. Such position was, given the early stage of discussions between the parties, wholly reasonable. This is borne out by BPL's unwillingness to agree the site sharing arrangements so that NRIL ultimately had to submit a unilateral undertaking to the Inquiry. NRIL's solicitors, Addleshaw Goddard (AG), first provided a bilateral draft site sharing agreement to BPL's solicitors, Norton Rose Fulbright (NRF) on 28 November 2023. No substantive comments were received but BPL's solicitors notified AG that they did not agree with the form of the draft agreement. AG provided a bilateral draft deed of undertaking to NRF on 22 December 2023. NRF provided their substantive comments on 11 January 2024. AG provided a further draft on 19 January 2024 which took on board many of the amendments that had been made by NRF. On 24 January 2024, NRF provided further comments on the draft bilateral deed of undertaking and AG provided a further draft to NRF on 25 January 2024. AG also suggested to NRF that a call be arranged for 26 January 2024 with a view to agreeing the outstanding points on the draft. NRF responded that they would not have time to obtain their client's instructions and preferred for a call not to take place on the 26th.

3.10 The Inspector will recall that NRIL had promised to provide a deed of undertaking prior to the Roundtable Hearing on 1 February. Accordingly, because a bilateral deed of agreement had not been agreed with BPL, NRIL produced a unilateral deed of undertaking which was based on the bilateral deed that had passed between AG and NRF. However, it was made clear to the BPL team that NRIL's preference remained to agree a bilateral deed of undertaking. To this day, no comments on the bilateral deed have been received from NRF or BPL. In short, BPL have not demonstrated a genuine wish to agree site sharing arrangements with NRIL despite NRIL's best efforts. Far from being unreasonable, NRIL has bent over backwards to engage constructively with BPL and to

put in place sensible, workable site-sharing arrangements. Those efforts have not been reciprocated by BPL.

3.11 As regards Paragraph 10 of the application, as noted above the Statement of Case was drafted at a time when discussions between the parties were at an early stage and, as such, it was necessary for BPL to reserve its position. Had NRIL pursued (and obtained) compulsory purchase powers over the totality of the Order Land, it would have been used as set out in the Statement of Case. Fortunately, further discussions regarding site sharing with BPL informed further discussion internally at NRIL regarding the extent to which it might be possible to further reduce land take. The fact that such discussions took place (both with BPL and internally within the NRIL team) following the making of the Draft Order and the submission of the Statement of Case, is in no way unreasonable or surprising. Certainly it does not amount to unreasonable conduct for the purposes of BPL's application for costs.

3.12 As regards Paragraph 11, NRIL disputes the fact that BPL were required to prepare its evidence on the assumption that NRIL would be contesting the Inquiry on the basis that it required possession of the totality of the Order Land. BPL knew and understood the revised basis on which NRIL was seeking that the Order be made; indeed Mr Aaronson's evidence expressly addressed that revised basis and without prejudice discussions that began during 2022 expressly considered the detail of site sharing arrangements that would allow continued use of the warehouse by BPL. Further and alternatively, to the extent that it was appropriate for BPL to address the "full acquisition" scenario, on the basis that, as a matter of process and in terms of the formal documentation, the Order was still at that time being sought in respect of the totality of the Order Land, it was necessary only to address that scenario in the briefest of terms (which of course was the basis on which BPL did address it; see further below)

3.13 NRIL does not dispute the matters stated at Paragraph 12 of the application. The fact that NRIL raised its revised position formally on Day 1 of the Inquiry was not unreasonable. Discussions between the parties had been ongoing right up and until the Inquiry (and indeed continued afterwards). In these circumstances it was not possible to confirm the position prior to Day 1 of the Inquiry, since the basis on which BPL and NRIL would 'share' use of the Order Land was not yet known.

3.14 As regards Paragraph 13 and the fact of NRIL making multiple revisions to the Order, see further below.

3.15 As regards Paragraphs 14, 15 and 16, NRIL wholly rejects the contention that it acted unreasonably in its dealings with BPL and its efforts to reach agreement regarding a revised and reduced land take for the Order. As BPL themselves acknowledge, NRIL engaged in extensive and detailed without prejudice discussions with BPL's representatives, with a view to determining the optimal arrangement for both parties. As noted by NRIL in its closing submissions, NRIL was bending over backwards in an effort to accommodate the various (and changing) requirements of BPL as regards the Order Land, at real operational cost to itself in terms of how NRIL and its contractors would be able to deliver the Scheme. Notably, BPL and its advisors knew well in advance of the Inquiry's commencement that NRIL would be introducing a 'reduced land take' and thereby revising the Order.

3.16 Far from the punitive action which BPL is now seeking, it is respectfully submitted that NRIL should be commended for the work which it undertook in this regard, both prior to and during (and post) the 2023 Inquiry sessions.

3.17 Further as regards the issue of unreasonable conduct, NRIL contends that it was in fact BPL which behaved unreasonably. In particular in this regard:

- In the course of discussions/negotiations regarding site sharing, BPL continually changed its requirements such that NRIL was compelled to revise its own proposals again and again, in order to address the 'moving goalpost' that was BPL's position. By way of example, and as the Inquiry is aware, NRIL's 19 December 2023 consultation letter included site sharing plans which had been prepared in collaboration with BPL's team but, a month later BPL's solicitors NRF reverted indicating that parts of what NRIL had understood to be agreed shared areas were no longer workable.

- The Land Plan was also amended in another important regard; namely the route of the permanent easement. NRIL had not realised that the proposed route of the easement, which had been consulted on, including with BPL, during 2022, cut across a corner of a building consented by BPL's planning permission. BPL did not point the conflict out to NRIL informally or in its objection letter to the TWA application or in its Statement of Case. The first occasion on which it mentioned the conflict was in the proof of evidence of its planning witness, Mark Connell, submitted some two weeks before the start of the inquiry. It remains a mystery to NRIL why BPL waited until that date to point out the conflict; BPL's failure to notify NRIL of the conflict earlier was, NRIL submits,

unreasonable behaviour on the part of BPL which caused unnecessary expense to be incurred by NRIL. NRIL immediately took steps to identify an alternative route for the easement that avoided the footprint of the proposed building and amended the Land Plan to reflect the revised alignment.

- NRF, on BPL's behalf made numerous applications to NRIL for the disclosure of documents under the Freedom of Information Act 2000. The details of those applications are not rehearsed here but it is noted that the applications were dealt with properly by NRIL's Freedom of Information Team in the usual way. Some documents were disclosed pursuant to the requests and others were not as the FOI regime includes a number of exemptions that mean disclosure is not required. NRIL also noted that many of the requests were a "fishing expedition" with BPL expecting to uncover a "smoking gun" that would strengthen its case. No such smoking gun existed or exists. Not content with the NRIL FOI team's responses, BPL, via NRF, made an application to the Inspector for an Order for disclosure by letter dated 15 January 2024. It had been intended that the Round Table Hearing on 1 February 2024 would provide an opportunity for anyone who wanted to make an oral submission in response to the consultation that closed on 30 January to be heard, and for conditions, the deed of undertaking and draft Order to be discussed, with closing submissions taking place a week later. However, the Inspector ruled that the 1 February hearing would only consider BPL's disclosure application. The Inspector refused BPL's application. The preparation for and attendance at the disclosure hearing and the delay to the close of the inquiry, have caused NRIL and BPL additional costs; costs which are entirely of BPL's making.

- Accordingly, and contrary to how matters are put in BPL's application, it was in consequence of BPL's own conduct that NRIL was required to effect multiple staged amendments to the Order documentation.

'Unreasonable behaviour causing unnecessary expense'

3.18 NRIL rejects the matters stated at Paragraphs 17-19 of the application. BPL did not incur expense unnecessarily by reason of NRIL's conduct regarding its revisions to the Order. In this regard NRIL notes the following:

- Notwithstanding the revisions to the Order, BPL continued (and indeed still continues) to object to the Order even in its revised form, and as a matter of principle. Thus the need for the Inquiry would not have been obviated by the earlier introduction of the revisions complained of.

- It is disingenuous of BPL to suggest that it would have stood down any of its witnesses or produced reduced proofs of evidence if the Land Plan had been amended earlier. The Inspector and Secretary of State will note that there was a further consultation on the amended draft Order and Land Plan that ran from 19 December 2023 until 30 January 2024; the purpose was to provide local residents and statutory consultees with an opportunity to comment on the amended Order and Land Plan and the site sharing arrangements that had been discussed between NRIL and BPL and which were shown on three site sharing plans (these were not "Order Plans" as paragraph 19 of the costs application seems to suggest). However, BPL took the opportunity to submit a 22-page Additional Objection; this was not the behaviour of an objector who was either cost-conscious or content with NRIL's amendment of the Land Plan to exclude the warehouse. In contrast, BPL stepped up the level of its objection to the Order.

- The evidence called by BPL remains relevant to its case notwithstanding the revisions to the Order. In particular in this regard
    - The evidence of Mr Gent and Mr Gallop (both written and oral) was substantively unaltered by reason of the revisions of the Order; indeed the revisions had no bearing on it whatsoever.
    - Whilst the written evidence of Mr Connell made brief and oblique reference to the scenario where temporary possession powers were sought over the totality of the Land (at Paragraph 2.4), no material time or expense was spent on that scenario. In fact, Mr Connell's proof of evidence addressed primarily the planning history of the site, relevant planning policy, BPL's own planning application and NRIL's application for deemed planning permission.
    - The written and oral evidence of Mr Aaronson was directly targeted at the revised Order, and the ability of the parties to 'share' the use of the site as NRIL proposed. Thus there was no wasted effort/expense caused by NRIL's revisions to the Order.
    - Part of the written evidence of Mr Rhead, and all of his oral evidence, remained relevant to BPL's case irrespective of the revisions to the Order. It is right to note

that his written evidence did address various hypothetical scenarios which would only have been consequent on NRIL taking temporary possession of the entirety of the Order Land. However, to the extent there was expenditure on these scenarios, BPL would not be entitled to recover costs in respect of them, for reasons which were raised by Leading Counsel for NRIL in discussions with the Inspector during the Inquiry, namely:

- First, the hypothetical scenarios identified were not predicated on any form of scrutiny of financial documentation or factual evidence. Rather, they represented bare assertion as to levels of financial liability, unsupported by analysis.
- Second, and importantly, NRIL had adduced evidence to the Inquiry from HS2 Ltd confirming that it (HS2 Ltd) was underwriting the costs of implementing the Proposals of NRIL. In this regard HS2 Ltd expressly confirmed that they had not only underwritten the estimated costs, but also would meet the actual costs, should those ultimately exceed what was estimated.
- Third, and again importantly, Mr Rhead conceded (XX) that the quantum of compensation payable by NRIL in consequence of its delivery of the Proposals was "not a relevant matter" for the Secretary of State's determination whether or not to make the Order.

3.19 Given this position, it is evident that BPL did not incur any unnecessary costs by reason of NRIL's conduct, even if such conduct were held to be unreasonable (which assertion is fundamentally denied).

Concluding Remarks

3.20 BPL's application for costs is misconceived, and ignores the reality of the circumstances existing in the run up to, and during, the Inquiry. NRIL did not behave unreasonably; rather it spent considerable time and resource seeking to accommodate the (changing) wishes of BPL, at considerable cost to itself. BPL did not engage substantively with NRIL until the run up to the Inquiry, and it was primarily due to NRIL's efforts that some form of mutual understanding as to site sharing was ultimately reached.

3.21 Further, and in any event, BPL did not in fact incur any unnecessary expense by reason of the revisions which NRIL has promoted in respect of the Order. Rather, as shown above, the totality of its evidence was, and continues to be, relevant to its case, notwithstanding that NRIL denies that such case is well-founded.

Alexander Booth KC

18th March 2024