Neutral Citation Number: [2023] EWHC 586 (KB)

Case No: QA-2022-000009

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/03/2023

Before:
MR JUSTICE CHOUDHURY
sitting with
COSTS JUDGE ROWLEY

- -

Between:

HARLOW DISTRICT COUNCIL	**Appellant/Defendant**
- and -	
POWERRAPID LIMITED	**Respondent/Claimant**

- -
- -

Mr Rupert Cohen (instructed by **Trowers & Hamlins**) for the **Appellant**
Mr Jamie Carpenter KC and **Mr Nick Grant** (instructed by **BDB Pitmans**) for the **Respondent**

Hearing dates: 4 October 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on 17 March 2023 by circulation to the parties' representatives by e-mail and by release to the National Archives.

MR JUSTICE CHOUDHURY

Mr Justice Choudhury:

Introduction

1. Powerrapid Limited ("**the Claimant**") is the owner of a piece of land in Harlow. Harlow District Council ("**the Defendant**") made a Compulsory Purchase Order ("**CPO**") in respect of the land ("**the Order Land**"). The Claimant successfully resisted the CPO and sought its costs. On 16 October 2019 the Secretary of State made that award of costs, which was made as an Order of the High Court on 3 March 2020. By an *ex-tempore* judgment dated 6 October 2021 ("**the October 2021 judgment**") and a reserved written judgment dated 7 December 2021 ("**the December 2021 judgment**"), Costs Judge Leonard ("**the Judge**") decided which categories of costs, in principle, fell within the scope of that award and made a preliminary assessment as to the applicable hourly rates. This is the Defendant's appeal against those two judgments. There are two grounds of appeal, although Ground 1 comprises four sub-grounds, (i) to (iv). Permission to appeal was granted by the Judge in respect of Grounds 1(i) to (iii) but refused in respect of Grounds 1(iv) and 2. The Defendant pursues all grounds of appeal, seeking permission to do so in respect of Grounds 1(iv) and 2.

Background

2. The background to this matter is succinctly stated in the December 2021 judgment as follows:

> "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."

3. It can be seen from that summary that the parties had been in negotiation for some time over the purchase (in fact since 2014), and that these negotiations had stalled as a result of, amongst other matters, the dispute between the Claimant and Homes England ("**HE**") as to the correct interpretation of the overage provision in the deed ("**the Overage Clause**"). HE's position in that dispute was supported by the Defendant. The Defendant resolved in June 2017 to pursue the CPO route to secure the purchase, although the CPO was not made until 24 September 2018.

4. The Claimant's objections to the CPO were upheld by the Planning Inspector ("**the Inspector**"). The Inspector's decision dated 18 June 2019 was issued after a 3-day inquiry (including a site visit) at which both sides were represented by Leading Counsel. The Inspector, having set out the background, went on to consider whether the CPO was (as asserted by the Claimant) premature. In considering the role played by the dispute over the Overage Clause, the Inspector said as follows:

> "17. Whether or not the covenant has been the main reason for development not progressing, there now appears to be a way forward through a dispute resolution mechanism contained within Section 10 of the covenant. That mechanism was triggered whilst the Inquiry sat and would require the parties to refer the matter to an expert whose decision would be final and binding. The AA [Acquiring Authority] has expressed surprise that the dispute resolution mechanism has not been tried before and concern that it cannot be invoked before the liability to make the 'additional' payment' has been triggered. Again, it is not for me to reach a finding on the interpretation of the covenant. However, the dispute resolution mechanism provides a hitherto untried means of moving forward and the objector's willingness to be bound by the outcome of the process would, at least, resolve the uncertainty which it says is its prime concern."

5. At [27] of the Inspector's reasons, the Inspector considered whether a compelling case for the development of the Order Land in the short term had been made out and said:

> "25 I also give significant weight to the availability of the significant amount of undeveloped land in reserve in the AA's ownership. As such, a compelling case for development of the Order land in the short term has not been made out. Whilst the AA has taken reasonable steps to acquire the land by means other than compulsory purchase, other options remain to be explored. Compulsory purchase has yet to become the last resort. An alternative to compulsory acquisition exists since there is a reasonable prospect that the objector will develop the land itself for the purposes set out in the Order in response to occupier demand. In these circumstances, it would be premature to use CPO powers to acquire the Order land at this time."

6. Accordingly, the CPO was not confirmed. That decision of the Inspector entitled the Claimant to seek its costs, which it did by way of an application dated 9 July 2019 to the Secretary of State ("**SoS**"). The Defendant resisted that application, seeking to argue that the Claimant should not be entitled to its costs on the grounds of unreasonable conduct, namely the invoking of the dispute resolution mechanism in the deed ("**DRM**") at a very late stage in proceedings.

7. The SoS's Order as to Costs was made on 16 October 2019 ("**the SoS's Costs Order**"). The SoS noted that the Inspector had not concluded that there had been any unreasonable conduct and considered that there were "no exceptional circumstances to justify not making a full award for costs". The SoS accordingly accepted the Claimant's application and granted a "full award" of costs. It was not within the SoS's remit to decide the amount of the costs award, which was left to negotiation between the parties, in accordance with the relevant terms of the "*Guidance on Planning Appeals and the award of costs*", issued in 2014. This guidance has been referred to in this appeal as the Planning Practice Guidance or "**PPG**" for short. The terms of the SoS's Costs Order were that the SoS:

> "…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."

8. The parties were not able to agree the amount of costs. The Claimant's Solicitors, BDB Pitmans, then wrote to the High Court for the SoS's Costs Order to be converted to an order of the Court. This is required before there can be a detailed assessment.

9. On 3 March 2020, Administrative Court Office lawyer, MP Cowlin, in exercise of powers delegated by the President of the (then) Queen's Bench Division pursuant to CPR Part 54.1A, made the following Order ("**the HC Costs Order**"):

> "IT IS ORDERED THAT the [SoS's Costs Order] 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.

10. The Claimant's Bill of Costs was in the total sum of £489,069.65. Costs were claimed from 22 June 2017, that being the date upon which the Claimant said it was on notice of the Defendant's intention to make a CPO. The Defendant's Points of Dispute contended, amongst other things, that there was no entitlement to costs incurred for the period before notice was given of the CPO on 27 September 2018. The Defendant further contended that costs incurred in obtaining legal advice as to the Overage Clause and access issues were not recoverable as part of the CPO process. It was also said that there was no entitlement to recover any costs for the period after the SoS's Costs Order, including the costs of obtaining the HC Costs Order. These issues as to the scope of the SoS's Costs Order and HC Costs Order (together "**the Orders**") came for determination before the Judge. At that hearing, the Claimant was represented by Mr Grant of Counsel (who also appeared before me, but now led by Mr Carpenter KC) and the Defendant by Mr Cohen of Counsel (who also appeared before me).

11. The issues before the Judge comprised questions as to the scope of costs recoverable pursuant to the terms of the Orders and as to the appropriate hourly rates. Judgment on the scope points was reserved, whilst an *ex-tempore* judgment was delivered in respect of the hourly rates.

12. In an admirably clear reserved judgment, handed down on 23 December 2021, the Judge, having set out the competing submissions and the authorities to which he was referred, turned to his conclusions at [78] onwards. It is convenient to set those conclusions out in full:

> "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. 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."

December 2021 Order and Grounds of Appeal

13. In an Order issued on the same date ("**the December 2021 Order**"), the Judge ordered that the Claimant is entitled in principle to recover its reasonable and proportionate:

> "(i) costs incurred prior to 27 September 2018
>
> (ii) costs incidental to (as opposed to "costs of") the public inquiry of 8-10 May 2019;
>
> (iii) costs incurred in respect of the "Overage Provision" applicable to the land the subject of the inquiry; and
>
> (iv) costs incurred after 16 October 2019."

14. The Defendant challenges each of these conclusions as being wrong under Grounds 1(i) to (iv) of the Appeal.

15. The December 2021 Order also set out the hourly rates for the relevant fee earners in BDP Pitmans' Planning Team and Litigation Team as assessed

during the October 2019 judgment. The Defendant challenges these assessments under Ground 2 of the Appeal.

Legal Framework

16. Section 250(5) of the *Local Government Act 1952* ("**the LGA**") provides:

> "(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"

17. This provision (as then enacted) was considered in *R. (on the application of Flintshire CC) v National Assembly for Wales* [2006] EWHC 1858 (Admin), in which HHJ Wyn Williams (as he then was), sitting as a Judge of the High Court, said of s.250(5):

> "11…As is clear from the section which I have just read, that is an enabling subsection. It gives no clue as to how the minister should set about the task of deciding whether or not to make such an order. To repeat, it simply empowers or enables the minister to make orders for costs in proceedings to which the section relates."

18. Guidance on costs in the planning context is, however, provided by the PPG. The PPG begins by explaining what an award of costs is, and then, at paragraph 28, it explains why such awards may be made:

> *"Why do we have an award of costs?*
>
> Parties in planning appeals and other planning proceedings normally meet their own expenses. All parties are expected to behave reasonably to support an efficient and timely process, for example in providing all the required evidence and ensuring that timetables are met. Where a party has behaved unreasonably, and this has directly caused another party to incur unnecessary or wasted expense in the appeal process, they may be subject to an award of costs.
>
> The aim of the costs regime is to:
>
> - encourage all those involved in the appeal process to behave in a reasonable way and follow good practice, both in terms of timeliness and in the presentation of full and detailed evidence to support their case.

- encourage local planning authorities to properly exercise their development management responsibilities, to rely only on reasons for refusal which stand up to scrutiny on the planning merits of the case, not to add to development costs through avoidable delay,

- discourage unnecessary appeals by encouraging all parties to consider a revised planning application which meets reasonable local objections."

19. It is apparent from these provisions that the costs regime in the context of planning appeals and other planning proceedings is a limited one in that it only provides for costs in the event of unreasonable behaviour by a party.

20. Mr Cohen, for the Defendant, places particular reliance on paragraphs 40, 41, 44 and 45 of the PPG. These provide:

> "*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 40]*
>
> *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]

…

How is the amount settled where an award is made?

The Inspector or Secretary of State can only address the principle of whether costs should be awarded in full or in part, and not the amount – this is settled subsequently between the parties.

Where a costs order is made, the party awarded should first send details of their costs to the other party, with a view to reaching agreement on the amount. Where costs are awarded against a party and the parties cannot agree on a sum, the successful party can apply to the Senior Courts Costs Office.

[Paragraph: 044]

What if the party does not pay?

Once the Planning Inspectorate has made an award of costs, it has no further role, and it is for the parties to negotiate the amount and to agree on the arrangements for payment. Failure to settle an award of costs is enforceable through the Courts as a civil debt. If a party has any doubt about how to proceed in a particular case, they should seek legal advice.

[Paragraph: 045]" (Emphasis added).

21. The costs regime in respect of CPO proceedings is not so limited. In a separate part of the PPG entitled, "The award of costs and compulsory purchase and analogous orders", the PPG provides as follows at paragraphs 57 to 59, 62 and 63:

"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. .... 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.

…

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.

...

[Paragraph: 057]

How are objectors notified of the award of costs?

When notifying successful objectors of the decision on the order under the appropriate rules or regulations, the confirming authority, usually the Secretary of State, will tell them that they may be entitled to claim costs and invite them to submit an application for an award of costs on the basis of their successful objection. The details of the level of costs are then a matter for negotiation between parties.

[Paragraph: 058]

Can an award be made for unreasonable behaviour?

An award of costs cannot be made both on grounds of success and unreasonable behaviour in such cases; but an award to a successful objector may be reduced if they have acted unreasonably and caused unnecessary expense in the proceedings – as, for example, where their conduct leads to an adjournment which ought not to have been necessary

[Paragraph: 059]

…

What if the objection is partly successful?

Where a remaining objector is partly successful in opposing a compulsory purchase order, the confirming authority will normally make a partial award of costs. Such cases arise, for example, where the authority, in confirming an order, excludes part of the objector's land.

[Paragraph: 062]

What if the compulsory purchase or analogous order is linked to another application?

Sometimes joint inquiries or hearings are held into 2 or more proposals, only one of which is a compulsory purchase (or analogous) order, for example an application for planning permission and an order for the compulsory acquisition of land included in the application. Where a remaining objector, who also makes representations about a related application, appears at such inquiries or hearings and is successful in objecting to the compulsory purchase order, the objector will be entitled to an award in respect of the compulsory purchase or analogous order only.

An objector is not, however, precluded from applying for the costs relating to the other matter on the grounds that the authority has acted unreasonably.

[Paragraph: 063]" (Emphasis added)

22. It is clear from these provisions in the PPG relating to CPO and analogous orders that "Costs will be awarded" in favour of a successful objector "unless there are exceptional reasons for not making the award". This creates a strong presumption, rebuttable only if there are exceptional reasons, that a successful objector will be awarded its costs, with no requirement, unlike the position with planning appeals and other planning applications, to establish unreasonable behaviour on the part of the other party. The rationale for that approach is obvious: a CPO involves the removal of property rights and the involuntary subjection of the landowner to a procedure for such removal. This contrasts with the position in respect of planning appeals where the landowner will be seeking to assert a right to deal with its property in a particular way without any risk (generally) of being deprived of ownership rights.

23. As provided by paragraph 62 of the PPG, an objector in CPO proceedings may benefit from a partial award of costs where it has been partly successful in opposing a CPO. It would appear therefore that a partial award in the CPO context means something different to a partial award in the general planning context, where, as provided by paragraph 41 of the PPG, a partial award may be made where for example an unnecessary adjournment is caused by the

unreasonable conduct of one of the parties. There is no reference to, or definition or explanation of, a "full award of costs" in the CPO context. Indeed, the only provision for the level of costs in that context is contained in the final sentence of paragraph 58 of the PPG, which provides that, "The details of the level of costs are then a matter for negotiation between the parties."

24. With that legal framework and guidance in mind, I turn to the Grounds of Appeal.

Grounds of Appeal

25. Whilst Mr Cohen dealt with Grounds (i) and (ii) together, I shall deal first with Ground 1(ii), which concerns the question of whether the Orders, which provide for payment of the "costs of" the Inquiry, should be read as including costs "incidental to" the Inquiry as well: this ground concerns the scope of the Orders, a determination of which is required before deciding whether costs in respect of a particular period fall within scope.

Ground 1(ii) – Does the reference to "costs of the Inquiry" include costs that are "incidental to" it?

Submissions

26. Mr Cohen submits that the Judge erred in concluding, at [83] of the December 2021 Judgment, that "Assessment on the standard basis (*Newall v Lewis*) in itself entitles a receiving party to recover costs "incidental to" proceedings", in that *Newall v Lewis* [2008] EWHC 910 (Ch) did not establish any such proposition and nor was this the subject of argument below. It is not the manner of assessment, i.e. whether or not on the standard basis, that entitles a receiving party to costs "of and incidental to" the proceedings, but the terms of the relevant order. Mr Cohen submits that, in the present case, the SoS's Costs Order (which the HC Costs Order merely replicated) merely provided for "costs of the Inquiry", and that in construing its meaning regard must be had to the PPG, which provides (at paragraph 40 thereof) that "the eligible

costs start from the date of the notification … of the relevant order. This is the point at which the applicant for costs begins to incur expense in the ensuing statutory process." Given that starting point, it was not open to the Judge to award costs in respect of any period before that starting point, particularly in the absence of any application by the Claimant for costs involving a departure from that starting point. Furthermore, he submits that, as the SoS's letter accompanying the SoS's Costs Order states, the intention was to make a "full award" of costs, such term being specifically defined (at paragraph 40 of the PPG) as "the party's whole costs for the statutory process, including the preparation of the appeal statement and supporting documentation…[and] the expense of making the costs application". That guidance as to "full costs" admits of no incidental costs.

27. Mr Carpenter KC submits that the Judge was correct to hold, following *Newall*, that the HC Costs Order was necessarily one which encompassed the costs incidental to the Inquiry. There are no express words in the Orders that impose any temporal or other restriction on the scope of recoverable costs. This approach to costs accords with the PPG and the policy behind the CPO costs regime, which provides for an award of costs to the successful objector save in exceptional circumstances. The provisions of the PPG on which Mr Cohen relies operate under a different policy context where there is no forcible deprivation of land rights and where the entitlement to costs only arises where there is unreasonable conduct on the part of the other party.

Ground 1(ii) - Discussion

28. Based on the authorities to which my attention was drawn, the relevant principles applicable in determining whether pre-action costs are recoverable in general litigation were set out in *In re Gibson's Settlement Trusts* [1981] 1 Ch 179. At 184E to G of *Re Gibson's*, Sir Robert Megarry VC said:

> "(1) On an order for taxation of costs, costs that otherwise would be recoverable are not to be disallowed by reason only that they were incurred before action brought. This is carried by the *Pecheries* case, where the order was for party and party costs, and

also by the *Frankenburg* case, where the costs were on the basis which was then known as the solicitor and client basis but is now called the common fund basis. I shall say more about these cases in due course.

(2) If the order for costs is not for costs simpliciter, but for the costs " of and incidental to " the proceedings (and this is the language of the order in the present case), the words " incidental to " extend rather than reduce the ambit of the order. …

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." (Emphasis added)

29. Later, at 186H to 187G, the Vice Chancellor considered the principles to be applied in assessing pre-action costs. Having reviewed the authorities, the Vice Chancellor said:

"…There were thus, three strands of reasonings, that of proving of use and service in the action, that of relevance to an issue, and that of attributability to the defendants' conduct….

Whatever may be the position on a party and party taxation, if the taxation is on the common fund basis, I think that one must go back to the words " costs reasonably incurred "; and, as I have said, I think that this must mean the costs of and incidental to the proceedings in question. Neither the fact that at the time when the costs were incurred no writ or originating summons had been issued, nor the fact that the immediate object in incurring the costs was to ascertain the prospective litigant's chances of success, will per se suffice to exclude the costs from being regarded as part of the costs of the litigation that ensues. Of course, if there is no litigation there are no costs of litigation. But if the dispute ripens into litigation, the question then arises how far the ambit of the costs is affected by the shape that the litigation takes.

(6) It is obvious that the matters disputed before a writ or originating summons is issued, and the matters raised by the writ or originating summons, and by any pleadings and affidavits, may differ considerably from each other. A wide-ranging series of disputed matters may be followed by a writ or originating summons which raises only a few of the issues; or a narrow dispute may be followed by proceedings which seek to resolve wider issues as well. How far does the ambit of the litigation extend or restrict the matters occurring before the issue of the writ or originating

summons which may be included in the taxed costs on the common fund basis?

If the proceedings are framed narrowly, then I cannot see how antecedent disputes which bear no real relation to the subject of the litigation could be regarded as being part of the costs of the proceedings. On the other hand, if these disputes are in some degree relevant to the proceedings as ultimately constituted, and the other party's attitude made it reasonable to apprehend that the litigation would include them, then I cannot see why the taxing master should not be able to include these costs among those which he considers to have been " reasonably incurred."" (Emphasis added)

30. Thus, the general position in ordinary litigation is that an order for costs can include antecedent costs, even without the inclusion of the words "of and incidental to". Indeed, the use of those words broadens the scope of recoverability even further. The guiding principles for determining whether such costs should be recoverable are "proving of use and service in the action, … relevance to an issue, and … attributability to the defendants' conduct". Although *Re Gibson's* was a case about costs awarded on the old "common fund basis", it is clear that the same general approach applies to an assessment of costs on the standard basis. Briggs J, sitting with assessors in *Newall*, said:

"16. …[I]t is beyond question that a simple order that one party pay another party's "costs of proceedings to be assessed on the standard basis" gives an entitlement to costs both of and incidental to those proceedings. The analysis which leads to that conclusion (which Mr Marven for the defendants did not seriously challenge) is as follows. Section 51(1) of the Supreme Court Act 1981 provides (to the extent relevant) as follows:

"Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in:

…

(b) The High Court …

shall be in the discretion of the court."

17. Prior to 1986, one of the bases upon which costs could be ordered was the "common fund" basis. In *Re Gibson's Settlement Trust* [1981] 1 Ch 179, 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."

18. 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." (Emphasis added)

31. Mr Cohen submits, however, that the underlined words in [18] of *Newall* do not establish that the manner of assessment, i.e. on the standard basis, entitles a receiving party to its costs "of and incidental to"; only the order can do that. I do not accept that submission. The reference in [18] of *Newall* to the "standard basis" merely reflects the basis of assessment under CPR 44.3 and 44.4, which in their present form (so far as relevant) provide:

> "Basis of assessment
>
> 44.3 - (1) Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs –
>
> (a) on the standard basis; or
>
> (b) on the indemnity basis,

but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.

…

Factors to be taken into account in deciding the amount of costs

44.4- (1) The court will have regard to all the circumstances in deciding whether costs were-

(a) if it is assessing costs on the standard basis –

(i) proportionately and reasonably incurred; or

(ii) proportionate and reasonable in amount, or

(b) if is assessing costs on the indemnity basis –

(i) unreasonably incurred; or

(ii) unreasonable in amount.

…"

32. As can be seen, the basis of assessment, whether costs are awarded on the standard or indemnity basis, is dependent on whether the costs have been reasonably or unreasonably incurred or are reasonable or unreasonable in amount. It was that which led Briggs J to conclude in *Newall* that that basis of assessment is "broadly equivalent" to the old common fund basis of taxation as that was also based on what has been reasonably incurred. As the common fund basis of taxation did include costs "of and incidental to" those proceedings, Briggs J concluded, by parity of reasoning, that so too does an order for costs on the standard basis (which is the default basis of assessment if no basis is specified: CPR 44.3(4)).

33. Mr Cohen submits that it was not argued before the Judge that the manner of assessment should dictate what is in scope. However, that takes him nowhere, because the *Newall* principle (i.e. that "costs of" includes "costs of and incidental to") is not dependent on the distinction between the standard and indemnity costs (which distinction merely determines the party with which the benefit of the doubt should lie), but on the basis for assessment in both, which

is the reasonableness (or unreasonableness as the case may be) of the costs incurred and their amount.

34. This interpretation of the effect of the decisions in *Re Gibson's* and *Newall* does not, as Mr Cohen submits, enable a costs judge to override the terms of the relevant order. Where, for example, an order imposes an express temporal limit on recoverable costs, the judge would not be able to order costs in respect of the forbidden temporal zone, even if such costs were incidental to the proceedings. However, subject to that temporal limit, the judge would be entitled to award costs otherwise of and incidental to the proceedings, even if the order is expressed absent the term "incidental to".

35. The question then is whether the Court should take a different (and more restrictive) approach where, as in this case, the Orders were made, not pursuant to s.51 of the SCA, but under s.250 of the LGA. Mr Cohen submits, first of all, that whilst a court order may include pre-action costs (whether or not the order refers to the "costs of", or "costs of and incidental to", the claim) that only applies where the court order is made under s.51 of the SCA, as that provision contains express reference to "the costs of and incidental to all proceedings". Authority for that proposition is said to derive from the judgment of Nugee J (as he then was) in *Hurst v Denton-Cox* [2014] EWHC 3948 (Ch), in which, after a review of the authorities, including *Re Gibson's*, it was said:

> "59. It seems to me that on those authorities, the law is as follows. If one is being asked to make an order which includes costs incurred before an action is commenced, section 51 of the Supreme Court Act entitles one to do it in appropriate cases, as does the relevant insolvency rule which does not refer to "costs of and incidental to", but simply refers to the costs of any person appearing on the petition."

36. However, on a proper reading of that passage, it is clear that Nugee J is <u>not</u> saying that such orders can only be made under s.51: instead, the law is that s.51 entitles the court to make such an order in appropriate cases and <u>so too</u> does the "relevant insolvency rule which does not refer to "costs of and

incidental to" …". The reference to the insolvency rules arises from Nugee J's analysis, at [57] to [58] in *Hurst*, of the judgment of Morgan J in another case:

> "57. Finally, I was referred to the decision of Morgan J in *Neuman's LLP v Andronikou* [2012] EWHC 3088 (Ch). He was there dealing (again I have only seen a short extract from what is obviously a very extensive judgment), as appears from paragraph [132], with the jurisdiction under the Insolvency Rules, Rule 4.218(3)(h) of which refers to "the costs of any person appearing on the petition whose costs are allowed by the court". At paragraph [133] he says this:
>
> > "As regards the costs incurred between 15th December 2009 and 23rd December 2009..."
>
> And I interpose to say one can see from paragraph [131] that the latter date is the date when HMRC presented its winding up petition, he continues:
>
> > "... it is helpful to refer to the general approach which is adopted in relation to orders for costs where a party is awarded the costs "of and incidental to proceedings". It is established that such an order can extend to costs incurred before the proceedings were commenced. The position is discussed in detail in *Re Gibson's Settlement Trusts* [1981] Ch 179, in particular between pages 184E and 188B. The earlier decision in *Frankenburg v Famous Lasky Film Service Ltd* [1931] 1 Ch 428 is analysed at pages 186E to 187B. In my judgment, it is open to me to hold that the company's costs incurred in the period from 15th December 2009 to 23rd December 2009 were "the costs of any person appearing on the petition"."
>
> 58. So far as that is concerned, it is true that he refers to *Re Gibson* as dealing with the approach that should be adopted in relation to orders where a party is awarded the costs of and incidental to proceedings. But it is noticeable that the actual decision is the meaning of the words of the insolvency rule, which does not refer to "costs of and incidental to" but simply "the costs of any person appearing on the petition", and he takes the view that those words are sufficient to include, in appropriate cases, costs incurred before the petition was presented." (Emphasis added)

37. Thus, Morgan J in the *Neuman* case felt able to conclude, based on the *Re Gibson*'s line of authority, that the wording of the costs provision under the Insolvency Rules, which simply refers to "the costs of any person appearing on the petition", was sufficient to include, in appropriate cases, pre-action costs. There is nothing in either *Hurst* or *Neuman* to suggest that this approach

is confined only to the Insolvency Rules; it seems to me that in other statutory regimes where similar costs provision is made, the same approach may be taken unless the statutory context provides otherwise.

38. In my judgment, the power to award costs under s.250 of the LGA, which simply refers to "the costs of the party at the inquiry", may similarly be treated as including, in appropriate cases, costs incurred before notice of proceedings for the CPO was issued. That is essentially what the Judge in the present case concluded at [83] to [85] of the December 2021 judgment. Taking such an approach is conducive to the desirable aim of achieving consistency between similarly worded costs regimes.

39. Mr Cohen's submission that the court should take a different approach here is based predominantly on two matters, both of which arise out of the PPG, which inspectors are obliged to apply: *Swale Borough Council v Secretary of State for Housing, Communities and Local Government* [2020] EWHC 3482 (Admin) at [58]. The first is the reference in paragraph 40 of the PPG to "eligible costs start[ing] from the date of the notification. This is the point at which the applicant for costs begins to insure expense in the ensuing statutory process." The effect of this, says Mr Cohen, is to exclude any costs incurred prior to notification, which in this case was on 27 September 2018. Powerfully though that submission was made, I am unable to accept it for the following reasons.

40. First, the policy reasons behind the approach to costs in CPO proceedings, i.e. that those from whom the state forcibly expropriates property should be fully compensated, support rather than undermine an approach to costs which is at least consistent with that under general litigation. As Mr Carpenter KC points out, that policy also finds expression in the *Guidance on Compulsory purchase process and The Crichel Down Rules* ("**the CPO Guidance**"). The CPO Guidance (at section 19) invites acquiring authorities to consider (amongst other measures intended to alleviate the uncertainty and anxiety for the owners and occupiers of affected land) funding the landowner's reasonable costs and expenses in the course of negotiation in advance of acquisition. Such costs are

clearly incurred before the issuing of CPO proceedings. It would be odd if the effect of the CPO Guidance was that a more generous approach should be taken to meeting the costs of landowners who agree to sell their land than to the costs and expenses of those who are successful in objecting to the compulsory acquisition of their land.

41. In fact, there is authority suggesting that, in the context of compulsory acquisition, the approach to the recovery of costs and expenses should, if anything, be more generous than in ordinary litigation. In *Purfleet Farms Ltd v Secretary of State for Transport, Local Government and the Regions* [2003] 1 P&CR 20, the Court of Appeal expressed concern that the Lands Tribunal below had adopted an approach to the awarding of costs in CPO cases that departed too readily from the normal 'costs follow the event' rule. Potter LJ, at [30], said:

> "30 …[I]t is difficult to identify a specific example of a situation in which pursuit of a particular issue or conduct in ordinary litigation would merit the court's departure from the general rule that a successful party ought to receive its costs, whereas it would not lead to the same result in proceedings before the Lands Tribunal. In the case of Emslie & Simpson [[1995] RVR 159] the Court of Session did not attempt to cite such an example; indeed, it made clear that it regarded the exercise of discretion by the Tribunal in that case as appropriate under both regimes. The difference is in my view to be found in the observations of Lord President Hope and is essentially one of emphasis, that is to say that there is a particular need in the case of a compensation reference before the Lands Tribunal to take as a proper starting point the fact that the claimant has had both the procedure and the need to vindicate his right to compensation thrust upon him by use of compulsory powers, in which context, taking up the words of Lord Morison quoted at para.25 above, it is:
>
> ''perfectly reasonable that . . . [the claimant] . . . should put forward his claim on the maximum basis which he can reasonably support and should be entitled to the expenses of doing so if he is successful in the general assertion of his right.' (Emphasis added)

42. Bearing those policy considerations in mind, there is nothing in the PPG which requires the different and more restrictive approach contended for by Mr Cohen.

43. Second, it is quite clear that, insofar as paragraph 40 of the PPG might be said to indicate a more restrictive approach, that paragraph applies to a different costs regime, namely that relating to planning appeals and other planning proceedings; it does not apply to costs incurred in CPO proceedings which are dealt with in an entirely separate part of the PPG. The planning appeals costs regime is very limited in that costs are only recoverable in the event of unreasonable conduct on the part of the other party. It stands to reason in that context that a costs order would not implicitly include anything that would permit recovery of costs that were not the result of unreasonable conduct. By contrast, where CPO proceedings are involved, costs will be paid to a successful objector unless there are exceptional reasons not to do so.

44. Mr Cohen submits that the SoS's reference in the letter accompanying the SoS's Costs Order to the making of a "full award" indicates that the costs regime under paragraph 40 of the PPG was being applied. A "full award" is stated in paragraph 40 to be "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." That description of a full award, submits Mr Cohen, excludes costs that are incidental to the statutory process. Reliance is also placed on *R (Bedford Land Investments Ltd) v Secretary of State for Transport and anor* [2015] 6 Costs LR 937, which considered the different wording in subsections (4) and (5) of s.250, LGA. There Patterson J said, at [33]:

> "33. The language used in s 250(5) gives the Secretary of State a discretionary power to award costs to "the parties at the inquiry". It is to be contrasted with the wording in s 250(4) where the wording is broader and the power to award costs is "in relation to the inquiry". 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."

45. Mr Cohen's submission is that the absence of the words "in relation to" or "of and incidental to" from s.250(5), LGA, necessarily means that the legislature

did not intend to include such costs within the ambit of an order made under that subsection. The difficulty with that submission is that Patterson J was not concerned in that case with the scope of costs, but with the entitlement to costs in the first place. It was held that the entitlement was only triggered upon attendance "at the inquiry". As stated at [45]:

> "45. As set out an inquiry is opened, evidence heard and then closed. The preceding steps, as the rules make clear, are part of the process leading up to the inquiry but are not part of the inquiry itself. That means that the phrase in s 250(5) "at the inquiry" means what it says: physical presence or representation at a convened public inquiry. That is consistent with the statutory background, context and language in both the ALA and the LGA. To hold otherwise would, in my judgment, distort the ordinary use of the English language."

46. Importantly, however, Patterson J went on to state, unambiguously, that although the entitlement to costs is dependent on attendance at the inquiry, the recoverable costs are not limited to those incurred at the inquiry:

> "47 …[I]t is said by the Secretary of State that the literal reading proves too much as the only costs that could be awarded would be those incurred at the inquiry. I do not accept that position. 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 from Circular 03/2009 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." (Emphasis added).

47. If costs incurred other than through attendance at the Inquiry are recoverable, there is no reason why a costs order made under s.250(5) should not extend in the usual way to costs incidental to those proceedings.

48. In any event, it seems to me that the SoS's Costs Order is to be construed having regard to the ordinary and natural meaning of the words used. There is nothing on the face of the SoS's Costs Order to indicate that the costs award is limited in the way being suggested by the Defendant. Whilst the context in

which the order was made is relevant in construing its meaning – see e.g. *Sans Souci Ltd v VRL Services Ltd* [2012] UKPC 6 at [13] – the reference to a "full award" in the accompanying letter does not unambiguously indicate that by that reference the SoS was intending to refer to paragraph 40 of the PPG, or, if he was, that he intended to impose some sort of limit on the scope of costs by doing so. The reference to a "full award" could signify nothing more than that this was not a partial award within the meaning of paragraph 60 of the PPG, which applies where an objector is only partially successful in opposing a CPO.

49. Even if that were not the case, and the more restrictive approach under paragraph 40 of the PPG was intended to apply to CPO proceedings, the court would bear in mind that the PPG is only guidance that may be departed from in an appropriate case. As held by HHJ Wyn Williams QC (as he then was) sitting as a Judge of the High Court in *R (Flintshire County Council) v National Assembly for Wales* [2006] EWHC 1858 (Admin) at [28]:

> "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." (Emphasis added)

50. The effect of the Guidance is not, therefore, to impose a blanket mandatory restriction on the recovery of pre-action costs or of costs incidental to the proceedings.

51. For all of these reasons, Ground 1(ii) fails and is dismissed.

Ground 1(i) – Costs incurred before 28 September 2018

52. As Ground 1(ii) has failed, then the proper approach to the Orders is to construe them as including costs of and incidental to the proceedings. As such, there is no remaining basis on which it can be said that the costs incurred prior to the issuing of the CPO are not recoverable in principle. In accordance with well-established principles set out in *Re Gibson* and subsequent cases, pre-action (or in this case pre-CPO notice) costs are recoverable in principle. Whether any item in the bill of costs is in fact recoverable will depend on the conclusions reached upon detailed assessment. At this stage, however, I see no proper basis for a blanket exclusion of this category of costs.

53. Accordingly, Ground 1(i) also fails and is dismissed.

Ground 1(iii) – Overage Clause

54. Mr Cohen submits that, irrespective of the court's conclusion on Ground 1(ii), the Judge erred in deciding that costs incurred in respect of the Overage Clause amounted to costs of or incidental to the Inquiry. It is said that the dispute as to the meaning of the Overage Clause had nothing to do with the issues to be resolved at the Inquiry, all of which were concerned with the reason for the Claimant's failure to market the Order Land sooner. In any event, submits Mr Cohen, that dispute was between the Claimant and HE, and the issues raised by that dispute in respect of valuation would have been addressed, if the CPO was confirmed, separately in the Upper Tribunal. Finally, it is said that by invoking (for allegedly tactical reasons) the DRM on the first day of the Inquiry, the Claimant had chosen to resolve the issue via a separate forum in which the Defendant would play no part and in respect of which there should be no costs liability.

55. Mr Carpenter KC submits that the decision to include this category of costs was an exercise of the broad discretion available to a costs judge and in respect of which the appellate court should be slow to interfere: see e.g. *Tanfern v Cameron-McDonald* [2000] 1 WLR 1311 at [32], *Solutia v Griffiths* [2001] 2 Costs LR 247 at [10] and *SCT Finance v Bolton* [2002] EWCA Civ 56 at [2]. He further submits that it is not tenable to suggest (as does Mr Cohen) that the issues relating to the Overage Clause had nothing to do with those to be resolved in the Inquiry. The Defendant had itself relied heavily upon the construction of the Overage Clause favoured by HE. The work done in relation to the issue meets the three *Re Gibson* tests for recoverability in that it was of use and service in the Inquiry, it was relevant to the Inquiry, and it resulted from the Defendant's conduct.

Ground 1(iii) - Discussion

56. Mr Carpenter's submissions are to be preferred. The Judge concluded (at [100] of the December 2021 judgment) that both parties had negotiated on the basis that a CPO might be made in terms satisfactory to both and that, insofar as that negotiation was informed by advice and representation by valuers and legal advisers, the Claimant is entitled to recover the costs of such advice and representation as costs incidental to the inquiry. That conclusion was plainly correct. It is evident from the history of the matter that the Defendant supported HE's construction of the Overage Clause and that it considered that its attempts to agree a sale price with the Claimant had been "complicated by the covenants which bind [the Claimant's] interest in the land": see the Defendant's Statement of Case for the Inquiry at [11.1]. Furthermore, the Defendant's written closing submissions to the Inquiry stated (at [1]) that "the covenant and its implications" was "the topic which … lies at the heart of this matter". In these circumstances, Mr Carpenter KC is quite right to submit that Mr Cohen's attempts to decouple the Overage Clause issue from the issue of whether it was (as the Claimant had submitted) premature to proceed with a CPO at that stage are without foundation. The two issues were inextricably linked.

57. The fact that the precise valuation pursuant to the Overage Clause might, if the CPO had been confirmed, have been referred to the Upper Tribunal did not detract from the fact that the issues raised by the Overage Clause in the progress of the sale of the Order Land were matters that the Inspector had to consider. As the Inspector stated at [14] of his decision: "… the dispute had clearly been a source of friction between the parties which has inhibited progress on the development of the land". In fact, the Overage Clause issue features prominently in the Inspector's conclusions as to the reasons for the development of the Order Land not progressing. Similarly, the fact that the invoking of the DRM at the Inquiry meant that the issue relating to the Overage Clause might be resolved as between the Claimant and HE did not mean that the costs incurred hitherto in respect of the Overage Clause were not relevant to the Inquiry. As such, these costs were incidental to the Inquiry and therefore recoverable.

58. For these reasons, Ground 1(iii) fails and is dismissed.

Ground 1(iv) – Costs incurred after 16 October 2019

59. This ground relates to the costs incurred in applying to the High Court under the second limb of s.250(5), LGA, for the SoS's Costs Order to be made a rule of the High Court. The amount of costs involved here, £6,813, is relatively small, but Mr Cohen submits that there is an important procedural issue as to the statutory basis on which such costs may properly be recovered.

60. The Judge had considered that such costs fell within the ambit of the decision of Yip J in *Maiden London Ltd v Ruddick & anor* [2018] EWHC 3684 (QB):

> "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."

61. Mr Cohen submits that the Judge was wrong to follow *Maiden* as that decision dealt only with the costs of applying for an order from the SoS; it did not deal expressly with the additional costs of going to the High Court for a further order embodying that of the SoS. Mr Cohen submits that as the High Court order merely converts the SoS's order without making any additional provision for costs up to the point of conversion, such costs can only be recovered by issuing separate Part 8 proceedings for an order that the costs of the application to the High Court be costs in the detailed assessment.

62. Mr Carpenter KC agrees that, to the extent that the Judge considered himself bound by *Maiden* in this respect, he was probably wrong. However, he submits that the Judge's decision that such costs are recoverable without having to commence further Part 8 proceedings is undoubtedly correct. He submits that the Defendant's suggestion that there needs to be a further application to the High Court under Part 8 is a solution to a problem that does not exist. The request for a High Court order does not involve any proceedings, and the order that results, in this case, namely the HC Costs Order, necessarily encompasses all costs prior to the making of that order.

Ground 1(iv) - Discussion

63. Notwithstanding his reliance on *Maiden*, the Judge was correct that this is not a case where separate Part 8 proceedings are required. As provided for by s.250(5), LGA, an order made by the SoS "may be made a rule of the High Court on the application of any party named in the order". That this is a simple administrative exercise without the need to issue further proceedings is confirmed by the fact that, pursuant to CPR 54.1A, the President of the King's Bench Division has delegated to court officers assigned to the Administrative Court Office the power to issue the requested order. If fresh proceedings were

required, then the matter could not be dealt with administratively as it would be likely to involve a dispute between the parties as to whether or not the order should be made; the power to delegate only being available in respect of, amongst other matters, matters "where there is no substantial dispute between the parties": CPR 54.1A(2)(b).

64. Mr Cohen submits that the situation here, following an order for costs made by the SoS, is analogous to that where parties settle a dispute and thereafter costs-only proceedings are issued in respect of which the Court can exercise its discretion to award the costs of the proceedings under s.51, SCA: see *Tasleem v Beverley* [2014] 1 WLR 3567 at [18]. However, in my judgment, there is no need for any further proceedings in this case given the express terms of s.250(5), which enable an application to be made to the High Court for an order, and the administrative nature of that exercise as discussed above. In those circumstances, the order made by the High Court (albeit administratively) is apt, like any costs order (subject to its precise terms), to include the costs incurred up to the point at which the Order is made. In the present case, that would include the costs of the application to the High Court. Any alternative approach requiring the steps suggested by the Defendant, would not be consistent with the policy intentions discussed above of ensuring that a successful objector in CPO proceedings should not find himself out of pocket in respect of proceedings which were involuntarily thrust upon him.

65. This ground passes the arguability threshold, particularly in light of the Judge's reliance on *Maiden*, and permission is granted. However, for the reasons set out above, Ground 1(iv), and therefore Ground 1 of the appeal overall, fails on the merits and is dismissed.

Ground 2 – Hourly Rates

66. This Ground concerns the hourly rates awarded by the Judge in the *ex-tempore* October 2021 judgment. There is a "heavy burden" on parties who seek to challenge such decisions. As stated by Wilson LJ in *SCT Finance v Bolton* [2002] EWCA Civ 56 (also cited above at [55]):

> "2. This is an appeal brought with leave of the single Lord Justice from the county court in relation to costs. As such, it is overcast, from start to finish, by the heavy burden faced by any appellant in establishing that the judge's decision falls outside the discretion in relation to costs conferred upon him under rule 44.3(1) of the Civil Procedure Rules 1998. For reasons of general policy, namely that it is undesirable for further costs to be incurred in arguing about costs, this court discourages such appeals by interpreting such discretion very widely."

67. Mr Cohen does not dispute that burden but submits that it is discharged in this case because there is a "clear and sensible complaint" that amounts to more than "add[ing] a little here and knock[ing] off a little there". Those quotes are taken from the judgment of Buckley J *in Mealing McLeod v Common Professional Examination Board* [2000] 2 Costs LR 223, the full extract from which reads:

> "Broadly speaking a judge will allow an appeal … if satisfied that the decision of the Costs Judge was wrong … that is easy to apply to matters of principle or construction. However, where the appeal includes challenges to the details of the assessment, such as hours allowed in respect of a particular item, the task in hand is one of assessment or judgment, rather than principle. There is no absolute answer. Notwithstanding that the judge to whom the appeal is made may sit with assessors … the appeal is not a re-hearing and, given the nature of the Costs Judge's task and his expertise, I would usually regard it as undesirable for it to be so … [S]ince the appeal is not a re-hearing I would regard it as inappropriate for the judge on appeal to be drawn into an exercise calculated to add a little here or knock off a little there. If the judge's attention is drawn to items which, with the advice of his assessors, he feels should in fairness be altered, doubtless he will act. That is a matter for his good judgment. Permission to appeal should not be granted simply to allow yet another trawl through the bill, in the absence of some sensible and significant complaint. If an appeal turns out to be no more than such an exercise the sanction of costs may be used." (Emphasis added)

68. It is well-established, therefore, that the role of the Appellate Court in this context is a limited one, that it should be slow to interfere with the exercise of judgment by a specialist costs judge, and that it should only do so where the conclusions of the judge below exceed the generous ambit within which reasonable disagreement is possible.

69. Mr Cohen submits that the Court should also have regard to the fact that the Judge did not preside over the substantive matter giving rise to the costs application, which means that this Court is (as asserted in the Defendant's skeleton argument) in "just as good a position to make a decision on the issue of hourly rates". However, specialist costs judges almost invariably will not have heard the substantive matter. Notwithstanding that, Parliament has entrusted costs judges with the specialist, and often difficult, task of assessing what costs and hourly rates are appropriate. In my view, it would be to usurp the role of the costs judge if the appellate court were to consider that it was in an equivalent position to the costs judge and/or had some greater right to interfere with a judgment merely because the judge below (like the appellate court) had not heard the substantive matter.

70. Mr Cohen also asserts, by way of introduction to this part of his skeleton argument, that "the assessment of costs in planning matters is, by its nature a rare event" and that "the issues in planning inquiries will not be familiar to costs judges nor will the conventional rates paid across the market". There is no evidence to support those assertions, whether generally or in respect of this particular Judge. But in any event, familiarity with an area of law is not a pre-requisite to reaching decisions on the costs arising in that area. Costs judges are relied upon to exercise their skill, knowledge and experience of costs generally, irrespective of whether they have knowledge of a particular area. The fact that a particular costs judge does not possess, or indeed that costs judges generally do not possess, detailed knowledge or experience of a particular specialist jurisdiction affords no basis, in my view, for treating the judgment below with any less deference than would normally be the case.

71. There is no dispute between the parties as to factors to be taken into account when assessing the amount of costs. CPR 44.4(3) provides:

> "(3) The court will also have regard to –
>
> (a) the conduct of all the parties, including in particular –
>
> (i) conduct before, as well as during, the proceedings; and

(ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;

(b) the amount or value of any money or property involved;

(c) the importance of the matter to all the parties;

(d) the particular complexity of the matter or the difficulty or novelty of the questions raised;

(e) the skill, effort, specialised knowledge and responsibility involved;

(f) the time spent on the case;

(g) the place where and the circumstances in which work or any part of it was done; and

(h) the receiving party's last approved or agreed budget."

72. The first seven of these at (a) to (g) are often referred to as the "seven pillars of wisdom".

73. When applying the seven pillars of wisdom, "the court should not be seen to be endorsing disproportionate and unreasonable costs…": per Fulford J (as he then was) in *Higgs v Camden & Islington Health Authority* [2003] 2 Costs LR 211[1]. Mr Cohen takes issue with the Judge's approach to the fourth pillar, namely the particular complexity of the matter or novelty of the questions raised.

74. Issue is also taken with the application (or non-application) by the Judge of the Guideline Hourly Rates ("**GHR**") contained in the 2021 edition of the *Guide to the Summary Assessment of Costs* ("**the Guide**"). In the Foreword to the Guide, the Master of the Rolls states:

> "I am acutely conscious that questions have again been raised about the Guide itself and the methods and analysis that go into its production. In response, I would emphasise that the Guide is, as it has always been, no more than a guide and a starting point for judges carrying out summary assessment. This Guide is no different to its predecessors in that it continues to offer assistance to Judges. In every case, a proper exercise of judicial discretion has still to be made, after argument on the issues has been heard."

[1] See also paragraph 10 of the Guide to the Summary Assessment of Costs 2021.

75. The Master of the Rolls' emphasis on the Guide being "no more than a guide and a starting point for judges carrying out summary assessment" is important to bear in mind. I note that the Judge in the present case was not conducting a summary assessment, for which the Guide is principally intended, but was identifying, as a preliminary issue in a detailed assessment, the hourly rates that would apply. Mr Cohen drew my attention to paragraph 9 of the Guide, which provides that, "The general principles applying to summary and detailed assessment are the same". That does not mean, however, that the Guide and, in particular the GHR, are as central to a detailed assessment as they are to a summary assessment. That is made clear by the following paragraphs of the Guide:

> "27. Guideline figures for solicitors' charges are published in Appendix 2 to this Guide, which also contains some explanatory notes. The guideline rates are not scale figures: they are broad approximations only.
>
> 28. The guideline figures are intended to provide a starting point for those faced with summary assessment. They may also be a helpful starting point on detailed assessment.
>
> 29. In substantial and complex litigation an hourly rate in excess of the guideline figures may be appropriate for grade A, B and C fee earners where other factors, for example the value of the litigation, the level of the complexity, the urgency or importance of the matter, as well as any international element, would justify a significantly higher rate. It is important to note (a) that these are only examples and (b) they are not restricted to high level commercial work, but may apply, for example, to large and complex personal injury work. Further, London 1 is defined in Appendix 2 as 'very heavy commercial and corporate work by centrally based London firms'. Within that pool of work there will be degrees of complexity and this paragraph will still be relevant." (Emphasis added)

76. Thus, whilst the GHR are intended to provide a starting point in a summary assessment, they may also be a helpful starting point on detailed assessment. Whether or not they are in fact considered to be such will be a matter for the costs judge having regard to all the circumstances of the case.

77. The relevant GHR are set out at Appendix 2 to the Guide:

Grade	Fee earner	London 1	London 2	London 3	National 1	National 2
A	Solicitors and legal executives with over 8 years' experience	£512	£373	£282	£261	£255
B	Solicitors and legal executives with over 4 years' experience	£348	£289	£232	£218	£218
C	Other solicitors or legal executives and fee earners of equivalent experience	£270	£244	£185	£178	£177
D	Trainee solicitors, paralegals and other fee earners	£186	£139	£129	£126	£126

London

Band	Area	Postcodes
London 1	(very heavy commercial and corporate work by centrally based London firms)	[not restricted to any particular London postcode]
London 2	City & Central London – other work	EC1-EC4, W1, WC1, WC2 and SW1
London 3	Outer London	All other London Boroughs, plus Dartford & Gravesend

78. The core of Mr Cohen's submission under this Ground is that the Judge wrongly departed from the "London 2" rates above and instead permitted hourly rates that ranged from 8% to 41% higher than those rates for the various fee-earners from BDB Pitmans, a firm that is located in St James' Park.

79. The bill of costs included claims in respect of fee earners from the Planning Team (in respect of the core work of resisting the CPO) and the Litigation Team (in respect of the work done in registering the costs award as an order of the High Court and instructing a costs lawyer to prepare a formal bill). Mr

Cohen challenges the Judge's decisions as to the hourly rates permitted for each team.

Planning Team

80. As to the Planning Team hourly rates, Mr Cohen attacks the October 2021 judgment on two principal bases: the first is that the Judge was wrong to conclude that the matter was "neither simple or straightforward" and that it required "skill, effort and responsibility"; the second is that the Judge erred in concluding that the Guide was not a useful starting point or that it was useful only to a very limited extent.

81. As to the first of these lines of attack, Mr Cohen submits that the Inspector's decision, which only ran to 6½ pages, demonstrates the lack of complexity and that the Inquiry was not fact heavy. He also highlights the fact that both sides were only represented by one barrister, that the Inquiry only lasted for two days and that there was limited documentation.

82. The Judge commenced the October 2021 judgment by focusing on the pillars of wisdom. He went through each of first three pillars concluding that there was no issue as to conduct in this case, that the amount at stake was substantial and that the matter involved an important dispute for both parties. He then turned to the fourth pillar, namely complexity, and the transcript shows that he held as follows:

> "10. That takes me to the complexity point. It is common ground, as far as I know, that this is not a question of legal complexity. The question is whether this case was factually complex. The Defendant's point there, as made by Mr. Cohen, is there was a two-day hearing, of which the evidence probably took a little over a day, with a half day site inspection. From that, we have a fairly brief and succinct judgment of which most, he is suggesting, is just background and about three pages is the actual meat of the issues upon which the decision turns. He also refers me to the fact that each party has one Q.C., no junior supporting them, and to the relative brevity of the parties' (if I may describe them in this way) Statements of Case and written submissions.
>
> 11. The point, according to the Defendant, was simply this. Was there a compelling case for a compulsory purchase order? Was it really the last resort? That is a relatively straightforward question, turning on

fairly narrowly defined issues, focusing particularly upon whether the Claimant intended to develop the property when demand justified it and just what that demand, at the time, was. The rest is described as more or less background or potential rather than actual issues between the parties.

12. It did occur to me that saying that whether there is a compelling case for a compulsory purchase order is a relatively straightforward question, is like saying that whether a party's costs are reasonably incurred and reasonable in amount is a relatively straightforward question. It may sound straightforward but, as we know, in practice, it may not be. Sometimes it is simple to decide and sometimes we can spend several days arguing about it and looking at some quite complicated issues when we do so. The decisions are always fact sensitive. As Mr. Grant says, so are compulsory purchase orders. It is all going to depend on the situation.

13. I like Mr Cohen's creative distinction between potential issues and real issues, but I do not think that it is a valid distinction for present purposes. The Defendant had a number of reasons, very carefully thought through, for believing that it was right to proceed with this compulsory purchase order. They involved, obviously, considerations of planning policy, development potential, demand, the benefits for the local community, valuation and so on. That was the Defendant's case as put.

14. It seems to me that the Claimant was perfectly entitled to look at all of those reasons critically and to examine them critically and to take issue with such of them as the Claimant thought appropriate. If that was, as it would appear, distilled down to very succinct key points and put in writing, that is appropriate. One might say that that is the legal representatives' job to do that, to put it to the planning inspector in as clear and succinct a way as possible, though the devil may be, to a certain extent, in the detail. As for having one Q.C. backed by a team of solicitors on each side, that just strikes me as an example of how to do the job properly. It does not seem to me to follow that one should conclude that the work itself is necessarily simple or straightforward. To my mind, it was not.

15. As we are looking at the Q.C.s, purely as background (as we are yet to consider counsel's fees in this case) I am aware that planning disputes can command very high fees. In my own personal experience of assessing costs, the highest hourly rate ever conceded by a paying party to a Q.C. (as opposed to determined by me) was, in fact, in a rather difficult planning case. That is the nature of the beast: it is going to depend upon the facts of the case. As I say, that is just background, but it gives us a bit of context against which I am judging these hourly rates.

16. So that takes me to the skill, effort, and responsibility. For the reasons I have given, I believe that they are all present. I also bear in mind the expertise of the solicitors, which is carefully explained in the

bill of costs and which I see no reason not to accept."

83. It is clear from that extract from the October 2021 judgment that the Judge gave careful consideration to the Defendant's arguments in support of the lack of complexity. That the matter was not legally complex was not in dispute: see [10]. As to factual complexity, the Judge noted that the fact that the questions to be answered by the Inquiry were straightforward, did not mean that the task of answering them was: see [12]. At [13] and [14], the Judge took into account that the Defendant had put forward a number of grounds in support of its case. Those grounds, which involved "considerations of planning policy, development potential, demand, the benefits for the local community, valuation and so on", were not intrinsically straightforward, and the Judge was entitled to conclude that the task of responding to them involved a degree of complexity. The fact that not all costs judges would necessarily share that view or that the appellate court might take a different view is not enough for the Defendant to succeed. The test is whether the Judge's conclusions exceeded the generous ambit within which reasonable disagreement is possible. In my judgment, it cannot conclusively be said that the Judge's conclusions fell outside that generous ambit. The nature of the work for the Inquiry was not, as I have said, intrinsically straightforward. Topics such as planning policy, development potential and valuation, those being some of the factors identified by the Judge as relevant to the case before the Inquiry, can involve quite complex and specialist issues. It was not necessary for the Judge to set out in detail, in the course of this oral judgment, the precise nature of the complexity under each topic in order to justify his conclusion. To require that degree of granularity would be to impose an excessive burden on costs judges and would be likely to encourage parties to bring to costs hearings the same level of detailed evidence and argument that ought to be the province of the underlying substantive dispute.

84. Complexity is not necessarily synonymous with being fact heavy. This may have been a relatively short inquiry without voluminous documentation, but that is not to say that it lacked complexity. Similarly, the number of Counsel

instructed to represent a party is not necessarily indicative of complexity. In any event, as the Judge noted, the parties in this case were represented by a "QC backed by a team of solicitors" ([14]). The fact that more Counsel were not involved may point more to efficiency (or, as the Judge put it, "doing the job properly") than a lack of complexity.

85. In relation to the GHR, the Judge held as follows:

> "18. Then there is the place in which the work is done, which brings us to the subject of the guideline hourly rates. I start by saying that I appreciate that the 2021 guideline hourly rates have been applied for a very short period, but they are just guideline rates, based upon the best evidence available. I would be unable to accept that insofar as one does treat them as a starting point (and I will come to that) that it would be inappropriate to uplift them in an appropriate case simply because they are new.
>
> 19. I think that is exactly what one would do, but the real question for me is to what extent they are a useful starting point in this case, and I think it is, if at all, to a very limited extent. This is not massively heavyweight litigation, the sort of multimillion pound dispute with trials a couple of months long, but it is certainly not routine. It is a very specific sort of work. It is quite difficult and specialised. It gives rise to very specific issues. It requires very specific skills for which parties can expect to pay, I think, quite substantial fees. In its nature, it is work that one might well see undertaken, as in fact we do see in this case, by firms based in the City of London.
>
> 20. This ultimately comes down to my applying judgment and experience as best I can. It is useful, I think, to refer to the fact that Costs Judge Rowley in one of those really heavy commercial disputes last year, was awarding hourly rates of something like £750 an hour for Grade A. That gives us a little context. Obviously, that is not this sort of case at all, but I do judge it as a case, as I say, requiring specialist skills and I am not at all surprised to see it being undertaken by lawyers in central London.
>
> 21. If I were to accept the guideline rates as a starting point (which, for the reasons I have given, I do not think would be really right) I would find the London 1 rates rather more useful as a reference point than London 2."

86. Mr Cohen submits that it is not right to say that an inquiry dealing with an objection to a CPO is "difficult and specialised" because: (i) such issues are adjudicated upon by non-legally qualified inspectors and are not legally

complex; and (ii) CPO litigation is "well known" and "all major hearing centres have a multitude of solicitors offering CPO services". In my judgment, neither point establishes that the Judge was wrong to view such work as he did. That the matter was not legally complex was, as I have said, acknowledged by the Judge. However, that does not necessarily mean that the factual issues relevant to the Inquiry (even if not all such issues were determined at the Inquiry) were straightforward. Moreover, it does a disservice to Inspectors, who are often required to preside over the most difficult and specialist of factual disputes, to suggest that their non-legally qualified status is commensurate with disputes that are neither difficult nor specialised. As to the fact that there are many practitioners offering CPO services, that tells one little, if anything, about the nature of their work generally, or specifically in this case.

87. Mr Cohen then criticises the Judge for rejecting the GHR as a starting point, for providing no reasons for doing so and for ultimately concluding that if the GHR are to be used as a starting point, the "London 1 rates were rather more useful as a reference point that London 2". I do not accept any of these criticisms.

88. As stated above, the Guide is intended to be a starting point in a summary assessment and "<u>may</u> be useful as a starting point in a detailed assessment". The Judge was not conducting a summary assessment and was not required to take the same approach to the Guide as he might have done had that been the case. It was open to the Judge to conclude, as he did, that the GHR were not particularly useful in this case. In any application of the Guide and the GHR there will be a degree of judgment involved. That is because the category definitions are very broad. London 1 is for "very heavy commercial and corporate work by Central London firms", whereas London 2 is for "all other work". London 2 therefore encompasses all manner of work from the most straightforward and simple of cases to work that is legally highly specialised and difficult. Some work fitting the latter description might well be considered by a costs judge to warrant a considerable uplift from the London 2 starting

point notwithstanding the fact that it does not amount (in terms of volume or value) to "very heavy commercial or corporate" work. In other words, the GHR do not dictate that London 1 rates are reserved exclusively for very heavy commercial or corporate work. The Judge in the present case concluded that whilst this was "not massively heavyweight litigation" (which would probably be London 1), it was: "certainly not routine"; "a very specific sort of work"; and "quite difficult and specialised". In my judgment, there is nothing that precluded the Judge from making those judgments in the present case.

89. Mr Cohen is right to say that a costs judge ought not to base assessments solely on preconceived notions about a category of work without reference to the particular work undertaken and for which the claim for costs is being made. Had the Judge relied only on the view that all CPO work was "difficult and specialised" in awarding the rates that he did then that would be unlikely to provide a proper foundation for the assessment. However, the October 2021 judgment needs to be read as a whole. When that is done, it is tolerably clear that the Judge's view as to level of difficulty was grounded in the particular features of this CPO Inquiry as set out (albeit briefly) in [13] and [14]. Moreover, the Judge's conclusion as to the appropriate hourly rate was not based solely on his view of complexity (which is but one of the seven pillars) but also on the value of the dispute, the importance of it to the parties and the specific skills required to undertake the work. Those are all matters that ought to be and were taken into account by the Judge.

90. Mr Cohen's final point in respect of the Planning Team hourly rates is that the Judge erred in law in taking into account his understanding that planning cases "can command very high fees" ([15]). However, as the Judge made clear in the same paragraph, this was "just background but it gives us a bit of context against which I am judging these hourly rates". Similarly, at [20], the Judge referred to the fact that Master Rowley had awarded a rate of £750 per hour in a heavy commercial dispute, noting that "That gives us a little context". The Judge was not, therefore, relying on assumptions as to the going rate or the level of fees in order to make his assessment, but merely referring to such

factors to provide some context and background against which to sense-check the rates being sought. I see nothing objectionable about a specialist costs judge taking account of market knowledge in this way. As Mr Carpenter KC submits in his skeleton argument, "[T]hat Costs Judges can bring such knowledge to bear is precisely why appellate courts afford their decisions on matters peculiarly within their expertise significant weight".

91. For all of these reasons, the challenge to the hourly rates awarded in respect of the Planning Team fails.

Litigation Team

92. The relevant passages in the October 2021 judgment are at [17] and [24]:

> "17. Time spent is not really a factor for present purposes. I know that Mr. Cohen touched on an apparently large amount of time spent by the litigation team. It was not really pressed as a particularly relevant point, but I think Mr. Grant has explained the context for that. There was more going on than simply obtaining an order from the administrative court. The litigation team did have to deal with costs and, as we have already found, the costs issues can be potentially quite complex. I have not lost sight of the fact that it was mooted by the Defendant that including certain categories of costs in the bill amounted to misconduct, so one should not understate the burden that is placed on the Claimant's solicitors for these purposes.
>
> …
>
> 24. The litigation team, as I say, were doing more than getting an order rubber stamped. I accept that. Also, one can hardly expect the Claimant to change solicitors at this stage. They would pay similar rates to what they were paying for the planning team, but I do not really see a reason for the increase in the Grade A rate. I do not think that as between the parties, on the standard basis, that can be justified. I would limit it to the £525 that is claimed for the senior fee earner on the planning team. I have no difficulty with either the B or C rates and, again, insofar as Grade D is involved, I would limit that to £150 per hour."

93. Mr Cohen submits that the Judge was wrong to consider that there was anything remotely complex about the work done by the Litigation Team. Their work involved nothing more that negotiating with the Defendant about costs and then obtaining the HC Costs Order. To allow the Grade A partner to

recover more than the London 1 rate for such work is, he submits, unjustifiable even if the awarded rate matches the one for the Grade A partner in the Planning Team. Mr Cohen further submits that it is not open to the Judge simply to reason that the rate permitted for the Planning Team provides a sufficient basis for awarding the same rate to an entirely different team doing different, simpler, work.

94. The Judge was alive to the argument that the Litigation Team's work involved little more than rubber stamping. That argument was rejected because, as the Judge found, there was more to the work done than that. There was (as the Defendant accepts) the negotiation with the Defendant as to costs undertaken pursuant to the SoS's Costs Order. Moreover, in that context, it was relevant to note that the Defendant had asserted that the Claimant had engaged in misconduct in relation to the bill. Mr Cohen says that this is a non-point as the allegation pertained "primarily" to the conduct of the costs draftsman drafting the bill and not to the Litigation Team. Be that as it may, it appears to be the case (if not accepted) that the alleged misconduct would feature at least to some extent in the negotiations in which the parties engaged about costs, and that increases the degree of complexity involved.

95. However, although not mere rubber stamping, it does not appear, on the face of it, that the work done by the Litigation Team was especially difficult or taxing. Certainly, if that work had been the only basis of claim before the Judge, the rates awarded would have been difficult to sustain. I therefore have considerable sympathy with Mr Cohen's argument that in these circumstances, the hourly rates permitted for the Litigation Team ought not to be the same as those for the Planning Team.

96. However, I am aware (with the benefit of my learned assessor) that the general position is that rates are assessed for a firm and are not reassessed for different stages of litigation. Furthermore, there is, as the Judge in the present case found, no expectation that a litigant should change firms and use a different (cheaper) firm for a smaller and simpler aspect of the work. That is not to say that different rates might not be awarded within the same firm in an

appropriate case. In this case, however, where the costs sought in respect of the Litigation Team (£7,233) comprised a very small proportion (1.5%) of the total bill, it is perhaps somewhat unrealistic to expect a costs judge to go through a full-blown "seven pillars of wisdom" analysis in respect of that amount in order to reach a significantly different rate in the course of a concise oral judgment. In any case, the Judge did not award the rates claimed for the Litigation Team automatically, without scrutiny or without an eye on proportionality: he expressly reduced the rates for the Grade A partner and for the Grade D lawyer in the Litigation Team to match those of their commensurate colleagues in the Planning Team.

97. For these reasons, there was no error of principle or law on the part of the Judge and no judgment that exceeded the generous ambit afforded to him. Accordingly, there is nothing that would entitle this Court to interfere with his conclusions.

98. This ground passes the arguability threshold insofar as it relates to the hourly rates for the Litigation Team, and permission is granted. However, for the reasons discussed, Ground 2 of the appeal fails on the merits and is dismissed.

Conclusion

99. For all of these reasons, and notwithstanding Mr Cohen's forceful and eloquent submissions, this appeal fails and is dismissed.