APPEAL REF: APP/D2320/W/3295556
APPLICATION REF: 21/01028/OUTMAJ
APPEAL BY THE MINISTRY OF JUSTICE
LAND ADJACENT TO HMP GARTH AND HMP WYMOTT

COSTS APPLICATION

Ulnes Walton Action Group – Rule 6 party

INTRODUCTION

1. This is Ulnes Walton Action Group's ("**UWAG's**") application for costs against the Ministry of Justice (the "**MOJ**") in respect of certain of the work undertaken by its highways expert, Mr Graham Eves, concerning the development of the 2023 Ulnes Walton Lane/A581 roundabout scheme ("the 2023 design").

2. In headline terms, UWAG makes this application for costs on two related bases.

3. Substantively, on its merits, the MOJ had no reasonable prospect of succeeding in its appeal in respect of the 2023 design, given that:

    a. The fundamental deficiencies as regards visibility were identified in independent audits as early as February 2023.

    b. There is no evidence before the Inquiry indicating that the substantial departures required would be agreed by the LHA in respect of the 2023 design.

    c. The fundamental deficiencies are essentially acknowledged by the MOJ's decision to advance a completely new design about a year later.

    d. In any event, the MOJ has essentially failed to make good its case in response to the myriad criticisms levelled at the 2023 design.

4. In combination, the above amounts to substantively unreasonable behaviour. UWAG should not have had to instruct Mr Eves to produce a proof of evidence and prepare on the basis of the 2023 design for the re-opened inquiry (which was then delayed); or to

prepare again on the basis of the 2023 design. The MOJ's unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense.

5. Further and alternatively, procedurally, UWAG should not have had to instruct Mr Eves to prepare for the inquiry on the basis of two alternative schemes, because the MOJ must have known well in advance of the proofs deadline in March 2024 that:

    a. It had a revised scheme ("the 2024 design") at an advanced stage of preparation;
    b. That revised scheme had been subject to Road Safety Auditing; and
    c. That revised scheme was – on its own case - in every respect better than the 2023 design, and therefore there was no further utility in the 2023 design.

6. On that basis it was unreasonable not to have informed UWAG in good time ahead of the proofs deadline that it had promulgated and designed a new scheme which was (on its case) better than the 2023 design in every material respect; and it was (and remains) unreasonable to insist that the 2023 design is a viable alternative to be considered.

7. Instead of informing UWAG of its new scheme in good time, the MOJ said nothing at all, and simply served its Proof of Evidence on the deadline, and by doing so announced the new revised design. It also (via the same proof) maintained that the 2023 design was a viable and safe 'alternative' which it wished to promote at the inquiry.

8. That necessitated UWAG to instruct Mr Eves, at short notice, to produce a Rebuttal critiquing (insofar as he was able in the time permitted) the revised design; as well as to continue to prepare for the inquiry, but now on the basis of *two* 'alternative' designs for the junction. It should not have had to do so. Because the Proof of Mr Yeates did not acknowledge that the existence of the 2024 scheme rendered the safety/suitability of the 2023 scheme moot and instead insisted that it remained a viable and safe alternative scheme, UWAG was thus required to instruct Mr Eves to prepare for the inquiry on the basis that both designs were 'live' and required addressing.

9. In the event it has become clear that in all but words, the MOJ accept that consideration of the 2023 scheme has been rendered moot by the emergence of the 2024 scheme, which it says is preferable in every material respect.

THE LAW / GUIDANCE

10. Planning Practice Guidance 'Appeals" (the "**PPG**") provides that an Inspector may make an award of costs in full or in part (§27 PPG) for and against interested parties (§29 PPG).

11. The aim of the costs regime is, *inter alia*, 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: (§28 PPG).

12. A cost order may be made where a "*party has behaved unreasonably, and this has directly caused another party to incur unnecessary or wasted expense in the appeal process*" (§28, §30 PPG). The PPG goes on to expressly envisage that a Rule 6 party "may… have an award of costs made to them" (§56 PPG)

13. The word "*unreasonable*" is used in its ordinary meaning (*Manchester City Council v SSE and Mercury Communications Ltd* [1988] JPL 774). Unreasonable behaviour may be procedural (relating to the process) or substantive (relating to the issues arising from the merits of the appeal) (§31 PPG).

14. In terms of what counts as unnecessary or wasted expenditure, it may be as much as the expenses of the entire appeal, or only for part of the process. Costs may include, for example, "*the use of consultants to provide detailed technical advice, and expert and other witnesses*" (§31).

15. The PPG at §52 provides a non-exhaustive list of the types of behaviour which may give rise to a procedural award against an Appellant. These examples include (but are not exhaustive):

    a. "*Resistance to, or lack of cooperation with the other…parties in providing information…"*

    b. A "*delay in providing information*"

c. The introduction of "*fresh and substantial evidence at a late stage necessitating…extra expense for preparatory work that would not otherwise have arisen.*"

16. This application, for a partial award of costs on behalf of a Rule 6 party's technical witness is therefore within the terms of what an Inspector can order, subject to the relevant grounds being made out.

FACTS

17. It is useful as the outset to identify the timeline of events giving rise to this costs application.

18. This appeal first came before the Inspector in July 2022 following which, in October 2022, the Inspector recommended (albeit at that stage not published) that the appeal be refused for reasons including those of highway safety: "*the proposal would exacerbate existing hazards and risks within the local road network, where the appellant's evidence (including the TA) on the proposed mitigation measures is lacking in detail and confidence that they would have the desired effect*." (IR §13.35).

19. Part of that rationale concerned the junction of UWL/A581 about which the Inspector said this: "*Nevertheless, while the LHA has no objection to the proposed mitigation works…it has not been demonstrated that the works would resolve capacity issues or that the financial contribution would be sufficient…"* (IR §13.32)

20. This view was maintained by the SoS in the minded to grant decision which was published, together with the Inspector's Report, in January 2023 (DL §§15-17).

21. Therefore, as at the time of the minded to grant decision, a key outstanding issue in the appeal was the highway safety implications of the scheme in so far as it concerned the UWL/A581 junction.

22. As part of the minded to grant decision, the SoS gave the MOJ another bite at the cherry with (eventually) an opportunity for a re-opened inquiry into the issue of highway safety.

23. As part of the re-opened inquiry, in early 2023, the MOJ crafted a new scheme to seek to mitigate the adverse highways impact to the UWL/A581 junction ("**the 2023 design**"). In sum, the 2023 design sought to provide a raised speed table, speed cushions along the A581, three new lighting columns on the UWL approach, relocated speed limit signs along UWL to extend the existing 30mph zone, a reduced inscribed central diameter and dragons teeth on all approaches.

24. The 2023 design was subject to two road safety audits, carried out by Hydrock on 21 February 2023 and by Via, also in February 2023. Hydrock opined that, in respect of the 2023 design there was still a "*lack of available road space*" which "*could increase the risk of collisions at the new mini roundabout*" and recommended that "*an alternative junction solution such as a sheltered right lane is provided at this location*." For their part, Via identified a series of issues with the junction, including that the "*restricted visibility*" meant that "[d]*rivers attempting to enter the mini-roundabout from Ulnes Walton Lane with insufficient visibility are likely to be involved in collisions with previously unseen main road traffic. This may result in injury to vehicle occupants or riders*." They recommended the acquisition of further land to improve visibility, or an alternative junction design.

25. Therefore, as of 21 February 2023, a little over a month from publication of the minded-to letter, the MOJ knew that there were serious safety problems with the 2023 design. Neither independent auditor considered that the 2023 design was "good to go". On the contrary, one advised the acquisition of land to expand the proposal or an alternative design; and the other advised an alternative design. In other words, go back to the drawing board.

26. In March 2023, evidence was filed by Stephen Yeates, the MOJ's highways expert. He disputed both Hydrock's and Via's identification of the relevant problems or the suggested recommendations (and appended in M3a design responses which set out the basis for these disputes) and maintained that the 2023 design offered suitable mitigation (M3 at §5.8.3).

27. In (or just before) August 2023, UWAG instructed Mr Graham Eves[1], a highways expert, to review the 2023 design, with a view to preparing an addendum proof of evidence for the re-opened inquiry, then scheduled to begin on 19 September 2023. That proof (O22) was submitted on 22 August in line with case management directions. It contains a critique of the 2023 design.

28. On or before 20 September 2023, unbeknownst to UWAG, the MOJ obtained drawings of a new scheme ("**the 2024 design**").[2] The design was based on the MOJ having secured (or securing) control of more land around the UWL/A581 junction with a view to addressing visibility issues, as well as a larger roundabout (M10a Appendix A).

29. Additionally a swept path analysis of the 2024 design was obtained on the same date (M10a Appendix F).

30. At latest, by September 2023, the MOJ had taken steps to secure more land, commissioned and received designs for the 2024 design and undertaken some analysis of its ability to overcome concerns around its 2023 design which had been raised by independent auditors some six months earlier.

31. On 16 October 2023, an ecology survey site walkover was completed of the site (M10a Appendix N).

32. On 25 October 2023, further drawings of the 2024 design were obtained by the MOJ (M10a Appendix B and Appendix C).

33. By 5 January 2024, a road safety audit had been undertaken for the 2024 design (M10a Appendix M).

34. Throughout this period the MOJ said nothing publicly about its revised scheme. It did not inform or warn the parties that it was coming, or communicate to the Inspector that

[1] It had previously instructed a highways expert, but he became unavailable due to illness.
[2] See M10a, p.4

an amendment to the (already immensely protracted) procedural timetable may be required.

35. At least five months after the MOJ had developed the 2024 design, its existence was revealed in the evidence of Stephen Yeates dated February 2024 (M10 §1.2.4). Despite having produced the 2024 scheme, the MOJ still maintained that the 2023 design was suitable (M10 §6.2.1). This was despite the fact that it is entirely apparent that the 2024 design is a direct response to some of the fundamental and unacceptable defects identified by independent auditors at the time that the 2023 design was commissioned in early 2023.

36. Mr Eves then filed a further rebuttal proof of evidence addressing the 2024 design in February 2024.

37. The hearing of the re-opened inquiry commenced on 25 March 2024. During cross examination of Kevin Riley, Chorley's highways expert, and Mr Eves, UWAG's highways expert, the MOJ's counsel did not ask *any* questions concerning the 2023 design, despite it being attacked in detail in the evidence submitted by both UWAG and the Council. The critiques of the 2023 design contained in the evidence of Messrs Riley and Eves thus went entirely unchallenged.

38. In cross-examination of Mr Yeates by UWAG's counsel, Mr. Yeates admitted that there was "*no world in which the 2023 design would be preferred to the 2024 design*", and did not demur at Mr. Barber's characterisation of that as meaning the 2023 scheme was moot or, as he put it, "*dead in the water*".

ARGUMENT

39. To succeed in its costs application, UWAG must demonstrate two things: one, that the MOJ has behaved unreasonably and, two, that the unreasonable behaviour directly caused UWAG to waste, or incur unnecessary, costs. UWAG addresses each in turn.

Unreasonable behaviour

40. Substantively, in the 2023 design, the MOJ has put forward (and maintained) proposed mitigation which has no reasonable prospect of being found to be safe and suitable in its location.

41. Fundamental defects were identified early on in the design process back in early 2023. Although the MOJ initially rejected both the identified problem and the VIA recommendation to purchase additional land to improve visibility as contained in their Stage 1 2023 RSA, the subsequent decision to implement that recommendation through the 2024 design is a tacit acknowledgement that the 2023 design is unacceptably and irredeemably sub-standard.

42. There was no reasonable prospect of the 2023 design being found to be safe and suitable, and it is only by happenstance that there was not an entire public inquiry from 19 September 2023 on that design alone. This amounted to unreasonable conduct, as did the MOJ's continued reliance on the 2023 design until today.

43. Procedurally, the PPG is clear that the following may be deemed unreasonable conduct: lack of co-operation with other parties in providing information and/or delay in providing information.

44. Simply put, the MOJ unreasonably failed to co-operate with UWAG (or Chorley), because it failed to disclose the existence of the 2024 design when it reasonably knew it would be running an alternative to the 2023 scheme (moreover, on its own case, an improved scheme which would render the 2023 design moot). Alternatively, if not an unreasonable failure to co-operate, it was an unreasonable delay.

45. The evidence demonstrates that: the MOJ knew by 21 February 2023, following the road safety audits of the 2023 design, that the 2023 scheme suffered from multiple safety concerns, and, by no later than September 2023, that it had an alternative to the 2023 design which was (on its own case) better in every material respect. Yet, the 2024 design was not disclosed for five months thereafter. It was not even mentioned. The MOJ ought reasonably to have notified UWAG of its intention to change the scheme in March 2023 when it knew it was unworkable or, giving it the benefit of the doubt, at least in September 2023 when it became apparent there was a (potentially arguably) viable

alternative. This is particularly so given that there was a deadline for further evidence scheduled for February 2024.

46. Had the MOJ disclosed its position vis-à-vis the 2024 design by (say) September 2023, UWAG could have instructed Mr Eves to consider that design and produce a proof of evidence in good time for the deadline in February 2024. Instead it was forced to respond in very short time, and by way of a Rebuttal.

47. Further, notwithstanding the obvious flaws of the 2023 design, the MOJ asserted in Mr Yeates' February 2024 evidence that it was pursuing the 2024 design as an alternative to the 2023 scheme i.e. that both should be considered, but then entirely failed without explanation to advance a positive case on the 2023 scheme during the re-opened inquiry. In reality it has not pursued the merits of the 2023 scheme (because it considers that the 2024 scheme is preferable in every respect). Again, no notice was given of the MOJ's intention not to pursue the 2023 design during the re-opened inquiry.

48. All of this amounts to unreasonable conduct. No explanation whatsoever has been offered for the extreme delay in disclosing its position.

49. In this respect UWAG notes Ms Hulse's evidence that the land acquisition deal has reached exchange of contracts but has not completed yet. No dates were given, but the MOJ self-evidently had sufficient confidence in the acquisition of land that it worked up the 2024 design (as set out above) from at least September 2023.

Wasted or unnecessary costs

50. Although UWAG's counsel have acted *pro bono* throughout, Mr Eves does not appear *pro bono* and his work has been (quite properly) at cost to UWAG.

51. Substantively, the MOJ's pursuit of the 2023 design has directly caused UWAG unnecessary and/or wasted expenditure in producing evidence and preparing for an inquiry in the summer of 2023 on the basis of the 2023 design alone; and in continuing to place reliance on the 2023 design, UWAG's highways consultant has had to needlessly continue to prepare in relation to a proposed mitigation which had no chance of being granted planning permission.

52. Procedurally, the MOJ's failure to co-operate and/or its delay in revealing the existence of the 2024 design and/or failure to properly pursue the 2023 design during the re-opened inquiry has caused unnecessary and/or wasted expenditure for UWAG in two ways:

a. Firstly, had the MOJ informed UWAG in a timely way that it had a revised scheme for the mini-roundabout at the Ulnes Walton Lane/A581 junction, and which it would say was better in every material respect than the 2023 design, UWAG (and Mr Eves) could have produced a Proof of Evidence addressing the 2024 design in good time for the deadline in February 2024, and prepared for the inquiry on that basis, rather than having to produce his response by way of a Rebuttal, in short order following receipt of the MOJ's evidence, alongside preparing to address the 2023 design dealt with by his initial Proof of Evidence.

b. Secondly, Mr Eves has been required to spend additional (and unnecessary) time preparing for his attendance at the re-opened inquiry, in dealing with the 2023 design. In effect, he had to prepare to give evidence and be cross examined on two designs. It has taken him longer to prepare to give evidence on two schemes than on one. The obvious reality is that the 2023 design has been abandoned. His detailed critique of it was not challenged *at* all in cross-examination and Mr Yeates agreed that there was no world in which the 2023 design was superior or preferable to the 2024 design. Dealing with the (many and compelling) criticisms of the 2023 design have, frankly, been a waste of time. Therefore, the additional costs of the time spent preparing to advance the criticisms of the 2023 design were unnecessary.

53. In light of the above, UWAG invites the Inspector to find that the MOJ behaved unreasonably in withholding details of the 2024 design until February 2024 and that this led to UWAG incurring unnecessary fees in respect of Mr Eves involvement.

CONCLUSION

54. In the circumstances it is submitted:

a. The Inspector has a discretion to make a partial award of costs in UWAG's favour in respect of the unnecessary additional costs of Mr Eves' work in respect of the 2023 scheme, from such time as it ought to have been reasonably obvious to the MOJ that it such work was unnecessary in light of its revised design (which moment is no later than September 2023).

b. The MOJ behaved unreasonably in:

   i. promoting and continuing to promote the 2023 design when it had no reasonable prospect of succeeding on appeal; and in the alternative

   ii. not disclosing its intended production of the 2024 scheme in September 2023 when it self-evidently knew about it, and its superiority as compared to the 2023 design;

   iii. delaying the provision of information about the 2024 scheme until February 2024, despite knowing about it in September 2023; and

   iv. not conceding the logical inevitability that the question of whether the 2023 scheme was moot (and asserting the contrary) until cross-examination of Mr Yeates.

c. That unreasonable behaviour caused UWAG to incur additional, unnecessary costs in respect of the work of Mr Eves.

55. A partial award of costs in those terms is therefore justified..

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26 April 2024